

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 9, 2020

CLAIM NO. 201765984

SARAH GRIMES

PETITIONER

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

PK MANAGEMENT, LLC and  
HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**BORDERS, Member.** Sarah Grimes (“Grimes”) appeals from the June 20, 2020 Opinion, Award, and Order rendered by the Hon. John McCracken, Administrative Law Judge (“ALJ”), finding Grimes sustained a work-related right hand puncture injury causing a neuroma on September 12, 2017. The ALJ awarded permanent partial disability (“PPD”) benefits based on a 3% impairment rating, enhanced by the three-multiplier pursuant to KRS 342.730. The ALJ ordered PK Management, LLC

(“PK”) to pay PPD benefits at the rate of \$30.41 per week. The ALJ rejected Grimes’ arguments that she was permanently totally disabled. Grimes did not file a petition for reconsideration. On appeal, Grimes argues the ALJ’s finding that she is not totally disabled should be reversed. We disagree, and affirm.

PK filed a Petition for Reconsideration arguing the ALJ ordered the PPD benefits to be paid at the full average weekly wage (“AWW”) and not two-thirds of the AWW, which was in error. In an Order dated July 21, 2020, the ALJ entered an Order on Petition for Reconsideration correcting the PPD benefit rate and amending his Opinion reflecting PPD benefits are to be paid at the rate of \$20.27 per week. Grimes did not file a petition for reconsideration and elected to appeal directly to this Board.

Grimes testified by deposition on November 20, 2019 and at the hearing held May 5, 2020. Grimes completed the ninth grade and did not receive a GED. Grimes stated she has a learning disability and took special education classes in school. She has difficulty reading, writing, and performing math. She previously worked in a factory, and as a restaurant server and hostess. Grimes worked as a housekeeper for PK, which required her to sweep, mop hallways and common areas, vacuum rugs, and to clean the bathroom, kitchen, bedroom, and living room areas in apartments. She lifted buckets filled with water and helped unload salt from trucks. Grimes stated she injured her right wrist/hand when she was struck by a razor blade on September 12, 2017. She was using the razor scraper to clean a bathtub when the blade broke. She attempted to change the blade and it slipped, went up in the air, and landed on her right hand. She wrapped her hand and told the manager and

assistant manager. Grimes stated she was not allowed to go to the doctor at that time, but she went the next day. She last worked for PK in November 2017. She stated that her doctor placed her on restrictions, but PK did not have light duty. Grimes no longer fishes or runs due to her hand pain. She stated she is not able to grip a pen and her penmanship has changed since the accident. Grimes does not believe she is capable of working and that she is totally disabled.

Page Kay Jamison (“Jamison”), Grimes’ mother, testified at the hearing. Jamison moved in with Grimes one year prior to the hearing because her daughter needed help due to her hand problems. Prior to the accident, Grimes cleaned her own house and played music. She testified Grimes now screams in pain, and is unable to vacuum, do laundry, or take care of her pets due to pain. Jamison also stated Grimes is unable to cook or cut vegetables and meat. While shopping, Grimes is unable to pick up items like milk or push the cart.

Jesi Denton (“Denton”), the property manager for PK, testified at the hearing. On September 12, 2017, Grimes reported the accident with the scraper, indicating it hit the top of her right hand. She did not appear to be in any distress. Denton stated Grimes had a very small cut but no blood was present. Denton asked Grimes if she wanted to go to the doctor and told her she would have to take a drug test prior to going. Grimes stated it was not a big deal and that she did not feel she needed to go to the doctor. Grimes left because it was near the end of the shift. She returned to work the next day wanting medical treatment and completed a first report of injury. Denton stated she never refused Grimes any medical treatment.

Denton stated that just after the accident, Grimes did not request first aid. Denton stated there are first aid kits available.

Grimes submitted medical records from Concentra Medical Centers documenting treatment from September 13, 2017 through October 13, 2017. The assessment was a laceration of right hand without foreign body and right hand paresthesia. Grimes was allowed to return to work with restrictions of limited use of her right hand and no exposure to water or other liquids. On September 15, 2017, Grimes reported increased pain in the top of her hand. She reported numbness between the first and second metacarpal on September 20, 2017. On September 27, 2017, she was prescribed Methylprednisolone because she seemed to be getting neuritis. On October 11, 2017, Grimes was allowed to return to work full shifts. She was directed to use Lidoderm patches for twelve hours per day.

