

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: February 15, 2019

CLAIM NO. 201487440

WELCH PRINTING CO.

PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE**

PHYLLIS HOWLETT;
DR. FRANK BONNARENS;
BAPTIST HEALTH MEDICAL GROUP; AND
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Welch Printing Company (“Welch”) appeals from the August 21, 2018 Opinion and Order, and the October 15, 2018 order on petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ awarded Phyllis Howlett (“Howlett”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits increased

by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits for her bilateral shoulder work-related injuries.

On appeal, Welch argues the ALJ erred as a matter of law in enhancing Howlett's PPD benefits pursuant to KRS 342.730(1)(c)1 since his findings on this issue are unreasonable, arbitrary and capricious. Welch also argues this error is so flagrant as to cause gross injustice, and the decision to apply the three multiplier is not in conformity with KRS Chapter 342. Because substantial evidence of record supports the ALJ's application of the three multiplier, we affirm.

Howlett filed a Form 101 on August 11, 2014, alleging she injured her right shoulder on February 6, 2014 while lifting her arm using a glue roller. Howlett also alleged a left shoulder injury due to over-use. During the litigation of this claim, Welch filed two medical disputes. The first challenged the platelet gel used during the right shoulder surgery performed on April 16, 2014, as well as a left shoulder surgery recommended by Dr. Frank Bonnarens. The second dispute challenged the physical therapy for the left shoulder. We note that although the ALJ did not specifically address the medical disputes, that issue was not raised on appeal and is not before this Board.

Howlett testified by deposition on November 11, 2014 and October 19, 2017, and at the final hearing held June 26, 2018. Howlett is right hand dominant. Howlett was involved in a motor vehicle accident ("MVA") in January 1991 resulting in a severe cervical whiplash and a low back injury. At the time of the February 6, 2014 work injury, Howlett was taking narcotic pain medication which her primary care physician prescribed to her after the 1991 MVA. Howlett broke

three ribs and experienced shoulder symptoms due to a physical assault in November 2008, and attended physical therapy. Howlett did not recall treating for neck and right shoulder pain in March 2011.

Howlett began working for Welch in August 2012 as a hand binder. She continued to perform that job until her injury. Howlett was required to lift up to fifty pounds. Howlett applied glue on the ends of coupon or paper products using a roller, which were stacked against both sides of several A-frames. Each stack required two to four layers of glue. Howlett rolled glue from ankle level to a height of over six feet, anywhere from two to four hours per shift. Howlett testified she also stacked product, rubber-banded and packaged product into boxes, caught paper product off the folder and stitcher machines, assisted in folding operations, operated the shrink-wrap machine and performed other necessary tasks.

Howlett testified that on February 6, 2014, a large order had come in and she was required to roll glue repeatedly throughout the day. She began experiencing pain in her right shoulder while rolling the glue but did not immediately seek treatment. Howlett first treated at Baptistworx on February 24, 2014. She was eventually referred to Dr. Bonnarens, who placed her on light duty restrictions and ordered a right shoulder MRI. Howlett testified she began experiencing left shoulder symptoms while working for Welch on light duty for her right shoulder. Howlett attributes her left shoulder symptoms to overcompensation. Howlett reported her left shoulder symptoms to Dr. Bonnarens.

Dr. Bonnarens performed right shoulder surgery on April 16, 2014, and left shoulder surgery on April 8, 2015. Howlett testified she continued to work

for Welch on light duty until her first surgery. Howlett did not work from April 16, 2014 through May 6, 2014, and was paid TTD benefits. Howlett then returned to light duty work until her second surgery on April 8, 2015. Howlett did not work from April 7, 2015 to June 7, 2015, and then returned to light duty work on June 8, 2015. Howlett testified she was still on light duty restrictions for one or both of her shoulders when she was involved in a non-work-related MVA on July 25, 2015. She injured her neck in the MVA, and underwent cervical surgery in April or May 2016. After the MVA, Howlett continued to work for Welch with light duty restrictions for her shoulders until her cervical surgery. Howlett did not return to any work after the cervical surgery.

Howlett testified she never returned to regular duty after February 6, 2014, and she was always under light duty restrictions for one or both of her shoulders. She returned to her same job earning the same wages, but worked fewer hours. Howlett explained there were some job tasks, such as rolling glue and lifting orders and boxes in excess of her weight restrictions that she could not perform while working light duty.

At the October 2017 deposition, Howlett acknowledged she stopped working at Welch in April 2016 due to the neck injury and surgery stemming from the July 2015 MVA. At the hearing, Howlett testified that notwithstanding the neck surgery, she did not believe she could return to hand binding based upon her shoulder condition because of the required heavy lifting and repetitive nature of the job. Howlett continues to experience pain, limited mobility and catching in both shoulders, right worse than left, for which she takes over-the-counter medication.

Howlett initially sought treatment at Baptistworx on February 24, 2014, for right shoulder pain. Howlett was diagnosed with right shoulder strain/tendonitis, and she underwent physical therapy. She was also restricted from lifting over five pounds, above shoulder work and repetitive use with her right arm.

Howlett began treating with Dr. Bonnarens initially for right shoulder pain on March 21, 2014. He ordered a right shoulder MRI. Howlett returned on April 10, 2014, complaining of left shoulder pain after repeatedly pushing down on a bar at work while on light duty restrictions for her right shoulder. Dr. Bonnarens noted Howlett had been performing light duty work and she had been adhering to right arm restrictions. Dr. Bonnarens noted his suspicion of left rotator cuff tendinopathy due to repetitive use. He recommended continuing the same restrictions for the right arm consisting of “light assist” and no lifting over two pounds or repetitive use with her left arm. Dr. Bonnarens performed right shoulder surgery on April 16, 2014, consisting of arthroscopic removal of loose body, repair of SLAP lesion, acromioplasty, Mumford and chondroplasty. On June 26, 2014, Dr. Bonnarens restricted Howlett to an eight-hour workday, no use of her right arm, and a five-pound lifting limitation of her left arm. On July 22, 2014, Dr. Bonnarens ordered physical therapy for both shoulders.

