Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 4, 2021

CLAIM NO. 201866274

SYSCO FOOD SERVICE PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

TERRY HECKEL
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Sysco Food Service ("Sysco") appeals from the March 15, 2021, Opinion, Award, and Order and the March 24, 2021, Order ruling on the Petition for Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ awarded Terry Heckel ("Heckel") permanent partial disability ("PPD") benefits enhanced by the three multiplier, temporary total disability ("TTD") benefits, and medical benefits for a work-related left shoulder injury.

On appeal, Sysco asserts the ALJ erred in enhancing the award of PPD benefits by the three multiplier. Sysco also asserts the ALJ erred in believing the law required him to award the three multiplier for the duration PPD benefits were awarded.

BACKGROUND

The Form 101, filed on September 9, 2020, alleges Heckel sustained work-related injuries to "multiple body parts" on August 28, 2018, in the following manner: "I was working and co-employee struck me with product on pallet/forklift and injured my left shoulder, toes, and right shoulder."

Heckel was deposed on October 5, 2020. At the time of his deposition, he was still working at Sysco as the "freezer receiver and lead man," the same position he held at the time of his injury. He described his daily duties as a freezer receiver:

> A: The trucks come in, they back in. They bring their paperwork. I check the paperwork and make sure everything matches up. Then I go out. We have lumpers unload the trucks, break them down. I go out and check the product.
>
> I carry a label harness on me, and I have a gun. And I scan the product, and it pulls up a label. I make sure all the dates are right on it, so nothing is outdated, make sure there ain't [sic] no damage basically and then sticker everything so it can be pulled inside.
>
> Then I do the paperwork and make sure if there's any OSDs, which is hazardous analysis nowadays, especially since – we have a whole lot more paperwork. And that's basically it. We – excuse me.
>
> …

> A: Well, and also sometimes we man – like supervisions [sic], main supervisors are in meetings, I run the shift and do my job normally, so that doesn't happen a lot, but it used to happen a lot.

Following his return to work after the injury, Heckel was unable to act as "lead man" as much as he had before the injury. He provided the additional duties he was required to perform as a lead man:

> A: If anything happens from anybody in the warehouse, I have to be the one in charge to take care of it. If anybody calls in that needs supervisors, I answer and take the questions and try to take care of the problems.
>
> I run, get the guys out if they're not back in time when we're done, I've got to send guys. It just depends.

He identified the most physically demanding aspects of his job:

> A: Well, it's like if things – we have lumpers, and they're always shorthanded. If they mess up things and they don't come back, I used to take the boxes and move them myself and restack them with ties or – we go through turnover for lumpers are really bad, because they don't make a lot of money. And they're not very dependable. I'm moving things around.
>
> I can't get on jacks anymore, because they can jerk. And I was told not – and you have to hold on with both hands and have both feet on your things. And if it jerks, it's going to jerk this arm, and it's not pretty.
>
> Moving shrink wrap and things like that, that's something that really bothers me, because you really don't know how much they weigh. When you pull shrink wrap, you don't know how tight it is when you go to pull that, and you'll know – I know real quick. I let go.
>
> I try to do everything with my right hand, but I can't hold paperwork, do the labels and have the gun all in one hand. I have to have both.
>
> Q: Are you required to move boxes currently?

A: Yes, I still move boxes. I don't move anything over 20 pounds anymore, though, because that's what I was told by my doctor. If it's over 20, I don't do it.

Heckel testified that he tries to stay within his physical/work restrictions although it is difficult stating "I try to, but when you're out there and you've done it for 30 years or whatever, it's sort of hard sometimes to not do certain things. I mean, I catch myself a lot, but you've just got to be careful." His stamina is "nowhere" where it used to be.

Heckel underwent two surgeries after the August 28, 2018, injury – a left rotator cuff repair and a total left shoulder replacement. Regarding his return to work following the surgeries, he testified as follows:

Q: After the date of the accident, did you continue to work until your first surgery?

A: Yes.

Q: Did you work in the same job position?

A: Yep.

Q: Were you under any restrictions at that time?

A: No, it was horrible.

Q: And then you were, of course, off after your surgeries. When did you return most recently?

A: I came back March 4th of I guess 2019 doing light duty. I was only doing paperwork.

Q: How long did you work light duty?

A: A month, maybe. It seem like it was April 4th or something, I went back and tried to work, but I went out slowly.

