

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 21, 2018

CLAIM NO. 201700958

TYSON FOODS, INC.

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

JOHN BURGARD and
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Tyson Foods, Inc. ("Tyson") appeals from the April 27, 2018 Opinion, Award and Order rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"), awarding permanent partial disability ("PPD") benefits and medical benefits to John Burgard ("Burgard"). The ALJ determined Burgard sustained a work-related right shoulder injury when he slipped while walking around a grain bin and grabbed a support as he was delivering chicken feed. After he underwent right

shoulder surgery, Burgard slipped and fell in a shower when he was transferring to a wheelchair re-injuring his right shoulder. Tyson also appeals from the May 21, 2018 order on its petition for reconsideration.

On appeal, Tyson argues the ALJ's findings do not comport with applicable law. It also alleges the ALJ's determinations are not supported by substantial evidence. We affirm.

Burgard filed a Form 101 on May 23, 2017 alleging he injured his right shoulder when he grabbed a metal support on a grain bin on September 5, 2016 to prevent him from falling. Burgard has continued to work for Tyson since the date of the accident, albeit performing light duty tasks. He has not returned to working as a truck driver since he sought medical treatment. Burgard began working as a truck driver in 2006, and started driving for Tyson in April 2009.

Burgard testified by deposition on August 2, 2017, and at the hearing held March 8, 2018. Burgard was born on January 24, 1953. He did not graduate from high school, but later obtained a GED. Burgard later completed a program of study at a truck driving school, and held a CDL at the time of the accident. Although he has continued to work for Tyson since the accident, missing only two days, he earns less than he did at the time of the accident.

Burgard's job at Tyson required a lot of physical activity. He climbed on top of his trailer to load feed. He then drove to farms to unload the feed into bins. It took twenty to forty-five minutes to load bins utilizing an auger system. Prior to becoming a truck driver, Burgard underwent an above the knee amputation of his right leg for reasons unrelated to the work accident.

On the date of the accident, Burgard drove between two bins on a farm. He pulled out the boom for loading the bins, and stumbled as he was walking between them. He grabbed a bin support to steady himself. This caused him to twist, and his right shoulder popped. Burgard initially treated at Baptist Health, and he was placed on light duty. He continues to work for Tyson, and missed no time due to the December 2016 surgery. He continued to experience right shoulder pain after the surgery. This pain worsened after he fell at home while attempting to get out of the shower. He testified the right shoulder is very tight, and he has pain up the shoulder blade into the right side of his neck. He also has numbness in his right forearm, fingers and thumb.

Burgard does not believe he is able to return to the job duties required of a truck driver. He is unable to pull himself up into the cab of a truck, and he does not believe he is able to drive it. He also experiences right arm cramps after brief usage, and his right shoulder aches at night.

Burgard filed the December 9, 2016 operative report from Baptist Health. This record reflects Burgard underwent a right shoulder arthroscopic surgery with rotator cuff repair and subacromial decompression performed by Dr. James Dodds.

Burgard also filed the July 19, 2017 report of Dr. James Farrage who evaluated his right shoulder. Dr. Farrage noted Burgard sustained an injury on September 5, 2016 when he caught himself with his right upper extremity extended as he slipped, resulting in an audible pop. An MRI dated September 19, 2016 showed full thickness tears involving the supraspinatus and subscapularis. Burgard

underwent arthroscopic repairs of the right shoulder and rotator cuff on December 9, 2016. He subsequently fell in the shower at home while recovering. Burgard underwent additional surgical repair on April 17, 2017.

Dr. Farrage opined the work accident caused Burgard's condition. He stated the original injury and repair placed Burgard at an increased risk for re-tear, which in fact occurred from a minor fall sustained while performing a transfer at bench level. Dr. Farrage found Burgard had reached maximum medical improvement ("MMI"), and assessed a 16% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He also restricted Burgard to no lifting over twenty pounds maximum, nor over ten pounds frequently, and to avoid climbing ladders or working above shoulder level.

