

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 25, 2021

CLAIM NO. 202000365

TRANE CO.

PETITIONER

VS.

APPEAL FROM HON. PAUL L. WHALEN,
ADMINISTRATIVE LAW JUDGE

EDWARD HIGGINS and
HON. PAUL L. WHALEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * *

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

ALVEY, Chairman. Trane Co. ("Trane") appeals from the February 5, 2021 Opinion, Award and Order rendered by Hon. Paul L. Whalen, Administrative Law Judge ("ALJ"). The ALJ determined Edward Higgins ("Higgins") sustained injuries to his neck, mid back, and low back caused by cumulative trauma. The ALJ awarded permanent partial disability ("PPD") benefits for Higgins' cervical

condition, and medical benefits for his cervical, mid back, and low back conditions. Trane also appeals from the March 15, 2021 Order denying its Petition for Reconsideration.

On appeal, Trane argues Higgins' work activities did not cause his cervical impairment. Trane also argues the ALJ abused his discretion in finding the three-multiplier applicable. Because substantial evidence supports the ALJ's determination Higgins sustained a cervical injury caused by cumulative trauma warranting an 8% impairment rating, we affirm in part. We vacate the ALJ's analysis regarding the application of the three-multiplier and remand for a determination of whether Higgins retains the physical capacity to perform the type of work he was performing at the time of his injury based upon the evidence of record pursuant to KRS 342.730(1)(c)1.

Higgins filed a Form 101 on March 14, 2020 alleging injuries to his head, neck, and back caused by cumulative trauma while working as a laborer for Trane. Higgins listed October 24, 2019 as the injury date, which is also the last day he worked for Trane. The Form 104 indicates Higgins worked for Trane, an HVAC company, and as an assembler from May 1985 to October 24, 2019.

Higgins testified by deposition on May 22, 2020, and at the hearing held December 15, 2020. Higgins resides in Lexington, Kentucky, and he is a high school graduate. Higgins completed some college course work at Kentucky Business College and Simmons Bible College. Higgins began working for Trane in 1985. Trane manufactures industrial air conditioners. Higgins initially worked on the small assembly line, and then moved to a different assembly line for the next two or

three years. He then worked as a machine operator for several years, which required him to slide heavy sheet metal. Higgins then moved to the small assembly line, and worked there for approximately fifteen years.

Trane later shut down the small assembly line, and “made a line of small, medium, big all together. I went to that line. . .” Higgins worked on this line building motors for the next twelve to fourteen years until he stopped working for Trane on October 24, 2019. Higgins built motors, weighing anywhere from 20 to 400 pounds. He described his last assembly job as follows at the hearing:

Of course, I didn't pick them up, but we used the hoist. But even with the hoist, you had to push them. You had to have the strength to push them because they didn't have automatic hoists at that time. They had - - it would pick it up, and then the individual would have to move it to where you wanted it to move.

Higgins provided similar testimony at the deposition:

I built big motors, small motors, all different size . . . and I would - - the strenuous thing was you'd get them out of the box, and then they're on a hoist chained from the ceiling, but you have to push the motors yourself over to your table to work on them, you know. You're not picking them up, but you're pushing. They're hanging, and you're pushing that heavy motor over there. Then you set it down, you bolt it down, and you do all of those things. And then after that you bolt it down to a plate, which makes it even heavier. And then after that you climb up on the hoist again and push it to the other side of the line. It's a lot of pushing and, you know, pulling on them, you know.

His job required repetitive bending, twisting, pushing, pulling, and lifting of 40 to 45 pounds. Higgins denied experiencing acute injuries while working on the assembly line, but emphasized the worked strained him. Higgins retired from Trane on October 24, 2019. He was under no formal restrictions when he stopped

working. At the time, Higgins held concurrent employment as a janitor for Aetna emptying small trashcans on a part-time basis. Higgins stopped working as a janitor in February 2020 due to Covid-19. Higgins testified he had no issues performing the janitorial job. Higgins has not returned to any employment since February 2020, and he is receiving unemployment benefits.

