

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: September 10, 2021

CLAIM NO. 201900545

SENECA FOODS CORPORATION

PETITIONER

VS.

APPEAL FROM HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE

JAMES MUNCY and  
HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART,  
VACATING IN PART & REMANDING

\* \* \* \* \*

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

**ALVEY, Chairman.** Seneca Foods Corporation (“Seneca”) appeals from the March 31, 2021 Opinion, Award, and Order and the May 10, 2021 Order overruling its Petition for Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ determined James Muncy (“Muncy”) sustained bilateral shoulder injuries on May 11, 2017 while working for Seneca. The ALJ

awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits based upon a 15% impairment rating assessed by Dr. Bruce Guberman, and medical benefits.

On appeal, Seneca argues the ALJ’s decision is not supported by substantial evidence. It argues the ALJ’s award of benefits is inconsistent with her findings pertaining to Muncy’s alleged shoulder conditions. We affirm in part, and find the ALJ did not err in awarding PPD benefits based upon the 15% impairment rating Dr. Guberman assessed. However, we vacate in part the award of TTD benefits from May 29, 2020 to August 6, 2020, and remand for a determination supported by the medical evidence.

Muncy filed a Form 101 on May 6, 2019 alleging injuries to both shoulders on May 11, 2017 while shoveling frozen food from a box while working for Seneca. In addition to working for Seneca, Muncy has worked in factory maintenance, as a cart pusher for Wal-Mart, and as a bus/lunchroom monitor and bus driver for a school system.

Muncy testified by deposition on June 14, 2019 and at the hearing held January 25, 2021. Muncy was born on August 19, 1966, and he resides in London, Kentucky. Muncy is a high school graduate, and he attended college for two years. He also took a two-year machine shop course.

Muncy’s first job with Truitt, or Seneca, involved assembling food trays. He was later moved to a job involving weighing, inspecting, and placing frozen food into containers. He was required to lift boxes weighing up to fifty pounds. He testified the spinach boxes weighed twenty-five pounds when full. He

used a shovel to remove spinach from boxes. He also used the shovel to break up frozen spinach. He worked thirty-two to forty hours per week.

Muncy was shoveling spinach on May 11, 2017 when he experienced pain in both shoulders. He testified he had no previous neck or shoulder problems. He testified the incident could have actually occurred on May 10, 2017. In either event, he reported the incident to Geraldine Harris, his supervisor. He initially treated with Dr. Charles Davis, his family physician, for his shoulder problems. He was referred to Dr. Alan Oster, an orthopedic surgeon. Dr. Oster ordered physical therapy and took him off work. Dr. Oster released Muncy to return to light duty on August 3, 2017, and later released him to full duty. Muncy never returned to work for Seneca after the incident, and he testified he does not believe he can perform the necessary job duties.

Muncy eventually had right shoulder surgery performed by Dr. Janak Talwalker. Muncy's personal health insurance paid for this surgery. He continues to have difficulty lifting overhead and with his activities of daily living, including putting on his clothes and combing his hair.

Muncy began working for the Laurel County Board of Education in February 2018. He was hired to work with disabled students on bus runs, and to monitor in the cafeteria. He now drives a school bus. He earns less now than he earned while working for Seneca. He takes over-the-counter medication for his shoulder pain, and he uses ice and a heating pad.

Muncy filed Dr. Oster's records in support of his claim. Dr. Oster saw Muncy on June 28, 2017 for pain across the shoulder blades with numbness in both

arms. Muncy reported he had strained both shoulders while shoveling at work on May 11, 2017. Dr. Oster diagnosed mild bilateral impingement with rhomboid strain. On August 3, 2017, he noted Muncy's condition had slightly improved. He released Muncy to light duty work with a ten-pound lifting limit. On September 7, 2017, Dr. Oster noted continued improvement, and he released Muncy to full duty work. On October 12, 2017, Dr. Oster noted Muncy continued to experience mild pain. He released Muncy from his care to return as needed.

Dr. Guberman evaluated Muncy on June 20, 2019. Muncy reported he experienced pain in both shoulders while using a shovel to break up frozen spinach at work. He complained of constant pain and stiffness in both shoulders. Muncy also reported he had never previously experienced shoulder problems. Dr. Guberman diagnosed chronic post-traumatic right and left shoulder strains caused by the work event. Dr. Guberman assessed a 9% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He stated Muncy did not have the physical capacity to return to the type of work he performed at the time of the injury. He also stated Muncy was unable to use his arms overhead for repetitive activities, and he should avoid lifting greater than twenty to twenty-five pounds occasionally or over five to ten pounds frequently. Dr. Guberman stated Muncy reached maximum medical improvement ("MMI") from his work injuries on June 20, 2019.