Grimes treated at Kort Physical Therapy from November 15, 2017 through January 5, 2018. Grip strength testing of the right hand ranged from 40 to 25 pounds during the period of treatment. On January 5, 2018, she was restricted to 10 pounds lifting on the right side and her grip strength was measured as 25 pounds. The therapist noted that Grimes had reached a plateau.

Grimes treated with Dr. Margaret Napolitano from November 6, 2017 through February 12, 2018. On November 6, 2017, Dr. Napolitano restricted Grimes to lifting no greater than 20 pounds, no frequent lifting, and carrying 10 pounds maximum. Grimes provided a history that she received a laceration to the back of her right hand on September 12, 2017. She stated she was having numbness and tingling into her long finger with a deep aching pain, and also complained of

pain in the right wrist, and numbness and tingling into the right index, long, and ring fingers. Dr. Napolitano noted Grimes had a “tiny 4mm laceration” to the dorsal right hand over the mid index MC region over the EDC. She stated the tingling sensation with Tinel’s over the incision suggested a possible superficial radial branch neuroma. No significant swelling was noted. On December 4, 2017, Dr. Napolitano removed Grimes from work. She gave Grimes a Kenalog injection into the right hand. Dr. Napolitano diagnosed a right dorsal hand puncture/laceration with dorsal radial sensory cutaneous branch injury. On January 3, 2018, Dr. Napolitano placed Grimes at maximum medical improvement (“MMI”). She continued Grimes’ off work status. No swelling was noted on this visit. Dr. Napolitano stated that while Grimes was at MMI, she had an impairment from grip loss and chronic pain dorsally from a “likely” neuroma. She did not recommend surgery, noting Grimes could be made worse with excision. On February 12, 2018, Dr. Napolitano returned Grimes to light duty with restrictions of lifting and carrying up to 15 pounds, pushing with 29.5 pounds of force, and pulling 20.5 pounds of force.

Dr. Ronald Burgess evaluated Grimes on March 30, 2018. Dr. Burgess diagnosed a superficial laceration of the dorsum of the right hand with no sequelae. He noted her loss of sensation did not follow the course of a branch of the radial nerve and there is no method by which a tiny laceration over the third metacarpal could cause tingling to the dorsum of the thumb. Dr. Burgess stated there is no objective evidence of an injury to any sensory branch of the dorsum of the hand. Dr. Burgess noted Grimes “went through quite dramatic shaking, grimacing, and crying with grip strength testing on the right with a total absence of any effort.”

Dr. Burgess felt Grimes was at MMI and could return to work without restrictions. He assigned a 0% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, (“AMA Guides”).

Dr. Jeffrey Fadel performed an independent medical evaluation (“IME”) on August 16, 2018. Dr. Fadel diagnosed posttraumatic neuroma of the dorsal cutaneous nerve of the right hand caused from a puncture wound at work. He stated the puncture wound lacerated a sensory nerve and there was subsequent formation of a neuroma creating the physical findings and a ratable impairment. Dr. Fadel felt Grimes had reached MMI by February 2018. He agreed with the restrictions outlined in the functional capacity evaluation completed by Dr. Mark Neal at KORT Physical Therapy. He stated those restrictions would make it impossible for Grimes to perform her previous employment activities. Dr. Fadel assigned a 6% impairment rating pursuant to the AMA Guides. Dr. Fadel felt surgery could improve her symptoms.

Ralph M. Crystal, Ph.D., performed a vocational evaluation on November 4, 2019. He stated Grimes is precluded from performing her past work and is capable of performing only limited light-duty work. She is limited to one-handed work with her non-dominant left hand. He noted 95% of all jobs require bilateral use of hands and fingers. Grimes’ opportunities are further limited by her reading, writing, and arithmetic abilities. He felt Grimes would be unable to focus and concentrate and is unable to complete a normal eight-hour work day or 40-hour

work week on a sustained basis due to her pain and limitations. Thus, he determined she was disabled from jobs typically found in a competitive labor market.

Dr. Stephanie Barnes performed a vocational evaluation on October 23, 2019 and submitted her report on November 18, 2019. She noted Grimes is a younger individual with limited education. Dr. Barnes stated Grimes' academic skills are inconsistent with her prior work as a cashier and a waitress. She stated her true academic skills cannot be substantiated based on the results of her evaluation and the results of the testing from Dr. Crystal. She stated that Grimes' past work required higher academic skills than those obtained in either evaluation. Dr. Barnes criticized Dr. Crystal's opinion that Grimes was unable to perform any work given her academic skills and right hand limitations. Dr. Barnes noted the medical records only limited her frequent use of the right hand for most activities and forceful use. Dr. Barnes stated Dr. Crystal appeared to base his opinion almost solely on Grimes' self-reported complaints. Dr. Barnes stated Grimes is capable of light work, even considering questionable academic testing results.

