Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 25, 2019

CLAIM NO. 201500985

RAYMOND BANKS
d/b/a BANKS AUTO SALES PETITIONER

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN, ADMINISTRATIVE LAW JUDGE**

CHARLES CRASE
UNINSURED EMPLOYERS' FUND
and HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Raymond Banks d/b/a Banks Auto Sales ("Banks") seeks review of the December 21, 2018, Opinion, Award, and Order of Hon. John H. McCracken, Administrative Law Judge ("ALJ"), finding Charles Crase ("Crase") sustained a work-related injury to his hands, fingers, and thumb while in the employ of Banks. The ALJ awarded temporary total disability ("TTD") benefits, permanent

partial disability ("PPD") benefits, and medical benefits. Pursuant to a Form 110 executed by Crase and the Uninsured Employers' Fund ("UEF"), the ALJ also extinguished any further liability of the UEF for the payment of income benefits pursuant to the award.[1] The UEF was also granted a right of subrogation against Banks for the amount of the award, plus those amounts the UEF paid in settlement of Crase's claim including the payment or reimbursement of medical expenses.

On appeal, Banks asserts:

> In this case, the findings of Dr. Jenkinson are clearly the accurate findings relating to Crase. The ALJ agreed with Dr. Jenkinson on the matters of maximum medical improvement and impairment rating. However, he rejected Dr. Jenkinson's findings as to Crase's ability to work, ignoring Dr. Jenkinson's noting of Crase's callused hands. Banks saw Crase doing physical labor when he saw Crase unloading the produce truck. Additionally, Crase is *not* seeking Social Security disability benefits. Prior to this injury, Crase was working while claiming he was disabled. Why would he not seek disability benefits if he believes he truly is disabled [sic]. The inconsistencies cannot be ignored.
>
> Because the finding that Crase cannot return to work is not supported by the evidence, neither is the finding that he is entitled to a three multiplier.

Since the sole issue on appeal is the applicability of the three multiplier, we will only discuss the evidence germane to that issue.

[1] The Form 110 indicates Crase's medical expenses were paid by Medicaid, and there were unpaid or contested medical expenses of $6,378.25, as of October 2, 2018, for which there is a lien. The agreement reflects the total amount paid by the UEF was $65,000.00, of that amount, $64,740.24 was income benefits, and $259.76 was consideration for a waiver of vocational rehabilitation. Crase did not waive his right to past and future medical benefits. The agreement also contains the provision that Banks is paying nothing in this particular settlement despite stipulating an employment relationship and the occurrence of a work injury. The agreement states, "the UEF intends to seek reimbursement from Mr. Banks for all amounts it pays out in this claim, via ALJ Opinion and Award and/or KRS 342.790." The agreement was approved by the ALJ on October 31, 2018.

Crase testified at the October 25, 2018, Hearing. He testified that on August 3, 2013, he was working for Banks and had been directed to mow Banks' lawn. He provided the following job description:

> Q: Okay. And, what was your position with Mr. Banks? What were your job duties? Tell the Judge what you did.
>
> A: I done whatever needed done. If it was mowing, I mowed. If it was detailing cars, I'd detail cars. Working on his building, he was building a building down there. I helped work on the building. Whatever needed to be done.

Crase testified regarding the number of hours and days he worked each week for Banks. He described the events of August 3, 2013, and the resulting injury as follows:

> A: On a lawnmower. Lawnmower turned over and didn't cut off and it was coming at me and I grabbed it and it messed by hand up.
>
> …
>
> Q: Okay. And, -- and, the injuries to the right hand, if you can, you know, show and explain to the Judge which fingers were injured.
>
> A: This thumb, they took the knuckle out. I can't use my thumb. It hurts. I can't grip nothing. I can't hang on to nothing. It just – it ruined my hand. It hurts. It stays tingly. I mean, it's just …
>
> Q: Were all five digits on the right hand injured?
>
> A: No, it didn't touch the pinky.
>
> Q: Okay. But it – but it looks like the index, middle and ring fingers were …
>
> A: Yeah.
>
> Q: …partially amputated.

A: This one, they put back on and it didn't take, so they had to go down to the next joint. It cut them off even.

Q: And, how many surgical procedures have you had done?

A: Let's see. I had – when I first done it, they put this one back on. They had to take it back off. That was two. They done this one. That made three. At least, three. I had to go and have this cleaned out about three times for the infection in his office, so I don't know if you'd call that surgery.

Crase was taken to the hospital in Jackson, Kentucky, where an initial surgery was performed. The medical records reveal Crase lost three fingers and substantial use of his thumb. Regarding his capacity to return to the type of work he was performing at the time of the injury, Crase testified:

Q: Okay. Well, what kind of problems are you having as of today with the right hand?

