

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: March 18, 2022

CLAIM NO. 202100142

TIMOTHY BABB

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

J B PALLETTS and  
HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Timothy Babb (“Babb”) appeals from the October 27, 2021 Opinion, Award and Order rendered by Hon. M. Christopher Davis, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits and permanent partial disability (“PPD”) benefits without the application of either the three-multiplier contained in KRS 342.730(1)(c)1, or the two-multiplier contained in KRS 342.730(1)(c)2 due to the fact Babb never returned to the same or

higher weekly wage. The ALJ also awarded medical benefits for the work-related left rotator cuff injury he sustained on March 3, 2020. Babb also appeals from the November 30, 2021 Order overruling his Petition for Reconsideration.

On appeal, Babb argues the ALJ improperly based his decision on an inaccurate application of the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Babb also argues the evidence does not support the ALJ’s finding that he can resume his usual and customary work. We find the ALJ appropriately weighed the evidence, and he did not misinterpret the AMA Guides. The ALJ’s decision is supported by substantial evidence, and therefore we affirm.

Babb filed a Form 101 on January 28, 2021, alleging he sustained a work-related left shoulder injury on March 3, 2020 while working for J. B. Palletts (“Palletts”) in Auburn, Kentucky. Babb alleged he was lifting 98-inch boards from a conveyor, when a board came down too quickly striking him from behind and pulling him to the ground. He asserted he experienced a pop in his left shoulder due to the incident. In the Form 104, Babb noted his previous employment included working as a lawn care laborer and as a team leader at a spice plant.

Babb testified by deposition on May 11, 2021, and again at the Hearing held September 16, 2021. Babb was born on July 19, 1963. He resides in Russellville, Logan County, Kentucky. He moved to Russellville from California in 2010. Babb is a high school graduate with no specialized vocational training. Babb testified he had previously sustained unrelated left wrist and right shoulder injuries, but he had no problems with his left shoulder prior to the injury date. He

additionally testified he had difficulty operating a nail gun prior to the injury date due to his previous right shoulder injury. He also occasionally experienced right shoulder problems prior to the injury date while moving floor jacks.

Babb indicated his job duties for Palletts included stacking lumber, sweeping, and occasionally using a nail gun. He testified the lumber weighed up to thirty pounds per board. He lifted four boards at a time, weighing a total of up to 120 pounds. He was able to do that prior to the accident, without difficulty despite his right shoulder problems.

At the time of the accident, Babb had just pulled four boards from the conveyor. Before he could stack them, four more boards came through and butted into the ones he was carrying, knocking him to the ground. He experienced a pop in the left shoulder at that point. He left work early that day due to left shoulder pain. Babb continued to work sporadically after the date of the accident until he underwent left shoulder surgery on June 18, 2020. Dr. Kirk Fee, his treating orthopedic surgeon, released him to return to work on December 1, 2020. He has had no medical treatment since his release. He testified Dr. Fee advised him to take it easy with his left shoulder for a year. He returned to lighter duty work after the release, earning \$10.00 per hour, but he was unable to perform all his job tasks.

Babb was terminated from employment in December 2020 after missing three days of work due to his illness. Babb testified he can only lift his left arm to shoulder level. He continues to have some left shoulder problems, and some days are worse than others. He is stiff every morning when he first gets out of bed, and it takes a few hours to loosen up. His left shoulder also stiffens after periods of

inactivity. He currently works five to ten hours per week for a landscaping company, earning \$12.50 per hour.

Babb testified a video that Palletts introduced did not accurately depict his job duties. He stated the video did not show the area where he was working when the accident occurred. He additionally noted the board shown in the video was poplar, which does not weigh as much as the oak or walnut he was working with on the date of the accident. He also testified the video only showed approximately a third of his work duties, and he is no longer able to lift completed pallets.