Dr. Burgess testified by deposition on December 18, 2019. He indicated he had reviewed the IME report of Dr. Fadel. Dr. Burgess stated Grimes' magnification of symptoms is so severe that it is impossible to determine if an abnormality actually exists. He noted that, if there is a neuroma present, it is not at the level that she is proposing. Dr. Burgess disagreed with Dr. Fadel's impairment rating. Dr. Burgess noted Dr. Fadel calculated a loss of the nerve without sensory testing to determine whether there is any loss of sensation. Dr. Fadel gave the rating for the entire superficial radial nerve, which goes over the dorsum of the hand,

thumb, index, and middle fingers, which he says is inconsistent with a small terminal branch of a neuroma. Dr. Fadel also assessed a 6% impairment rating for pain. However, in the sensory evaluation of nerves, the AMA Guides bases grade one on sensory loss and pain. Therefore, Dr. Fadel gave 3% for pain, clearly an example of giving an impairment for the exact same thing twice. Dr. Burgess disagreed with the restrictions in the FCE, noting there is no objective reason that, with a minor, insignificant puncture wound on the dorsum of the hand, she could not do all the things she said she could not do. He noted there is a massive discrepancy between the injury and her complaints. Dr. Burgess stated there is no medical evidence upon review of the records or in his evaluation that would support rendering her completely incapable of returning to the workforce in any capacity.

In the June 20, 2020, Opinion, Award, and Order, the ALJ found, in relevant part as follows, *verbatim*:

**Injury and Benefits pursuant to KRS 342.730.**

The evidence from Grimes, Denton and the medical records clearly reveal that on September 12, 2017, a scraper caused a cut/puncture of the top of Grimes right hand. The real issue is whether this caused a permanent injury. The ALJ relies on Grimes, Dr. Napolitano, Concentra records and Dr. Burgess to find that on September 12, 2017, Grimes sustained a work-related injury to the top of her right hand when she was cut/punctured by a razor blade on a scraper, while working for Defendant.

Grimes asserts that she is permanently totally disabled. Defendant states she is capable of returning to work. These positions are polar opposites from one another and the ALJ believes the medical evidence provides a guide to answer the question of whether she sustained a permanent injury.

On the date of the accident, Grimes stated that she was denied treatment for her injury. Denton stated that she told Grimes that before she could see a doctor she needed to take a drug test. Denton stated that Grimes said that she was okay and left work. The next day Grimes wanted to seek treatment. Denton stated she never saw any blood. Grimes stated there was a little blood. Grimes stated that she was in recovery for an addiction. There is no indication that she was under the influence of any drug or alcohol on September 12, 2017, however, the ALJ believes that Denton advised Grimes she would have to take a drug test and that Grimes declined treatment that day.

Dr. Napolitano provides important information regarding her treatment of Grimes. She ultimately diagnoses a right dorsal hand puncture with dorsal neuroma and recommends restrictions of occasional lifting up to 15 pounds floor to waist, 15 pounds waist to shoulder, carrying up to 15 pounds, pushing 29.5 pounds of force and pulling of 20.5 pounds of force. She references the FCE; however, the ALJ did not see that report filed on LMS. Dr. Burgess disagrees with Dr. Napolitano's diagnosis and restrictions. Dr. Napolitano's records appear to indicate that Grimes cooperated with all of the examinations of Dr. Napolitano as there are no notes otherwise. On January 3, 2018, Grimes reported that she had good and bad days, but had minimal improvement. On February 12, 2018, Dr. Napolitano indicated that Grimes had a full range of motion of the right hand digits and wrist, but expressed significant pain with deep pressure and dysesthesias in the distribution of the dorsal radial nerve.

She stated that Grimes could work light duty in accordance with the January 24, 2018 FCE conducted at KORT. These restrictions were less restrictive than those imposed by Dr. Napolitano of five pounds. The ALJ was not able to review the FCE findings and determine what her grip strength results were obtained during the FCE.