A: I can't – my thumb is real sore. I can't – can't hardly use it. It just stays tingly all the time.

Q: Okay.

A: I can't – I can't grip nothing with it. I can't hang on to nothing. I drop stuff. It hurts. That thumb hurts bad.

Q: Is the pain – is it constant throughout the day?

A: Yeah, and, if you stub it, it'll put you on your tip-toes.

Q: Are you able to carry anything with that right hand essentially?

A: No. No, I lose the grip in it.

Q: Do you believe that you could still perform the type of work you were performing for Mr. Banks …

A: No.

Q: … on the date of injury?

A: No.

Q: And, why not?

A: I can't use my hand.

Q: And, do you believe you could perform any type of work that you're trained and qualified to do as a result of the injury?

A: No.

Banks also testified at the hearing and acknowledged that at the time of the injury Crase was an employee. He offered no testimony regarding Crase's capacity to perform the type of work he was performing at the time of the injury.

The UEF introduced the report of Dr. David Jenkinson generated as a result of an independent medical examination conducted on March 27, 2013. Crase relied upon the April 30, 2015, medical report of Dr. Thomas A. Smith and the February 16, 2018, report of Dr. Bruce Guberman.

Relying upon the opinions of Dr. Jenkinson, the ALJ determined Crase sustained a 19% impairment rating as a result of the work accident. The ALJ also concluded Crase was not permanently totally disabled. In finding the three multiplier applicable, the ALJ provided the following findings of facts and conclusions of law:

…

The ALJ must also determine whether the provisions of KRS 342.730(1)(c)1 or 2 apply. Subparagraph 1 applies when the plaintiff lacks the physical capacity to return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. Essentially it must be determined whether the injury has permanently altered the worker's ability to earn an income. Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006).

The Kentucky Supreme Court most recently considered the three multiplier in Trane Commercial Systems v. Tipton, when it stated, "To determine if an injured employee is capable of returning to the type of work performed at the time of the injury, an ALJ must consider whether the employee is capable of performing "the actual jobs that the individual performed." 481 S.W.3d 800, 804 (Ky. 2016) *quoting* Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004). In Forman, the issue was whether the ALJ erred in equated a claimant's collectively bargained for job classification and "type of work" as used in KRS 342.730(1)(c)1. The Court concluded "the type of work that the employee performed at the time of the injury" as used in the statute means "the actual jobs that the individual performed." Id. at 145. The required analysis must 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." Id.

Mr. Crase worked for Mr. Banks as a car detailer, mower and handyman. Dr. Smith and Dr. Guberman state that he is unable to return to the type of work he was performing at the time of injury. Dr. Jenkinson stated that he could return to general labor. The ALJ had the opportunity to review the photographs filed of record and to observe Mr. Crase's injury. While the ALJ agrees with Dr. Jenkinson regarding the impairment, the ALJ disagrees with his opinions regarding return to work.

The ALJ does not believe that Mr. Crase has the physical capacity to perform the work he performed at the time he was injured. This is not to say that he is unable to perform some of these tasks on a limited basis. However, Mr. Crase sustained a severe injury to his hand and fingers and the ALJ believes this will have a sustained impact on his ability to earn money and return to work that requires the use of both hands. The ALJ agrees with Dr. Smith and Dr. Guberman in that he lacks the physical capacity to return to the type of work he performed at the time of injury. Mr. Crase testified that he was unable to perform his prior work as performed for Mr. Banks. The ALJ relies on Mr. Crase, Dr. Guberman and Dr. Smith to find that Mr. Crase does not retain the physical capacity to return to the type of work he performed on

> August 3, 2013. The ALJ finds that he is entitled to a three multiplier pursuant to KRS 342.730(1)(c)(1).

As Crase testified he had not worked since his injury, the ALJ did not conduct any analysis regarding the applicability of the two multiplier.

Crase, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including entitlement to enhanced benefits pursuant to KRS 342.730(1)(c)1. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Crase 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).

As an initial matter, we note that pursuant to KRS 342.285, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Consequently, since Banks did not file a petition for reconsideration, our sole task on appeal is to determine if substantial evidence supports the ALJ's determination that the three multiplier is applicable. Concluding substantial evidence supports the ALJ's decision on this issue, we affirm.

