Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 1, 2019

CLAIM NO. 201800392

TA OPERATING, LLC — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. JEFF V. LAYSON, ADMINISTRATIVE LAW JUDGE**

WANDA NAPIER — RESPONDENT/ CROSS-PETITIONER
and
HON. JEFF V. LAYSON, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. TA Operating, LLC ("TA Operating") appeals from the September 29, 2018 Opinion, Award, and Order rendered by Hon. Jeff V. Layson, III, Administrative Law Judge ("ALJ"). The ALJ found Wanda Napier ("Napier") sustained a work-related injury to her right knee on July 13, 2016 when she tripped and fell due to a raised floor tile while working at TA Operating. The ALJ awarded

temporary total disability ("TTD") benefits, permanent partial disability ("PPD") without the enhancement by any multipliers contained in KRS 342.730(1)(c), and medical benefits. TA Operating also appeals from the October 22, 2018 order denying its petition for reconsideration. Napier cross-appeals.

On appeal, TA Operating argues the ALJ erred by disregarding the opinions of Dr. Richard Deerhake in determining Napier sustained a work-related injury on July 13, 2016 for which surgery was required. It argues substantial evidence does not support the ALJ's decision. On cross-appeal, Napier argues the ALJ erred in not enhancing her PPD benefits by the two multiplier contained in KRS 342.730(1)(c)2. Because the ALJ's decision is supported by substantial evidence, he did not err as a matter of law, and a contrary result is not compelled, we affirm.

Napier filed a Form 101 on March 13, 2018 alleging she injured her right knee when she lost her footing and fell while walking to attend the coffee bar at work on July 13, 2016. At the time of the accident, she was concurrently employed at Florence Tanning and Coin Laundry. According to her Form 104, Napier began working for TA Operating as a cashier in January 1980. She has also worked as a laundry attendant for Florence Tanning and Coin Laundry since 2001.

Napier testified by deposition on April 26, 2018, and at the July 24, 2018 hearing. Napier was born on December 31, 1956, and is a resident of Florence, Kentucky. Napier is a high school graduate with no specialized vocational training. She began working as a cashier for TA Operating in January 1980. Her job duties include waiting on customers, taking care of the coffee bar, and stocking food. She stated the job involves standing, walking, bending, stooping, and lifting up to ten

pounds. She works ten-hour shifts, beginning at midnight, four days per week. She testified that once or twice a month she borrows a chair from one of the onsite restaurants to sit for part of her shift due to her right knee problems. She testified she lifts up to fifty pounds while working at the laundry. Napier testified she continues to perform the same duties at both jobs that she performed prior to her injury. She testified her right knee symptoms worsen during her shift at TA Operating. She takes Gabapentin, and uses Ben-Gay for relief of her symptoms.

The coffee bar is located across the room from the cashier stand. The floor has one-foot-by-one-foot tiles. On July 13, 2016, Napier was walking across the floor to tend the coffee bar. Her shoe caught on a raised tile causing her to fall to the floor, landing on her palms and knees. She experienced an onset of right knee pain, but continued to work the remainder of her shift. Napier tended the coffee bar, and reported the incident the next morning when her manager arrived at work. The manager then completed an accident report. Napier continued to work, and sought no medical treatment until July 27, 2016. After her right knee complaints persisted, she was referred by TA Operating to treatment with Concentra. Napier was restricted from stooping after that appointment. She continued to work until her May 30, 2017 surgery. She returned to work with TA Operating in August 2017.

Napier was diagnosed with myasthenia gravis in 1997, which involves muscle deterioration. She also injured her right knee in December 2013 when her leg became trapped between her car door and the car frame. She underwent an unrelated right total knee replacement due to that accident in March 2014. She was off work for six weeks due to that surgery, and returned to work with no problems.

She subsequently had a couple of incidents at home where she tripped and fell, but no medical treatment was required.

Although there was a question as to whether TA Operating was aware of her concurrent employment, Napier testified that her manager not only knew of it, she worked with Napier on scheduling to accommodate the other job. The parties stipulated that if the concurrent wages were considered, her pre-injury wages were $618.82 per week, and post-injury wages are $592.32 per week. Napier testified she received short-term disability benefits from an insurance policy, for which she paid the premiums, during the period of time she was off work due to the May 2017 surgery.

In support of her claim, Napier filed Dr. Joshua Murphy's April 26, 2017 office note. Dr. Murphy noted Napier's complaints of right knee pain due to her work injury. He also noted the history of a previous right knee replacement by Dr. Richard Goldfarb. Dr. Murphy diagnosed a mechanical loosening of the right knee prosthetic joint, and recommended a revision of the right knee arthroplasty.