> Q: And you've been working full duty since April 4th of 2019?
>
> A: Yes.

Heckel planned to retire on October 23, 2020, because he "can't keep doing this."

At the time of the August 28, 2018, injury, the heaviest weight Heckel was required to lift was fifty to seventy pounds. He elaborated further:

> Q: And how often would that occur that you'd have to do that type of lifting?
>
> A: Off and on. Usually every week some, I mean, I would do it. I mean, because if you want to get it done, you get in there and do it, because the lumpers are – they're not very good. We don't keep them very long.
>
> Q: With the problems that you currently have with your left shoulder, is there any way you could do your job without those restrictions that the doctor placed on you?
>
> A: No way. There's no possible way.

Heckel also testified at the January 27, 2021, hearing. He described his job title and duties at the time of the work injury:

> A: I was the freezer dock receiver, and I was also a lead man too.
>
> Q: Tell me what that job entailed as of August of 2018.
>
> A: You bring – truck drivers back trailers in. They bring in paperwork. I match the paperwork up to make sure everything looks okay. They bring – lumpers bring the product off – on the dock and break it down. I inspect all the product, make sure there's no damage.
>
> I look for HACCP problems, which is hazardous material, and any kind of damaged or any kind of broken boards or anything like that to make sure, and it matches up the way we take it into the warehouse. And

then someone comes and picks it up after I scan it. I put dates in or whatever I have to.

It feeds a label that I carry on my hip, and I pull that off and stick it on the product, and then our forklift guys take it and put it away.

Q: In theory, it sounds like a not too physical job. As you perform it, what are the physical aspects?

A: It's a lot more physical than it sounds, I guess. I mean, you have to move cases, for one thing. Lumpers are very not responsible people. They're all young, and we go through them like water – or we did go through them like water because they don't pay them much.

So you're going behind, grabbing boxes, moving – you have to get data off of the product, especially frozen product because it gets condensation on it. So you have to pull shrink-wrap, things like that, which don't sound like much, but you can grab some shrink-wrap sometimes, and it's almost like pulling a hundred pounds when it grabs.

And, I mean, you have to move boxes. Sometimes the weights and the dates aren't sitting on the outside of the cases. So you've got to move them around. Frozen cases are frozen together most of the time. So that's a little bit harder too. So you put a lot more into it.

You're on your feet all day long on concrete, working back and forth, and you're squeezing between pallets out there. It's not like a perfect world where you got so much room. And you got guys spinning around you the whole time on forklifts, and you got guys on lumping service, 18-year-old-kids that come out there and don't know what they're doing. So you've got to be watching all the time.

I mean, I've been bumped a few times. Ever after my injury I even got hit, and I was, like, it's just – it's pretty dangerous, actually.

Heckel was required to lift an average of fifty pounds when handling frozen foods. The job also required engaging in significant overhead work.

Immediately after the injury, Heckel worked through November 1, 2018. He characterized the work as "horrible" because he could not sleep and "I couldn't do anything. I was – that's the worst pain I'd ever been in in my life."

At the time of the hearing, Heckel had retired from Sysco. He furnished his reasons for retirement:

> A: I just really couldn't do the job anymore. Like – you know, like I said, I was a lead man. I used to be the kind of guy that went on all the docks and helped out. Bosses are gone, I take over. But it got to the point where I could barely do my job during the day without – I was exhausted, is what it was.
>
> It's take a lot of stamina out of me, and just even though you say don't use that left arm, don't do that, when you've done something for 30-something years and you're out there doing it, it's hard not to grab ahold of something, and when you do, you know. I mean, I got real good reflexes, which used to be a good thing. It's not a good thing when you got a shoulder – so you got to constantly have it on your mind not to grab this, not to pull this.
>
> I can't get on the equipment because equipment – you got to get on pallet jacks, and you got to do what they call four-point stance: Two hands, two feet planted, and you – if that jack jerks, which they do, I mean, it will rip that shoulder right out. So I never could do it.
>
> It's not – it wasn't just all the physical work. The mental part of knowing people are still banging around you and you're out there moving and you're getting – I'm exhausted. I'd come home and I wouldn't be able to do anything. I mean, I just – there's so much stuff that you don't even realize that you do until you can't do it. It takes a toll. It's take a toll on me.

> I never had an accident in 39 and a half years. Never been wrote up for anything….