In support of his Form 101, Babb filed Dr. Fee's February 16, 2021 report. Dr. Fee diagnosed Babb with a left shoulder rotator cuff tear caused by the work injury. He assessed a 5% impairment rating pursuant to the AMA Guides. He stated Babb has the capacity to return to his job duties for Palletts. He also stated Babb should be "mindful" of heavy lifting and bilateral shoulder motion.

Babb also filed Dr. James Farrage's April 29, 2021 report. Dr. Farrage noted Babb reported he sustained a left shoulder injury while removing lumber from a conveyor. Dr. Farrage diagnosed Babb with a left shoulder rotator cuff tear, and he continues to complain of left shoulder pain. Dr. Farrage assessed a 12% impairment rating pursuant to the AMA Guides. Dr. Farrage assigned restrictions of no lifting over thirty pounds on occasion, and fifteen pounds frequently. He also stated Babb could occasionally lift up to fifty pounds.

Joe Beachy ("Beachy"), a part owner of Palletts, testified by deposition on July 1, 2021. He has been a co-owner of that company since 1995. He testified

Babb worked there from 2018 to 2019. He then quit for two months and returned to work from December 2, 2020 to January 11, 2021. Babb helped build pallets and stacked boards/lumber. Beachy testified regarding a video filed into evidence showing the weighing of a board. He stated Babb was only required to lift one board at a time, not four. He asserted the video displayed the pallet-making process. Beachy testified the finished pallets weigh sixty to ninety pounds. Beachy did not observe the accident. He also testified Babb performed the same job duties when he returned to work on December 2, 2020, that he engaged in at the time of the accident. Babb last worked on January 11, 2021. When he did not report to work for a week, his job was given to someone else.

Palletts filed Dr. Fee's notes for treatment he administered from April 29, 2020 to November 10, 2020. Dr. Fee noted the history of the work injury. He also noted he had previously successfully treated Babb's right shoulder. Babb complained of left shoulder pain into his neck, and the inability to lift his left arm. Dr. Fee diagnosed Babb with left shoulder pain and weakness, with a probable left shoulder rotator cuff tear. The June 18, 2020 note indicates the preoperative and postoperative diagnoses were left rotator cuff tear, and severe AC joint arthrosis. Dr. Fee repaired the left shoulder tear and a distal clavicle resection. On November 10, 2020, Dr. Fee noted Babb was recovering well, and had excellent range of motion. He stated Babb could return to work on December 1, 2020, with no restrictions.

Palletts filed an undated report from Dr. Charles Barlow, who evaluated Babb at its request. Dr. Barlow noted the reported left shoulder injury which occurred when Babb was lifting boards from a conveyor. He additionally

noted the June 2020 surgery, and the release to return to work in December 2020. He diagnosed Babb with a left shoulder rotator cuff tear, for which he had reasonable treatment, and believed he reached maximum medical improvement on December 1, 2020. Dr. Barlow assessed a 3% impairment rating pursuant to the AMA Guides. He opined Babb requires no restrictions, and he disagreed with the 12% impairment rating Dr. Farrage assessed.

A Benefit Review Conference (“BRC”) was held on August 31, 2021. Palletts disputed whether Babb sustained a work injury, despite paying TTD and medical benefits. The BRC Order also indicates Babb’s physical capacity to return to work is at issue. Other issues preserved for determination by the ALJ included benefits per KRS 342.730, work-relatedness/causation, unpaid/contested medical expenses, TTD benefits, injury as defined by the Act, and exclusion for pre-existing active disability. The BRC Order was subsequently amended to include the dates TTD was paid, and the rate. The amended Order also reflects the amount of the medical benefits Palletts paid on Babb’s behalf, and the fact that no unpaid bills were identified.