Napier filed additional records from Dr. Murphy for treatment from April 26, 2017 through September 6, 2017. In the May 30, 2017 operative note, Dr. Murphy noted that he performed a right knee arthroplasty revision surgery. The follow up office notes outline Napier's progression after the surgery, and recommendations for physical therapy. Napier also filed Dr. Murphy's October 19, 2015 office note recommending physical therapy for chronic pain.

Napier also filed Dr. Thomas Bender's May 15, 2018 report, who evaluated Napier at her attorney's request on May 8, 2018. Dr. Bender outlined the

history of Napier falling to her knees as she was going to check supplies at the coffee bar. He also noted the previous history of right knee replacement in 2014 due to the 2013 motor vehicle accident. Dr. Bender opined that because of the July 13, 2016 fall, Napier sustained a right knee/lower leg contusion with acceleration of the mechanical loosening of the right knee prosthesis. Dr. Bender assessed a 20% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Of this rating, he apportioned 15% to the prior right knee replacement, and 5% to the July 13, 2016 injury and surgery. Dr. Bender additionally stated Napier was temporarily totally disabled from working from May 30, 2017 through August 26, 2017, but that she has no permanent restrictions.

TA Operating filed the office notes of Dr. Monica Flynn for treatment she administered to Napier on September 30, 2013 and October 3, 2013. Dr. Flynn noted Napier had twisted the medial aspect of her right knee, and diagnosed a right knee strain. She noted Napier complained of sharp, severe pain. Dr. Flynn restricted Napier from climbing, squatting and walking. We note this treatment occurred prior to Napier's December 2013 accident which necessitated the right knee replacement in 2014.

Dr. Deerhake evaluated Napier at TA Operating's request on July 26, 2017. He noted the July 13, 2016 incident when Napier tripped over a tile and fell to her hands and knees, and the development of a right knee contusion. He also noted the history of the previous right knee replacement in 2014, and her history of myasthenia gravis. In his October 31, 2017 note, Dr. Deerhake stated he had

reviewed additional medical records. He noted Napier had been having right knee pain prior to July 13, 2016, and there was a concern of the loosening of her knee joint prior to her fall. He stated there is no evidence the fall substantially aggravated her condition. He did not believe she had reached maximum medical improvement ("MMI"), and would not do so until a year after the May 2017 surgery. Dr. Deerhake indicated he would limit Napier from squatting, kneeling, climbing, and lifting more than twenty pounds.

Dr. Deerhake testified by deposition on June 25, 2018. He testified the medical records outline Napier's continuing complaints with her right knee after the 2014 replacement. He testified it is unlikely the fall, as Napier described, would cause the loosening of her prosthesis. Dr. Deerhake stated Napier has a 20% impairment rating pursuant to the AMA Guides, due to the 2014 arthroplasty, and no impairment attributable to the July 13, 2016 trip and fall. Dr. Deerhake testified the surgery performed by Dr. Murphy for the loosening of Napier's prosthesis was reasonable and necessary. He also testified the period of time Napier was temporarily disabled from work was reasonable and necessary.

In a subsequent note dated August 6, 2018, Dr. Deerhake stated Napier would have no additional impairment due to the July 13, 2016 injury. He also stated she requires no additional treatment for the residuals of the incident. He stated she reached MMI from two months after July 13, 2016. He also stated she has no restrictions due to the July 13, 2016 incident, but would have some restrictions due to the 2014 knee replacement.

A Benefit Review Conference ("BRC") was held on July 10, 2018. TA Operating did not stipulate that Napier sustained a work-related injury on July 13, 2016. The parties stipulated that Napier has the physical capacity to return to the type of work performed at the time of the injury. The issues listed in the BRC order include work-relatedness/causation, injury as defined by the Act, benefits per KRS 342.730, TTD, pre-existing active, medical benefits, and whether TA Operating was aware of Napier's concurrent employment.

The ALJ issued the Opinion, Award and Order on September 29, 2018. The ALJ outlined the evidence and found Napier sustained a work-related right knee injury on July 13, 2016. He determined Napier has a 5% impairment rating due to the work-related injury. He found TA Operating was aware of Napier's concurrent employment, and she had a pre-injury average weekly wage ("AWW") of $618.82. The ALJ noted the parties stipulated Napier's post-injury AWW, considering the concurrent employment, is $594.32 per week. The ALJ found TA Operating is responsible for Napier's medical treatment stemming from the July 13, 2016 injury. The ALJ awarded TTD benefits from May 30, 2017 through August 26, 2017. He also awarded PPD benefits based upon the 5% impairment rating assessed by Dr. Bender, but found none of the multipliers contained in KRS 342.730(1)(c) are applicable.

TA Operating filed a petition for reconsideration, arguing the ALJ erred in failing to rely upon Dr. Deerhake's opinions. The petition was denied by the ALJ in an order issued December 5, 2018.