Burgard additionally filed the November 8, 2017 report of Dr. Mark Smith. Dr. Smith saw Burgard on that date for complaints of right shoulder pain upon referral from Dr. Dodds. He noted Burgard's fall at work with right rotator cuff tear, and the December 2016 surgery. Burgard underwent a second surgery on April 12, 2017. Burgard complained of loss of range of motion and strength with numbness, tingling and pain. He assessed Burgard with a long head biceps tear, and rotator cuff re-tear. Dr. Smith recommended a rotator cuff repair and superior capsular ligament reconstruction with allograft. He did not believe a shoulder replacement is necessary.

Dr. Stacie Grossfeld evaluated Burgard at Tyson's request on August 24, 2017. She noted Burgard sustained a work-related injury while grabbing a rail on

a grain bin. She noted he had pre-existing arthritis, but had not undergone surgery prior to the accident. She also noted the subsequent fall at home causing an additional tear to his rotator cuff. She noted he underwent additional surgery, and is not at MMI because he needs shoulder replacement surgery. Dr. Grossfeld disagreed with the 16% impairment rating assessed by Dr. Farrage because she determined Burgard had not yet reached MMI. She noted that due to the poor quality of his rotator cuff, it would not take much to re-tear it.

Dr. Grossfeld testified by deposition on September 11, 2017. She stated Burgard had an old chronic rotator cuff tear prior to his work accident, which completely tore at that time. She stated she is unable to assess any impairment prior to the date of the accident due to insufficient information. She stated the additional tear he sustained at home was unrelated to his work injury. She did not think the work injury or the December 2016 surgery increased Burgard's risk of additional injury or harm. She testified Burgard had at least a 6% impairment rating pursuant to the AMA Guides after the first surgery but prior to his fall at home. She also testified that Burgard's fall at home led to her recommendation for the shoulder replacement surgery.

Tyson filed treatment records of Dr. Dodds from October 27, 2016 through February 17, 2017. Dr. Dodds initially noted Burgard's work-related accident causing a right shoulder injury. His initial diagnosis was right shoulder pain with unspecified chronicity, a complete right rotator cuff tear, and right shoulder impingement syndrome. He proposed a right shoulder arthroscopy with right rotator

cuff repair. He performed the surgery on December 9, 2016. The post-operative diagnosis was rotator cuff tear and right shoulder impingement.

On January 20, 2017, Dr. Dodds noted Burgard fell at home the previous week as he was attempting to put on his prosthetic leg. He noted Burgard had experienced more pain, numbness and burning since that incident. He ordered additional physical therapy and a repeat MRI. Dr. Dodds noted that, "falling is a common cause of rotator cuff tear and in this acute stage for his surgical repair rupture would be a possibility, especially with the size of his tear and the difficulty with the repair process." On February 17, 2017, Dr. Dodds noted Burgard's pain is severe at times, and his motion has worsened. An MRI evidenced tears, arthritis, and surgical repair. He noted Burgard might require additional surgery.

Tyson also filed records from Main St. Family Medicine for treatment dates of October 26, 2012; August 8, 2013; March 3, 2015 and May 1, 2015. Those records are largely illegible, but reference rotator cuff tendinitis, along with bilateral shoulder, left ankle and left leg pain.

Tyson additionally filed physical therapy records from Liberty Rehabilitation, again largely illegible, for forty physical therapy sessions between September 7, 2016 and February 13, 2017. On October 7, 2016, the therapist noted Burgard had diminished right shoulder range of motion, strength, or use of right arm for functional activity. On December 9, 2016, the therapist noted Burgard exhibited moderate guarding with passive range of motion with moderate shoulder girdle guarding. On January 13, 2017, the therapist noted sensation to the right upper extremity was normal to light touch. He observed diminished right shoulder range of

motion and right upper extremity strength, along with “right shoulder pain due to recent RTC repair.” He also noted Burgard reported altered sensation to the right forearm since his stumbling incident at home.

A Benefit Review Conference (“BRC”) was held on October 12, 2017. The contested issues listed in the BRC Order include benefits per KRS 342.730 and work-relatedness/causation (re-tear). A second BRC was held on December 14, 2017. The contested issues listed in that BRC Order include permanent income benefits per KRS 342.730 including multipliers, work-related injury, medical expenses unpaid or contested, and physical capacity to return to the type of work performed at time of injury.