Heckel introduced several medical records of Dr. Ryan Krupp. Pertinent to the issue on appeal is the January 29, 2020, record in which Dr. Krupp determined Heckel had reached maximum medical improvement following the total left shoulder arthroplasty and assessed an impairment rating of 21% pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. *Dr. Krupp imposed the following restrictions: lifting, pushing, and pulling up to twenty pounds, pushing/pulling repetitive up to two hours per day, and no work at or above shoulder level.* (Emphasis added).

Sysco introduced Dr. Thomas Loeb's November 10, 2020, Independent Medical Examination report. He imposed the following restrictions: *"If he were to attempt to return to work at this point in time, he would have restrictions of no lifting of any weight above chest level on the left side and no lifting greater than 15 to 20 pounds between waist and chest on the left side. He should have no push or pull activities greater than 25 to 30 pounds using the left upper extremity."* (Emphasis added).

The January 13, 2021, Benefit Review Conference Order and Memorandum lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid or contested medical expenses, credit for [this was left blank], and TTD. Under "Other" is the following: "work-relatedness/causation and occurrence of the incident are at issue for all issues other than the left shoulder."

The March 15, 2021, Opinion, Award, and Order contains the following Findings of Fact and Conclusions of Law which are set forth, in relevant part, *verbatim*:

> **III. Benefits per KRS 342.730**
>
> The Plaintiff has a 22% impairment rating and lacks the capacity to return to the type of work done on the date of injury.
>
> As the Plaintiff notes there is nothing substantive to differentiate the two ratings, 21% and a 22%. I select the rating from Dr. Loeb as he examined the Plaintiff more recently.
>
> I accept the Plaintiff's testimony and find him entirely reliable. He only worked a few weeks after his surgery and even that time he remained under restrictions. He volunteered to be furloughed due to Covid because he was having trouble with his left shoulder. He retired early, at less than full benefits, due to his shoulder. All doctors who have given restrictions limit him to lifting less than 50 pounds, which he has testified was a basic requirement. He never, as the Defendant has argued, returned to work at full capacity or without issues. He lacks the capacity to return to the type of work done on the date of injury and KRS 342.730(1)(c)1 and 3 apply.
>
> KRS 342.730(1)(c)2 also applies. However, given the fact he had to retire at less than full benefits from the only job he has had for 20 years I find KRS 342.730(1)(c)1 more applicable.
>
> The Plaintiff has seemingly, via his brief, waived his claim for a permanent, total disability award. Regardless, given his two decades of experience with supervising other employees, completing paperwork, inspecting and entering data on his device I would not find him totally disabled. This type of work, especially with the degree of attention required when working with food, is not insignificant.

IV. Award

> The Plaintiff's permanent partial disability award is: 900.63 (AWW) x 2/3 (workers' compensation rate) x .22 (impairment rating) x 1.15 (grid factor) x 3.6 (KRS 342.730(1)(c)1 and 3) = $546.86 a week, from August 28, 2018, for 425 weeks. He is also entitled to future work-related and reasonable and necessary left shoulder injury. The right shoulder and toe claims are dismissed.

Sysco filed a Petition for Reconsideration asserting the same arguments it now makes on appeal. Heckel also filed a Petition for Reconsideration asserting the ALJ erroneously calculated his average weekly wage ("AWW") and, consequently, his PPD benefits. In the March 24, 2021, Order, the ALJ overruled Sysco's Petition for Reconsideration and sustained Heckel's.

Heckel filed a second Petition for Reconsideration requesting that the ALJ also correct his calculation of TTD benefits based upon the amended AWW. In the April 1, 2021, Order, the ALJ sustained Heckel's petition.

ANALYSIS

Sysco first asserts the ALJ erred in awarding Heckel PPD benefits enhanced by the three multiplier, because the evidence indicates he retains the physical capacity to perform the same job he performed at the time of his injury. According to Sysco, the "best evidence" in support of its argument is Heckel's return to work performing his same pre-injury job for a year and a half.

As the claimant in a workers' compensation proceeding, Heckel had the burden of proving each of the essential elements of his claim, including enhanced benefits by the three multiplier. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Heckel was successful in his burden, we must determine 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).

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 supporting a different outcome than 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).

Importantly, 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 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). In other words, it is not this Board's role to second-guess the ALJ's discretion if substantial evidence supports his ultimate decision, and we would be committing reversible error in so doing.