Higgins injured his neck in a motor vehicle accident in the 1990s. He was treated with physical therapy and medication. Higgins was restricted from work for approximately seven months, and then returned to full duty work for Trane without restrictions. He testified his neck injury stemming from the accident fully resolved. Higgins received cervical treatment in 2010, but he testified his physician did not inform him the condition was work-related. Higgins sustained a work-related head injury in May 2019 when a handle from a hoist struck him in the head, but testing was normal. He was not assigned any restrictions due to the May 2019 head injury. He continued working on the assembly line for Trane, without restrictions, until October 24, 2019.

Higgins testified he began experiencing neck and back pain four or five years ago prior to his work injury when he stepped off a tow motor. He treats with his primary physician, Dr. Larry Hubbs, for his neck and back. Dr. Hubbs prescribes Naproxen and Meloxicam, and he ordered diagnostic testing. Higgins also uses Biofreeze and over-the-counter medication for his symptoms. He continues to experience neck and back pain, which has progressively worsened since he retired. Higgins testified Dr. Julie Ann Martin was the first physician to inform him his

cervical and back conditions are work-related. Higgins attributed his neck and back conditions to his thirty-five year work history with Trane, testifying as follows:

Well, I just had a lot of heavy-duty work, you know, at the time. And, you know, a lot of things was different than it is today, you know. Now they're making some of the hoists that they run and they can move it around just pushing buttons. But, you know, back in the day, you were pushing a lot of stuff, tugging on a lot of stuff, using a hammer to beat stuff into place and stuff like that. It was just some brute work. . . . It was a difficult job, put it like that, and it could have caused strain on you. But, you know, at one time I was young, and now I got kind of old. And you're doing that heavy-duty work, it will just - - it will wear the body down, you know.

Higgins testified he is now unable to perform his prior job at Trane considering his neck and back conditions, despite the fact he worked full duty until he retired on October 24, 2019.

In support of his claim, Higgins filed the January 29, 2020 records of Dr. Martin, D.C., and the July 15, 2020 report by Dr. Bruce Guberman. Dr. Martin, a chiropractor, evaluated Higgins on January 28, 2020 for intermittent headaches and pain in his neck, upper back, mid back, and low back. She summarized Higgins' work activities with Trane, and noted the 1991 motor vehicle accident and the 2019 head injury. She performed an examination and took X-rays of Higgins' cervical, thoracic, and lumbar spine. Dr. Martin diagnosed symptomatic headaches, lumbar facet syndrome, cervical segmental dysfunction, thoracic segmental dysfunction, lumbar segmental dysfunction, cervical sprain/strain, thoracic sprain/strain, and lumbar sprain/strain. Dr. Martin also completed a questionnaire on January 29, 2020. She indicated Higgins' present medical issues (headache, neck, and back) were

caused by his job activities, and the continuation of those duties would have adverse health consequences. Dr. Martin believes Higgins' job aroused his conditions into disabling reality.

Dr. Guberman evaluated Higgins on July 15, 2020. Higgins reported his cervical pain began in 2010 without a specific injury or trauma. He noted Higgins had a cervical MRI in May 2010 and he was treated with medication. He further noted Higgins underwent a neurological evaluation for his cervical pain in May 2010. He also reviewed Dr. Martin's records. Dr. Guberman noted Higgins continued to have intermittent neck pain, which increased in severity as he continued to work. He then struck his head at work in June 2019, and continued to have progressively worsening neck pain. Dr. Guberman noted Higgins reported the onset of low back pain in 2016 without a specific injury. Dr. Guberman noted Higgins complained of low back pain radiating to his hips, and cervical pain radiating into the posterior aspect of the head, both shoulders, and arms. Dr. Guberman performed an examination and diagnosed degenerative joint and disc disease of the cervical and lumbosacral spine caused by cumulative trauma at work. Dr. Guberman stated as follows regarding causation:

In my opinion . . . the claimant has more significant symptoms, range of motion abnormalities, interference with activities of daily living, and function limitations in regard to his cervical and lumbar spine than would be expected for a man of his age, and that is due to the cumulative trauma of his work as described above.