The ALJ rendered a decision on April 27, 2018 finding Burgard sustained a work-related right rotator cuff injury on September 5, 2016. Regarding the effect of the second incident when Burgard fell while exiting the shower, the ALJ stated as follows:

I find the original rotator cuff repair to be directly related to that injury and but for the plaintiff having had the original injury and surgery for which he was in the acute phase of recuperation, the subsequent fall at home may not have resulted in any additional injury. Instead, the need for the second surgery is a fortuitous, unexpected injury traceable to work just as the development of osteomyelitis in a diabetic following a work related blister. Although Dr. Dobbs did not use any "magic words" of causation, such words are not necessary under Union Underwear v. Scearce, 896 S.W.2d (Ky. 1995). Therefore, the threshold issues are resolved in favor of the plaintiff.

The ALJ awarded PPD benefits based upon the 16% impairment rating assessed by Dr. Farrage. The ALJ determined Burgard does not have the

physical capacity to return to the type of work performed at the time of the injury, and enhanced the award of PPD benefits by 3.6 pursuant to KRS 342.730(1)(c)1. The ALJ also determined Burgard's medical treatment, including his surgeries, are compensable.

Tyson filed a petition for reconsideration, arguing that pursuant to Beale v. Hammons, 804 S.W.2d 13 (Ky. App. 1991), the workplace incident must be the precipitating event leading to the injury. Tyson requested an additional finding of fact regarding whether the September 5, 2016 work accident was the precipitating event leading to the fall at home, and the need for repeat surgery. It argued Dr. Dobbs' opinion did not constitute substantial evidence establishing causation. It also requested the ALJ to clarify the precise rule of law referenced in his citation to Union Underwear v. Scarce, 896 S.W.2d (Ky. 1995).

In is order entered May 21, 2018, the ALJ found as follows:

This matter is before the ALJ on petition for reconsideration filed by the defendant in regards to the ALJ's findings regarding causation. The defendant argues it was error for the ALJ to rely on the medical opinion of Dr. Farrage while drawing inferences from the medical records to support that opinion. The ALJ has considered the argument and the response thereto. The ALJ further points to the recent Kentucky Supreme Court decision in Ford Motor Company v. Donald Jobe, 2017-SC-000010-WC (rendered April 26, 2018) designated "to be published" as support for the finding that impairment following a subsequent event may be compensable. In that case the subsequent event was to a different body part than the original work injury. After considering the arguments, the petition for reconsideration is denied as a reargument of the evidence.

On appeal, Tyson argues the ALJ's findings do not comport with applicable law, and are not supported by substantial evidence. We initially note that as the claimant in a workers' compensation proceeding, Burgard had the burden of proving each of the essential elements of his claim. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful in his burden, the question on appeal is 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).

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). An ALJ is vested with broad authority in determining causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, this 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).

An ALJ's discretion is not unlimited. In reaching a determination, the ALJ must provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review, and as noted above the determination must be based upon substantial evidence. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

The fact Burgard sustained a traumatic injury to his right shoulder on September 5, 2016 is unquestioned, as noted by all of the medical evidence of record. The issue lies with whether the subsequent re-injury at home is related to the work injury. Tyson submitted a few records from 2012 to 2015 indicating some problems with the right shoulder prior to the injury; however, it is clear that Burgard continued to work until the specific September 5, 2016 incident that ultimately led to the December 2016 surgery. It is also noted Burgard was placed on light duty after the incident.

The ALJ determined the shower incident would not have occurred without the September 2016 injury and December 2016 surgery. Although the ALJ merely cited to the inference from Dr. Dodds' records in his original decision, he also referenced Dr. Farrage's report in the order on reconsideration. Dr. Farrage specifically stated the injury and surgery placed Burgard at increased risk of a re-tear, and this is exactly what occurred. The opinions from Dr. Farrage and the notes from Dr. Dodds constitute substantial evidence supporting the ALJ's determination, which we will not disturb. We also determine the ALJ did not err in his application of the law.

Accordingly, the April 27, 2018 Opinion, Award, and Order, and the May 21, 2018 Order on petition for reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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