Dr. Guberman evaluated Muncy again on September 8, 2020. He noted Muncy had continued complaints of pain in both shoulders. He noted the surgery Dr. Talwalker performed on Muncy's right shoulder only partially improved

his symptoms. His diagnosis of Muncy's condition did not change from his initial evaluation. He again stated Muncy's conditions were caused by the work incident. He assessed a 15% impairment rating pursuant to the AMA Guides based upon Muncy's range of motion. Dr. Guberman reiterated Muncy is unable to use his arms overhead for repetitive activities. He additionally stated Muncy should not lift greater than fifteen to twenty pounds occasionally or over five pounds frequently. Dr. Guberman stated Muncy had reached MMI on September 8, 2020.

Muncy filed records from BHMG Orthopedics for treatment he received from Catherine Dickinson PA-C ("Ms. Dickinson"), on three occasions between October 17, 2019 and February 18, 2020. On October 17, 2019, injections were administered for Muncy's complaints of bilateral shoulder pain. On December 5, 2019, Muncy followed up with Ms. Dickinson. She noted bilateral shoulder injections provided some relief, but Muncy lacked the ability to lift and reach overhead. She diagnosed chronic pain of both shoulders, disorder of both rotator cuffs, impingement syndrome in both shoulders, and scapula-thoracic syndrome. On February 18, 2020, Ms. Dickinson diagnosed chronic pain in both shoulders, supraspinatus tendon tear, bilateral osteoarthritis of the acromioclavicular joints, left supraspinatus tendonitis, and scapula-thoracic syndrome. She determined his conditions are work-related.

Muncy additionally filed Dr. Talwalker's records for treatment administered between February 25, 2020 and October 6, 2020. Dr. Talwalker recommended right rotator cuff repair surgery on February 25, 2020. The surgery was performed on May 29, 2020, and consisted of a right shoulder arthroscopy, right

rotator cuff repair, and an open distal clavicle resection. Dr. Talwalker saw Muncy on June 16, 2020, July 14, 2020, August 25, 2020, and on October 6, 2020. On the last office visit, he noted Muncy's condition was improving, but he was still stiff. He diagnosed Muncy as status-post complete right rotator cuff repair, work-related injury, arthritis of the right acromioclavicular joint, status post right shoulder arthroscopy, and right shoulder adhesive capsulitis.

Dr. Ronald Burgess evaluated Muncy at Seneca's request on July 25, 2019. He noted Muncy first sought treatment for his shoulders on May 11, 2017. He noted Muncy had bilateral trapezius soreness of several months duration. On the date of the evaluation, Muncy had subjective complaints of discomfort in his trapezius and parascapular muscles, with no objective evidence of any abnormality. Dr. Burgess indicated Muncy exhibited severe symptom magnification. He opined the May 8, 2018 work incident did not result in a harmful change evidenced by objective findings. He determined Muncy reached MMI by September 7, 2017, and could return to work with no restrictions. He stated Muncy had 0% impairment pursuant to the AMA Guides.

Dr. Burgess completed a medical questionnaire at Seneca's request on August 17, 2020. Dr. Burgess stated Muncy's current complaints in both are unrelated to the May 11, 2017 work incident. He likewise stated Muncy's shoulder conditions were not aggravated by the May 11, 2017 work incident.

Dr. Burgess again evaluated Muncy at Seneca's request on October 26, 2020. He noted Muncy had one more physical therapy appointment scheduled. He stated Dr. Talwalker's notes indicate Muncy has adhesive capsulitis. He also stated

that since Muncy had not reached MMI, he was unable to assess an impairment rating. Dr. Burgess opined Dr. Guberman inappropriately assessed an impairment rating since Muncy had not reached MMI. He stated Muncy has only reached MMI for the left shoulder.

Seneca also filed records from the Frazier Rehab unit at St. Joseph Hospital in London for treatment Muncy received from July 13, 2017 to August 10, 2017. Muncy initially presented with bilateral shoulder pain with decreased strength and range of motion. The records reflect he slowly improved. The September 6, 2017 record indicates Muncy had met his physical therapy goals.

Seneca filed records from Dr. Davis at Mountain View Family Practice from October 13, 2017 to May 7, 2019. The October 13, 2017 office note reflects Muncy was there for a follow-up of his diabetes and A1C. The record notes a history of hypertension and hyperlipidemia, GERD, gout, asthma, and anemia. Shoulder problems were not mentioned, nor were they listed in the additional six treatment notes through May 17, 2019.

Seneca filed Dr. Dale Absher's May 18, 2017 note. Muncy complained of neck and bilateral shoulder pain from shoveling. X-rays taken on that date revealed no acute bony abnormalities.