We initially note that as the claimant in a workers' compensation proceeding, Napier had the burden of proving each of the essential elements of her cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was successful in her burden regarding the causation and entitlement to TTD benefits and PPD benefits, the question on appeal is whether substantial evidence 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). Where evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must

be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

While we note that Dr. Deerhake opined Napier sustained no more than a temporary contusion to her right knee, he also determined the surgery performed by Dr. Murphy was reasonable and necessary. He also determined the period Napier was restricted from working was also reasonable and necessary. We additionally note that Dr. Bender disagreed with Dr. Deerhake regarding the extent of the injury Napier sustained on July 13, 2016. Dr. Bender specifically opined the loosening of the right knee prosthesis was attributable to the July 13, 2016 trip and fall. Likewise, contrary to Dr. Deerhake's opinion, he determined Napier sustained a 5% impairment rating attributable to the July 13, 2016 injury and subsequent surgery.

The ALJ acted within the discretion afforded him in determining Napier sustained a compensable work-related injury to her right knee. As stated

above, this determination is supported by Dr. Bender's opinion. The ALJ was not compelled to rely upon Dr. Deerhake's contrary opinion. We acknowledge TA Operating's ability to point to the contradictory and conflicting opinions of Dr. Deerhake. However, the ALJ as fact-finder, not the Board, determines the credibility of the evidence. The ALJ may choose whom and what to believe when faced with conflicting evidence. It was the ALJ's prerogative to rely on the opinions of Drs. Murphy and Bender in making his determination. The ALJ properly exercised his discretion in arriving at his determinations regarding the occurrence of a work-related injury, the award of TTD benefits, PPD benefits, and medical benefits, and we will not disturb his decision.

We likewise find the ALJ did not err in determining Napier is not entitled to an enhancement of her award of PPD benefits pursuant to the multipliers contained in KRS 342.730(1)(c). The ALJ's determinations fall squarely within the discretion afforded to him, and his assessment of the multipliers contained in KRS 342.730(1)(c) is supported by the record. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

The transcript of the hearing held July 24, 2018, reflects as follows:

> JUDGE LAYSON: Okay. So just to summarize, and this is pretty consistent with what is in the BRC order, if Ms. Napier had concurrent employment, her pre-injury average weekly wage is $618.82. If the concurrent wages aren't included, her pre-injury average weekly wage is $555.75. Is that correct counsel?
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> MR. GUENTHER: Yes.
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> MR. DURBIN: Yes.

> JUDGE LAYSON: Now, with regard to Ms. Napier's post injury average weekly wage, if we include the concurrent employment, her post injury average weekly wage is $594.32. And if the concurrent wages aren't included, the post injury average weekly wage is $529.63. Is that correct, Counsel?
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> MR. DURBIN: Yes.
>
> MR. GUENTHER: Yes.

We initially note that the three multiplier contained in KRS 342.730(1)(c)1 is not applicable since it is undisputed that Napier returned to the work she was performing at the time of the injury, and she has no permanent restrictions. The ALJ determined Napier's concurrent wages should be included in the determination of her AWW. The ALJ additionally acknowledged the parties agreed and stipulated the post-injury AWW is less than Napier earned prior to the date of the accident. Pursuant to KRS 342.730(1)(c)2, in order to qualify for the two multiplier, an employee must return to work at equal or greater wages than the pre-injury AWW, and that work must cease in accordance with the standards set forth in accordance with the standards set forth in Livingood v. Transfreight, LLC., 467 S.W.3d 249 (Ky. 2015). In this instance, the parties stipulated to the pre- and post-injury AWWs, both inclusive and exclusive of Napier's concurrent wages. The ALJ included the concurrent wages, and noted the stipulation regarding the inclusion of those wages on Napier's return to work.

Although Napier now argues she is entitled to the two multiplier contained in KRS 342.730(1)(c)2, this was not an issue specifically preserved in the BRC order, nor was it raised at the hearing. As reflected above, at the hearing, Napier, through her attorney, agreed with the ALJ regarding the stipulation of her

pre- and post-injury wages. Napier did not move at any time afterward for relief from this stipulation. Therefore, this was not an issue properly preserved for determination by the ALJ or for review by this Board. Based upon the ALJ's determination and the stipulations of the parties, there is no evidence that Napier is entitled to an enhancement of her award of PPD benefits by the two multiplier.

That said, if Napier ever returns to work at a wage equal to or greater than she earned at the time of injury, based upon her combined wage, she may be entitled to the application of the two-multiplier, pursuant to KRS 342.7301(1)(c)2. However, we acknowledge this enhancement would be precluded if the loss of employment is due to her "conduct that is shown to be an intentional deliberate action with a reckless disregard of the consequences either to himself or another" pursuant to Livingood v. Transfreight, LLC, supra.

Accordingly, the September 29, 2018 Opinion, Award, and Order, and the October 22, 2018 Order denying TA Operating's petition for reconsideration, rendered by Hon. Jeff V. Layson, III, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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