In his decision rendered October 27, 2021, the ALJ found Babb sustained a left rotator cuff tear while working for Palletts on March 3, 2020. Relying upon Dr. Fee’s records and report, the ALJ found Babb’s hypertrophic osteoarthritis or distal clavicle condition is not work-related. The ALJ found Dr. Fee’s interpretation of the AMA Guides acceptable, and he pointed out that interpretation was not challenged by any of the other medical evidence. The ALJ awarded PPD benefits based upon a 5% impairment rating Dr. Fee assessed for the

left rotator cuff tear. The ALJ, again relying on Dr. Fee, found Babb retains the ability to do the type of work performed on the date of injury, thereby finding the three-multiplier contained in KRS 342.730(1)(c)1 is inapplicable. The ALJ also found, “KRS 342.730(1)(c)2 may apply in the future but that is the subject of a motion to reopen.” The ALJ additionally awarded TTD benefits at the rate of \$184.75 per week from May 8, 2020 through December 1, 2020. He also awarded medical benefits pursuant to KRS 342.730.020 only for treatment of the left rotator cuff tear.

Babb filed a Petition for Reconsideration, arguing neither Dr. Fee nor Dr. Barlow accurately assessed their respective impairment ratings. He argued the distal clavicle resection was performed as part of the surgery repairing the left rotator cuff, and the impairment for that condition should have been included. He also asserted the ALJ erred in determining Dr. Fee released him to return to work without restrictions, and the three-multiplier contained in KRS 342.730(1)(c)1 is applicable. Babb also argued the ALJ erred in noting Dr. Fee treated him for the AC arthrodesis.

The ALJ issued an Order on November 30, 2021, denying Babb’s Petition for Reconsideration. He stated both alleged errors, including the work-relatedness of the distal clavicle resection and the finding that KRS 342.730(1) is not applicable, are supported by the opinions rendered by Drs. Fee and Barlow.

On appeal, Babb argues the ALJ did not correctly set out the law regarding the proper use of the AMA Guides. He also argues substantial evidence does not support the ALJ’s finding he could return to his usual and customary work.

As the claimant in a workers' compensation proceeding, Babb had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Babb was unsuccessful in his burden regarding inclusion of the impairment for the AC arthrosis, and the application of the three-multiplier pursuant to KRS 342.730(1)(c)1, 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 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). The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings 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).

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). 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). Mere evidence contrary to the ALJ's decision is inadequate 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Substantial evidence supports the ALJ's determination that Babb sustained a work-related left shoulder rotator cuff tear, surgically repaired by Dr. Fee. The ALJ explained why he relied upon the impairment rating Dr. Fee assessed. Contrary to Babb's assertion, Dr. Fee released him to return to work on December 1, 2020. Dr. Fee's follow-up report did not set forth any specific restrictions but he cautioned Babb to be careful. The ALJ stated he gave more credence to Dr. Fee's opinions since he was the treating orthopedic surgeon. He also specifically found only the left shoulder rotator cuff tear was caused by the work injury. He clearly explained why he found the other conditions unrelated. While Babb points to Dr. Farrage's opinions, those are merely a contrary viewpoint upon which the ALJ could, but was not compelled to, rely. Babb's arguments go to the weight afforded the evidence. The ALJ is not permitted to assess impairment ratings. As noted above, the ALJ's explanation for his reliance upon Dr. Fee's opinions fell clearly within his discretion as an ALJ. Dr. Fee's opinions constitute substantial evidence supporting the ALJ's determination, and a contrary result is not compelled.

We also determine substantial evidence supports the ALJ's determination Babb retains the physical capacity to return to his previous work and a contrary result is not compelled. KRS 342.730(1)(c)1 states 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.

The ALJ relied upon Dr. Fee's opinions regarding Babb's ability to return to work. While Dr. Fee advised Babb to be careful, his activities were not specifically restricted. A review of Dr. Fee's records and report supports the ALJ's determination the three-multiplier is not applicable. Therefore, again, a contrary result is not compelled.

Accordingly, the October 27, 2021 Opinion, Award and Order and the November 30, 2021 Order on Petition for Reconsideration rendered by Hon. M. Christopher Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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