Seneca also filed Dr. Oster's July 2, 2020 medical questionnaire. Dr. Oster noted the May 11, 2017 work incident did not result in a harmful change to either Muncy's left or right shoulder. He determined Muncy reached MMI by October 12, 2017. He assessed 0% impairment pursuant to the AMA Guides. Dr. Oster additionally noted Muncy could return to work at his regular job with Seneca.

At the Benefit Review Conference held December 21, 2020, the parties stipulated Seneca received due and timely notice of the injuries. TTD benefits were paid from May 11, 2017 to July 19, 2017. The issues for determination included benefits per KRS 342.730, work-relatedness/causation, injury as defined by the Act, ability to return to work, TTD duration, extent and duration, and future medical benefits.

In the Opinion, Award & Order, the ALJ determined Muncy sustained work-related bilateral shoulder strains on May 11, 2017; however, she did not believe the right shoulder injury resulted in a rotator cuff tear necessitating surgery. She noted Muncy had a gap in his treatment history, but observed he continued to have shoulder symptoms. Relying upon Drs. Guberman and Talwalker, the ALJ determined Muncy sustained work-related injuries to both shoulders on May 11, 2017. The ALJ stated she found the 15% impairment rating Dr. Guberman assessed is the most credible impairment rating in the record, and “is most consistent with the treatment records and Muncy’s continuing symptoms”. She noted that when Dr. Guberman evaluated Muncy on the second occasion, he found the range of motion had decreased.

The ALJ awarded TTD benefits from May 11, 2017 through September 7, 2017, and again from May 29, 2020 through August 6, 2020. The ALJ awarded PPD benefits based upon the 15% impairment rating Dr. Guberman assessed. The ALJ found Muncy has the ability to return to his pre-injury work, and is therefore not entitled to an enhancement of his award of PPD benefits pursuant to KRS 342.730(1)(c)1.

Seneca filed a Petition for Reconsideration arguing the ALJ erred in finding Muncy sustained a permanent work injury due to the May 11, 2017 work incident. Since the ALJ determined there was no harmful change, at worst Muncy sustained only a temporary injury, for which only temporary benefits could be awarded. Seneca argued Muncy is not entitled to any permanent benefits. In the alternative, Seneca argued any award for benefits should be based solely on Dr. Guberman's pre-surgery assessment of a 9% impairment rating. Seneca also argued it should not be held responsible for TTD benefits subsequent to the May 2020 surgery for a condition the ALJ found is not work-related.

In her May 10, 2021 Order, the ALJ denied Seneca's Petition for Reconsideration. The ALJ stated she found no error on the fact of her decision.

On appeal, Seneca argues the ALJ's decision is not supported by substantial evidence. It argues the award of TTD benefits and PPD benefits is inconsistent with the ALJ's determination regarding the extent of Muncy's bilateral shoulder injuries.

As the claimant in a workers' compensation proceeding, Muncy had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snowder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Muncy was successful in his burden, the question on appeal is whether substantial evidence in the 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). 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).

Seneca requests this Board to re-weight the evidence and substitute its judgment for that of the ALJ. This we cannot do. The ALJ accurately summarized the evidence, provided a thorough analysis, and specifically outlined why she relied

upon Dr. Guberman's opinions over those of Dr. Burgess. The ALJ acted squarely within her discretion in relying upon Dr. Guberman's opinions in determining Muncy sustained work-related bilateral shoulder injuries caused by the May 11, 2017 work incident, and her determination on this issue will not be disturbed.

The ALJ determined Dr. Guberman appropriately assessed a 15% rating for Muncy's bilateral shoulder injuries, which she found compensable. We determine the ALJ did not err in relying upon the impairment rating Dr. Guberman assessed. An ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). Again, the ALJ appropriately exercised her discretion, and a contrary result is not compelled.

That said, we must vacate the award of TTD benefits from May 29, 2020 to August 6, 2020. Apparently, this was the period Dr. Talwalker indicated Muncy could not work due to his right shoulder surgery that the ALJ determined was not compensable. On remand, the ALJ is directed to review the award of TTD benefits from May 29, 2020 to August 6, 2020. If the ALJ determines Muncy could not work during this period due to the surgery she found unrelated and not compensable, then he is not entitled an award of TTD benefits. However, if the evidence supports an award of TTD benefits during that period due to residuals from the ongoing effects of his work injury, the ALJ may make such award. However, it is incumbent upon the ALJ to provide a basis for such award based upon the medical evidence. We do not direct any particular result, and the ALJ may make any determination based upon the evidence.

Accordingly, the March 31, 2021 Opinion, Award, and Order and the May 10, 2021 Order on Petition for Reconsideration, issued by Hon. Monica Rice-Smith, Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This matter is **REMANDED** for additional determinations regarding entitlement to TTD benefits from May 29, 2020 to August 6, 2020.

STIVERS, MEMBER, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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