Dr. Guberman assessed an 8% impairment rating for the cervical spine and 0% for the lumbar spine pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Dr. Guberman found Higgins attained maximum medical improvement on July 15, 2020. Dr. Guberman found Higgins is unable to sit and/or walk combined for a total of more than 30 minutes at a time or more than 4 hours in an 8-hour workday. Dr. Guberman restricted Higgins from lifting, carrying, pushing or pulling more than 15 to 20 pounds occasionally or more than five pounds frequently. He advised Higgins to avoid using his arms overhead or for repeated activities, and to avoid kneeling, crawling, squatting, and climbing ladders. He opined Higgins is unable to hold his head in one position for a prolonged period or turn his head far or rapidly in either direction. Dr. Guberman opined Higgins does not retain the physical capacity to return to his previous work in light of his restrictions.

Trane submitted Dr. Stacie Grossfeld's May 27, 2020 report. Dr. Grossfeld noted Higgins' complaints of pain in his head, neck, and low back. Dr. Grossfeld reviewed the medical records, including those from 2010, 2018, 2019, and 2020. Dr. Grossfeld performed an examination and diagnosed, "cervical stenosis C2-C7, lumbar stenosis L4-S1. These diagnoses are not related to his employment with Trane." Dr. Grossfeld was unable to identify any objective harmful change to Higgins' human organism. Dr. Grossfeld attributed Higgins' current complaints to the natural aging process. She assessed a 0% impairment rating related to Higgins' employment. Likewise, she recommended no further treatment or permanent restrictions. Dr. Grossfeld opined Higgins retains the physical capacity to return to the type of work he performed at Trane.

A Benefit Review Conference was held on October 20, 2020. The parties identified the following contested issues: jurisdiction under the Act, work-

related injury/causation, permanent income benefits per KRS 342.730, unpaid or contested medical expenses, proper use of the AMA Guides, pre-existing condition, statute of limitations/repose, manifestation of injury date, and causation.

The ALJ rendered an opinion on February 5, 2021. He first determined Higgins' claim was not barred by the statute of limitations since Dr. Martin was the first to inform him his conditions were due to his work activities on January 29, 2020. Regarding causation and the application of the three-multiplier, the ALJ stated as follows, *verbatim*:

In this claim, Mr. Higgins was told by a physician and diagnosed with a cumulative trauma injury on January 29, 2020, by Dr. Julie Martin. Dr. Martin's diagnoses were supported by Dr. Bruce Guberman's IME of July 15, 2020. Defendant/ Employer had an IME performed by Dr. Stacie Grossfeld on May 27, 2020. Dr. Grossfeld diagnosed Mr. Higgins with cervical stenosis C2-C7, and lumbar stenosis L4-S1. Dr. Grossfeld said this diagnosis was not related to Mr. Higgins' employment with Trane, Co.

Within Dr. Grossfeld's report, the ALJ finds medical records that deserve consideration. One is the November 6, 2017, report of Mr. Higgins visits with APRN Larry Hubbs at Baptist Health Medical Group. APRN Hubbs stated that Mr. Higgins primary complaint was left shoulder pain. It started when Higgins threw a skid in the trash at work. The second was on May 23, 2019, when APRN Hubbs saw Higgins with a complaint of back pain. The record stated Higgins has pain when "he is working on motors and raises his back up, it is low back pain, it does not radiate into his legs."

Plaintiff requested a finding that he was permanently and totally disabled. The ALJ is unable to find that Plaintiff is permanently and totally disabled. The ALJ finds that the medical evidence presented herein requires a finding of permanent partial disability or PPD.