Dr. Smith's report reveals he performed a physical examination and a records review. He noted Crase had undergone at least three surgeries on his right hand. His diagnosis was previous lawnmower accident with trauma to the right hand under the deck of the mower. Crase described to Dr. Smith the physical requirements of the work performed at the time of the injury. Dr. Smith concluded Crase did not retain the physical capacity to return to the type of work he was performing at the time of the injury explaining as follows:

> Cannot work at any job requiring dexterity, lifting with, grasping by right hand. Also cannot do labor that places stress on right hand as it is fragile from the damage incurred. Also cannot climb, balance, run dangerous machinery, drive commercially, dig or do any labor activity that would place him or his right hand in danger due to his damaged right hand.

In his Form 107, Dr. Guberman noted Crase's admission diagnosis was: "1. Right hand crush injury with partial amputation of the index and ring finger. 2. Fracture of the right thumb proximal phalanx with dislocation of IP joint. 3. Near complete amputation of right long finger with neurovascular injury." Dr. Guberman set forth Crase's symptoms at the time of his examination. He noted there had been amputation of the right index finger at the distal interphalangeal joint, the right middle finger at the proximal interphalangeal joint, and the right ring finger at the distal interphalangeal joint. The stumps were well-healed, scarred, but tender and sensitive to touch. Dr. Guberman provided the flexion limitations of Crase's injured digits. His diagnosis was:

> 1. Status post crush injury and laceration of the right hand with right thumb open fracture of the proximal phalanx, right thumb extensor tendon laceration, right index finger amputation at the distal phalanx, right long finger, and

> near complete amputation of the distal interphalangeal joint with dislocation and right ring finger complete amputation at the distal interphalangeal joint.
>
> a. status post surgery on August 5, 2013 for open reduction internal fixation of the right thumb proximal phalanx, open reduction internal fixation of the right longer finger distal interphalangeal joint, extensor tendon repair of right thumb, revision amputation of the right index finger, revision amputation of the right ring finger, and irrigation debridement of the right hand.
>
> b. status post right hand long finger amputation at the proximal interphalangeal joint for infection on 11/07/2013.
>
> c. status post right thumb IP joint fusion on May 8, 2014.
>
> In summary, the claimant is a middle-aged male who suffered a severe laceration and crush injury to his right thumb when he was riding a lawnmower that turned over and caused a laceration to his right hand. At the time of the injury, as described above, he was found to have amputation of the right index finger at the distal phalanx and near complete amputation of the right long finger at the distal interphalangeal joint. He also had right ring finger complete amputation of the distal interphalangeal joint. He also suffered an open fracture to the proximal phalanx of his right thumb. He underwent three operative procedures and extensive conservative treatment. He is left with range of motion abnormalities in the remaining joints of the right hand. He also has sensory loss in the right hand. Overall, grip strength and manipulability are markedly impaired in the right hand compared to the left hand.

Like Dr. Smith, Dr. Guberman did not believe Crase retained the physical capacity to return to the type of work he performed at the time of the injury explaining as follows:

> Does the plaintiff/employee retain the physical capacity to return to the type of work performed at the time of injury? **No.**

> **The claimant has marked impairment of grip strength and manipulability in his right hand. He is not able to use his right hand for gripping, grasping or fine or manipulative activities. He is not able to use his right hand to operate controls nor repetitive activities. (emphasis added).**
>
> Which restrictions, if any, should be placed upon plaintiff/employee's work activities as the result of the injury?
>
> **The claimant has marked impairment of grip strength and manipulability in his right hand. He is not able to use his right hand for gripping, grasping of fine or manipulative activities. He is not able to use his right hand to operate controls nor repetitive activities. In my opinion, he is not able to lift, carry, push or pull objects weighing more than 20 pounds occasionally or more than 5 pounds frequently using both hands. (emphasis added).**

In concluding the three multiplier was applicable, the ALJ relied, in part, on the opinions of Dr. Guberman and Dr. Smith as set out above. The ALJ also relied upon the testimony of Crase set forth herein. Long accepted is the premise that, 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, supra; Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). We have consistently held that it remains the ALJ's province to rely on a claimant's self-assessment of his ability to labor based on his 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 Crase did not have the capacity to return to the type of work performed at the time of injury. His decision

is supported by substantial evidence in the record. Therefore, it may be not set aside on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Further, within his discretion, the ALJ may rely upon Dr. Jenkinson's impairment rating, but reject his opinion regarding Crase's physical capacity to return to the type of work he performed at the time of injury. The opinions of Dr. Guberman and Dr. Smith, as well as Crase's testimony, standing alone or in concert constitute substantial evidence supporting the ALJ's determination the three multiplier is applicable. Thus, we are without authority to disturb the ALJ's decision on appeal.

Accordingly, the December 21, 2018, Opinion, Award, and Order is **AFFIRMED**.

ALL CONCUR.

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