Grimes physical therapy notes reflect that she participated in multiple grip strength tests as the measurements are logged into the records. Manual

therapy was performed on her right hand on almost every therapy visit. Dr. Burgess conducted his IME on March 30, 2018. During that visit he conducted grip strength tests with the Dynamometer. Dr. Burgess stated that the Dynamometer recorded no effort on the grip test. He stated that during the test Grimes cried, grimaced, shook and was dramatic in behavior. He also found that her complaints of pain and numbness did not follow the anatomical nerve pathway for the radial nerve. Her complaints were the same as measured to the median nerve, which was not injured. Dr. Burgess stated that the cut, even if it cut the nerve, would not produce pain and numbness in all of the areas complained. He found no objective evidence of an injury to any sensory branch of the dorsum of the hand.

Dr. Fadel conducted his IME on August 16, 2018. According to Dr. Burgess, Dr. Fadel's only objective finding was hypersensitivity over the dorsal portion of the right hand distal to the area of initial trauma involving mostly the middle and index fingers. While Dr. Fadel conducted range of motion measurements of the right hand and fingers, he did not conduct grip strength measurements. He assessed three percent impairment due to sensory loss involving the radial nerve. He then added an additional three percent impairment due to pain.

The ALJ is concerned by the inconsistency of Grimes efforts in the grip strength test with her treatment providers as compared to Dr. Burgess. The ALJ believes that she was injured by the scraper razor blade; however, her inconsistent response between the treatment providers and Dr. Burgess is cause for concern as to her actual ability to perform physical tasks and her ability to work.

The ALJ relies on Grimes, Dr. Napolitano and Dr. Fadel to find that on September 12, 2017, while working for Defendant, Grimes sustained a permanent injury to the right hand and radial nerve. The ALJ agrees with Dr. Fadel to the extent that Grimes sustained a three percent impairment due to sensory loss. The ALJ does not agree with Dr. Fadel that an additional three percent impairment is appropriate in

Grimes case. The ALJ agrees with Dr. Burgess on this issue. The ALJ relies on Dr. Fadel to find that Grimes sustained a three percent impairment as a result of the work injury.

### **Multipliers/Permanent Total Disability.**

KRS 342.0011(11)(c) defines permanent total disability to mean the “condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury.”

In City of Ashland v. Stumbo, 461 S.W. 3d 392 (Ky. 2015) the Kentucky Supreme Court laid out a five-step analysis which the ALJ must utilize in determining entitlement to permanent total disability. Initially, the ALJ must determine if the claimant suffered a work related injury. Next, the ALJ must determine what, if any, impairment rating the claimant has. Third, the ALJ must determine what permanent disability rating the claimant has. Then the ALJ must make a determination that the claimant is unable to perform any type of work. Finally, the ALJ must determine that the total disability is the result of the work injury.

In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker’s age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of “work” under normal employment conditions. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The ALJ awarded a three percent impairment due to the work injury. Grimes is 39-years-old and is considered a young worker. She has a ninth grade education with no GED. The ALJ reviewed both vocational reports and is not persuaded that Grimes is precluded from working in a competitive workplace. As the ALJ noticed inconsistencies in the physical aspects of how Grimes responded to her treating doctors as opposed to Dr. Burgess, the ALJ also takes note of the inconsistencies discussed by Dr. Barnes in Grimes prior

work and academic performance. Dr. Barnes criticized Dr. Crystal's opinions in that they appear to predominantly rely upon the self-reported complaints of Grimes. The record clearly reveals that Grimes drew unemployment benefits following her leaving work for Defendant. The ALJ reviewed the preinjury and post injury hand writing samples. The ALJ also reviewed Grimes signatures on her forms when she filed the Form 101. The ALJ is not a handwriting expert; however, a review of these records did not reveal to the ALJ any appreciable change in hand writing.

Dr. Burgess found no atrophy in her right hand or fingers. The ALJ believes that Grimes right hand injury does not prevent her from obtaining work in a competitive workforce. Additionally, she is a younger worker. The ALJ believes that Grimes inconsistent behavior while seeing Dr. Burgess lends some credence to symptom magnification, at least on that date. The ALJ relies on Grimes age, inconsistent responses to Dr. Burgess, Dr. Burgess opinions and Dr. Barnes to find that Grimes is not permanently totally disabled. The ALJ believes that the evidence proves that she has a greater physical capacity than she asserts.

### **Multipliers.**

The ALJ found that Grimes was not permanently totally disabled. Therefore, the ALJ must now 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).