The ALJ relies upon the diagnoses of Dr. Julie Martin in finding that Plaintiff, Edward Higgins suffers from cumulative trauma to his neck, as well as upper and lower back. The ALJ finds this is supported by the IME of Dr. Bruce Guberman, and the medical reports noted above reviewed by Dr. Grossfeld.

The ALJ finds the medical evidence shows Mr. Higgins has suffered a work-related injury of cumulative trauma, which was diagnosed by a physician on January 29, 2020. Based upon the medical evidence, the ALJ finds Dr. Guberman's assignment of an 8% whole person impairment rating reasonable for the medical information provided.

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Based upon the opinion of Dr. Guberman and the testimony of Mr. Higgins, the ALJ finds that Plaintiff is unable to obtain employment equal to what he had at Trane, Co. Proof was submitted that Mr. Higgins is unable to continue to do the same job. According to the stipulations, he was making \$1,010.00 a week at the time of the injury. The ALJ finds the testimony of Mr. Higgins credible in this matter. The ALJ finds that Mr. Higgins will not be able to find a position that pays equal to or greater than his position on October 24, 2019. Therefore, the ALJ finds that Plaintiff is entitled to the three (3) multipliers as set forth in KRS 342.730 (1) (c). The ALJ awards Plaintiff the three multipliers (3.6 adjusted income multiplier), which equals a weekly award of \$164.93 per week for 425 weeks.

The ALJ finds pursuant to KRS 342.020, that Plaintiff is entitled to future medical benefits for the care and treatment of the work-related injuries incurred on October 24, 2019 and diagnosed by a physician on January 29, 2020.

Trane filed a Petition for Reconsideration arguing the ALJ utilized the wrong standard in determining the three-multiplier is applicable. Trane asserted the ALJ should have determined whether Higgins retains the physical capacity to return to his former job, not whether he thinks Higgins will be able to find a job of similar

pay. Trane asserted that even if the correct standard was used, the evidence does not support the application of the three-multiplier. Trane also requested additional findings detailing which medical evidence the ALJ relied in awarding the 8% impairment rating. Trane asserted that Dr. Guberman's assessment of impairment is not supported by objective medical evidence. The ALJ summarily denied the petition on March 15, 2021.

On appeal, Trane argues Higgins' work did not cause his cervical impairment. It asserts the ALJ's findings regarding causation are not supported by substantial evidence. It also notes Dr. Guberman is not a treating physician and is a cardiologist. It notes Dr. Martin is a chiropractor. Trane asserts the opinions of Drs. Martin and Guberman are conclusory and are not supported by the remaining evidence of record. Trane asserts Dr. Guberman's assessment of impairment was not evidenced by objective medical findings. Trane asserts the ALJ ignored Dr. Grossfeld's opinion noting she is an orthopedic specialist and who rendered a causation opinion most consistent with Higgins' testimony.

Trane also argues the ALJ abused his discretion in finding the three-multiplier applicable, emphasizing Higgins worked without restrictions until he was laid off, and that he testified he would have continued working if the plant had not shut down. Trane asserts Higgins' job was not overly strenuous and there is no objective evidence suggesting he could no longer continue performing his job. Trane also points our attention to Dr. Grossfeld's opinion.

As the claimant in a workers' compensation proceeding, Higgins bore the burden of proving each of the essential elements of his claim. Snawder v. Stice,

576 S.W.2d 276 (Ky. App. 1979). Since Higgins was successful in his burden before the ALJ, we must determine 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).

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 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).

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).

The records and opinions of Drs. Martin and Guberman constitute substantial evidence supporting the ALJ's determination Higgins' cervical condition was caused by cumulative trauma, warranting an 8% impairment rating. Injury is statutorily defined as a work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment, proximately causing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011 (1). The term "objective medical findings" means clinical findings, observations, and other standardized testing performed as part of a physical examination as well as sophisticated diagnostic tests. Gibbs v. Premier Scale Co./Ind. Scale Co., 50 S.W.3d 754 (Ky. 2001). A diagnosis complies with the requirements of KRS 342.0011(1) and (33) if it is based upon symptoms of a harmful change confirmed by means of direct observation and/or testing applying objective or standardized methods. Id. Causation is a factual issue that must be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995). When the question of causation involves a medical relationship not apparent to a layperson, the issue is properly within the province of medical experts. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184, 186-187 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966).