KRS 342.730(1)(c)1 states, in relevant part, as follows:

> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

In Trane Commercial Systems v. Tipton, 481 S.W3d 800 (Ky. 2016), the Kentucky Supreme Court articulated the type of analysis an ALJ must undertake when considering enhancement by the three multiplier stating: "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.'" (*quoting* Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004)). In Forman, the Court concluded "the type of work that the employee performed at the time of the injury" as used in KRS 342.730(1)(c)1 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. Significantly, a claimant's post-injury testimony is competent evidence regarding whether he or she retains the physical capacity to

return to the type of work performed at the time of injury. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

As the above-cited cases require the correct inquiry is whether Heckel is able to perform his *actual pre-injury job tasks.* In the case *sub judice*, the ALJ relied upon Heckel's testimony regarding his ability to perform the same tasks he was performing at the time of the injury. Heckel testified during both his deposition and at the hearing that he was unable to perform all of his pre-injury tasks, including lifting over fifty pounds, something that was a pre-injury requirement. The ALJ correctly noted "[a]ll doctors who have given restrictions limit him to lifting less than 50 pounds." Notably, Dr. Krupp limited Heckel to lifting, pushing, or pulling under twenty pounds while Dr. Loeb limited his to fifteen to twenty pounds. Both physicians also restricted Heckel from carrying out any overhead work with his left arm which Heckel testified at the hearing was a large part of his job. As the ALJ concluded, despite Sysco's assertions to the contrary, Heckel never "returned to work at full capacity or without issues." The ALJ, in keeping with the required analysis, considered Heckel's actual pre-injury duties and determined Heckel is no longer able to perform some of them. As this conclusion is supported by substantial evidence, we affirm the enhancement of the PPD benefits by the three multiplier.

That said, we note the ALJ did not engage in the proper analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). In Fawbush, supra, the Supreme Court decreed where both KRS 342.730(1)(c)1 and 2 are applicable, the ALJ must then determine which provision is more appropriate on the

facts. In Adams v. NHC Healthcare, 199 S.W.3d 163, 168-169 (Ky. 2006), the Supreme Court stated as follows:

> The court explained subsequently in *Adkins v. Pike County Board of Education,* 141 S.W.3d 387 (Ky. App. 2004), that the *Fawbush* analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.

After a consideration of these factors, if the evidence indicates a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future, the application of paragraph (1)(c)1 is appropriate. Fawbush at 12.

Here, the ALJ determined KRS 342.730(1)(c)1 and KRS 342.730(1)(c)(2) applied, but he failed to conduct a complete Fawbush analysis. In determining the three multiplier is applicable, the ALJ stated as follows: "However, given the fact he had to retire at less than full benefits from the only job he has had for 20 years I find KRS 342.730(1)(c)1 more applicable." Such an analysis is deficient. However, as neither party raised this issue in a Petition for Reconsideration or on appeal, we need not address it.

Sysco next alleges the ALJ erred by awarding the three multiplier for the entirety of the award of PPD benefits. It requests remand to the ALJ with the instruction to consider not enhancing the award of PPD benefits by the three multiplier during the period that Heckel returned to work. We decline this request.

Nothing within KRS 342.730(1)(c)1 suggests the three multiplier can be awarded for only a portion of the award of PPD benefits. In fact, use of the word "shall" in the statute indicates that the three multiplier *must* enhance the award of PPD benefits for the *entirety* of its duration. Pertinent to this inquiry is the language in Carnes v. Parton Bros. Contracting, Inc., 171 S.W.3d 60, 68-69 (Ky. App. 2005) in which the Court of Appeals instructed as follows:

> In statutory interpretation and construction, "'[m]ay' is permissive [,]" [footnote omitted] while "'[s]hall' is mandatory[.]" [footnote omitted]

"The most commonly stated rule in statutory interpretation is that the 'plain meaning' of the statute controls." Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004). Where the language of a statute is clear and unambiguous, it is not open to construction or interpretation and must be applied as written. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008). This Board is not at liberty to interpret a statute at variance with its stated language; consequently, on this issue, we must affirm.

Accordingly, on all issues raised on appeal, the March 15, 2021, Opinion, Award, and Order and the March 24, 2021, Order are **AFFIRMED**.

ALL CONCUR.

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