Grimes testified that after the September 12, 2017 injury, she continued to work the same job and same hours while on work restrictions until November 2017. The ALJ relies on Grimes to find that she is not now employed.

Dr. Burgess stated Grimes exhibited symptom magnification. He believed that many of her complaints did not follow the radial nerve branch. The ALJ believes that Dr. Napolitano is more persuasive than Dr. Burgess on whether she retains the physical capacity to return to the same type of work she performed on September 12, 2017. The ALJ believes the evidence, and contradictions in her level of participation in the examinations, indicates that she is able to work, just not the work she performed at that time of injury. The ALJ relies on Dr. Napolitano, Grimes and Dr. Fadel to the extent his opinion is limited to returning to her prior work, to find that Grimes does not retain the physical capacity to return to her job with Defendant. Although not precluded, she has difficulty gripping and using force necessary to work an eight-hour day sweeping, and using mops and brooms. Additionally, there are aspects of her job that require her to lift buckets full of water on more than a one-time basis during the workday. The ALJ finds that Grimes is entitled to a three multiplier pursuant to KRS 342.730(1)(c).

PK filed a Petition for Reconsideration asserting the ALJ applied the incorrect rate in calculating PPD benefits, which was sustained by Order dated July 21, 2020.

On appeal, Grimes argues the ALJ's finding that she is not totally disabled should be reversed because it is "clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or....arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

As the claimant in a workers' compensation proceeding, Grimes had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful in that

burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

Grimes failure to file a petition for reconsideration further restricts our review. Pursuant to KRS 342.285, in the absence of a petition for reconsideration, concerning 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, where no petition for reconsideration was filed prior to the Board’s review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is any evidence of substance 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).

Grimes argues on appeal that the evidence in this claim clearly proves she is totally disabled and the ALJ’s Opinion finding she is not is clearly erroneous, is arbitrary and capricious, is an abuse of discretion, and mandates reversal. We disagree. KRS 342.285 states as follows:

**342.285 Appeal to Workers' Compensation Board --  
Remanding claim to administrative law judge.**

- (1) An award or order of the administrative law judge as provided in KRS 342.275, if petition for

reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award.

(2) No new or additional evidence may be introduced before the board except as to the fraud or misconduct of some person engaged in the administration of this chapter and affecting the order, ruling, or award, but the board shall otherwise hear the appeal upon the record as certified by the administrative law judge and shall dispose of the appeal in summary manner. The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact, its review being limited to determining whether or not:

- (a) The administrative law judge acted without or in excess of his powers;
- (b) The order, decision, or award was procured by fraud;
- (c) The order, decision, or award is not in conformity to the provisions of this chapter;
- (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or
- (e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(3) Within sixty (60) days following the date on which the last appellate brief was filed, the board shall enter its decision affirming, modifying, or setting aside the order, decision, or award, or in its discretion remanding the claim to the administrative law judge for further proceedings in conformity with the direction of the board. The board may, before decision and upon a sufficient showing of fact, remand the claim to the administrative law judge.”

As can be seen from the above statute, the role of the Board is not to substitute its judgment for that of the ALJ, which is exactly what Grimes is asking this Board to do.

The ALJ reviewed the evidence of record and determined Grimes suffered a work-related puncture injury to her right hand, and retained a 3% impairment as a result. He then determined Grimes did not retain the physical capacity to return to the job she was performing at the time of her injury and, accordingly, enhanced her benefits by the three multiplier pursuant to KRS 342.730.

The ALJ performed the five step analysis required by City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015) and determined Grimes had not met her burden of proving she was totally disabled as a result of her work-related right hand injury, setting forth with specificity why. The ALJ was confronted with proof from Dr. Napolitano, opining Grimes suffered a work-related injury, and Dr. Fadel opining Grimes suffered a work-related injury and retained a 6% impairment rating as a result. The ALJ also considered proof from Dr. Burgess opining Grimes did not suffer a permanent work injury and retained a 0% impairment rating. The ALJ determined Grimes did suffer a permanent partial disability as a result of the work injury, entitling her to a PPD award based on a 3% impairment, and rejected her argument she was totally disabled. We believe this determination was clearly supported by the evidence of record and will not be disturbed on appeal.

Accordingly, the Opinion, Award, and Order rendered on June 20, 2020 by the Hon. John McCracken, Administrative Law Judge is hereby **AFFIRMED.**

ALL CONCUR.

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