The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980). While objective medical evidence must support a diagnosis of a harmful change, it is not necessary to prove causation of an injury through objective medical findings. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

The ALJ was confronted with conflicting medical opinions. Dr. Martin examined Higgins and obtained X-rays. Her diagnoses included cervical segmental dysfunction and cervical sprain/strain. Dr. Martin opined Higgins' neck condition was caused by his job activities while employed by Trane, which aroused his condition into disabling reality. Dr. Guberman also examined Higgins and reviewed the medical records, including several diagnostic studies. He diagnosed degenerative joint and disc disease of the cervical spine due to cumulative trauma. Dr. Guberman assessed an 8% impairment rating for the cervical condition pursuant to the AMA Guides. On the other hand, Dr. Grossfeld diagnosed Higgins with multilevel cervical stenosis, which she opined is unrelated to his work activities. The ALJ determined he was more persuaded by the opinions of Drs. Martin and Guberman. Those opinions constitute substantial evidence on which the ALJ could rely in determining Higgins' cervical condition was caused by cumulative trauma and warranting an 8% impairment rating. This was a proper exercise of the ALJ's discretion and it will not be disturbed on appeal. Likewise, Trane's attacks on Dr. Guberman's and Dr. Martin's opinions go to the weight and credibility to be afforded their testimony, which was a matter to be decided exclusively within the

ALJ's province as fact-finder. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Therefore, we affirm on this issue.

With that said, we vacate the ALJ's analysis regarding the application of the three-multiplier since he did not utilize the proper standard in formulating his determination. 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.

In Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004), the Kentucky Supreme Court held, “[w]hen used in the context of an award that is based upon an objectively determined functional impairment, ‘the type of work that the employee performed at the time of injury’ was most likely intended by the legislature to refer to the actual jobs that the individual performed.”

Therefore, the issue is whether Higgins retains the physical capacity to perform the type of work he was performing at the time of his injury. However, the ALJ stated, “Based upon the opinion of Dr. Guberman and the testimony of Mr. Higgins, the ALJ finds that Plaintiff is unable to obtain employment equal to what he had at Trane” The ALJ noted the stipulated pre-injury average weekly wage of \$1,010.00, and determined Higgins “will not be able to find a position that pays equal to or greater than his position on October 24, 2019. Therefore, the ALJ finds that Plaintiff is entitled to the three (3) multipliers as set forth in KRS 342.730(1)(c).” We note in its Petition for Reconsideration, Trane requested the ALJ reconsider his

opinion after performing a proper analysis pursuant to KRS 342.730(1)(c)(1). However, the ALJ summarily denied the petition.

We determine the ALJ utilized the incorrect standard in determining the three-multiplier is applicable since he found Higgins is unable to find employment that would pay the same or greater pre-injury than the average weekly wage. Therefore, we vacate the ALJ's analysis regarding the application of the three-multiplier to the award enhancing the PPD benefits. We remand with directions to specifically address whether Higgins retains the physical capacity to perform the type of work he was performing at the time of his injury based upon the evidence of record. The ALJ may very well reach the same result, but such determination must be based on the appropriate standard. We do not direct any particular result, and the ALJ may make any determination based upon the evidence of record.

Accordingly, the February 5, 2021 Opinion, Award and Order and the March 15, 2021 Order on Petition for Reconsideration rendered by Hon. Paul L. Whalen, Administrative Law Judge, is hereby **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** to perform a proper analysis pursuant to KRS 342.730(1)(c)1.

STIVERS, MEMBER, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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