On October 7, 2014, Dr. Bonnarens allowed Howlett to return to regular duty for her right shoulder, but continued restrictions for her left shoulder. He ordered an MRI, which was performed on October 13, 2014. The following day, Dr. Bonnarens restricted Howlett from using either arm overhead or lifting greater than ten pounds. On January 6, 2015, Dr. Bonnarens allowed Howlett to return to

regular duty for her right shoulder. Dr. Bonnarens eventually performed left shoulder surgery on April 8, 2015, consisting of arthroscopic acromioplasty, Mumford, debridement and removal of loose bodies, and debridement of anterior and posterior labral tears. In the last note of record dated June 30, 2015, Dr. Bonnarens noted Howlett is benefitting for physical therapy and indicated her restrictions were continued, although it is unclear what those restrictions consisted of.

Welch filed pre-injury treatment records from 2008, 2009 and 2011. Because they do not pertain to the issue of the three multiplier, those records will not be summarized.

Howlett filed Dr. Robert Byrd's October 23, 2014 report and October 6, 2014 medical questionnaire addressing her right shoulder. In his report, Dr. Byrd diagnosed a SLAP lesion of right upper extremity status-post surgical repair; right biceps tendinitis; right rotator cuff tendinitis; and left shoulder rotator cuff tendinitis. Dr. Byrd assessed a 7% impairment rating for the right shoulder condition pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). In the questionnaire, Dr. Byrd indicated Howlett's work-related injury brought her condition into a disabling reality, and she had attained maximum medical improvement ("MMI"). Dr. Byrd restricted Howlett from carrying or lifting over ten pounds. Dr. Byrd checked "yes" to the following question: "As a result of my client's resulting functional impairments and limitations, do you believe more likely than not that my client is now medically disqualified from returning to the pre-injury work activities?"

Howlett also filed the May 10, 2017 report and medical questionnaire completed by Dr. Jules Barefoot on the same date addressing primarily her left shoulder. In the report, Dr. Barefoot reviewed the treatment history for both shoulders, and noted the subsequent July 2015 MVA and April 2016 cervical fusion. Dr. Barefoot also noted Howlett last worked for Welch in April 2016. Dr. Barefoot diagnosed Howlett as status post left shoulder arthroscopy with a Mumford procedure and debridement of labral tears on April 8, 2015, status-post right shoulder arthroscopy with a Mumford procedure on April 16, 2014, and status post-multilevel anterior cervical fusion on April 16, 2016. Dr. Barefoot assessed a 13% impairment rating for the left shoulder pursuant to the AMA Guides, due to her work injury. He opined the prior, underlying left shoulder degenerative condition was activated into its symptomatic disabling reality by the work injury. Dr. Barefoot opined Howlett will have difficulty using her left arm at or above shoulder level, will not be able to operate machinery requiring hand controls or with pushing or pulling, and is not able to safely work at heights, on ladders or on scaffolding. He opined Howlett will require ongoing medical treatment.

In the attached medical questionnaire, Dr. Barefoot further indicated Howlett had attained MMI. He restricted her from lifting or carrying five pounds frequently and ten pounds occasionally. He checked “yes” to the following question: “As a result of my client’s resulting functional impairments and limitations, do you believe more likely than not that my client is now medically disqualified from returning to the pre-injury work activities?”

Welch filed Dr. Thomas Loeb's December 2, 2014 report, January 9, 2014 addendum, January 23, 2015 addendum, and April 18, 2017 report. In the December 2, 2014 report regarding the right shoulder, Dr. Loeb diagnosed chronic degenerative changes, long standing in nature, partially aggravated by repetitive, cumulative trauma from the workplace. Dr. Loeb assessed a 6% impairment rating for the right shoulder pursuant to the AMA Guides, attributing 5% to the prior degenerative condition and 1% to the work-related aggravation. Dr. Loeb declined to assign permanent restrictions or recommend any additional treatment for Howlett's current right shoulder condition. Regarding the left shoulder, Dr. Loeb diagnosed degenerative changes, which are delineated on the October 13, 2014 MRI. Dr. Loeb opined the MRI findings suggest long-standing, pre-existing, chronic changes due to degenerative disease in the left shoulder, but there may be some contribution from repetitive or cumulative trauma from the workplace. Dr. Loeb assessed a 1% impairment rating for the left shoulder, attributing .8% to the prior degenerative condition and .2% to the work-related aggravation. Dr. Loeb found neither restrictions nor further medical treatment, including surgical intervention, are necessary for the left shoulder. Dr. Loeb opined Howlett reached MMI for both shoulder conditions in August 2014.

In the January 9, 2014 addendum, Dr. Loeb opined the platelet gel used in this case is medically unnecessary. In the January 23, 2015 addendum, Dr. Loeb opined the recommended left shoulder surgery by Dr. Bonnarens is not medically necessary.

Dr. Loeb evaluated Howlett again on April 18, 2017, following the April 2015 left shoulder surgery and 2016 cervical fusion. Dr. Loeb assessed a combined 14% impairment rating for both shoulders pursuant to the AMA Guides, attributing 3% to the work injury. Dr. Loeb noted in retrospect, the left shoulder surgery was reasonable and necessary, attributing 20% to the work injury. Dr. Loeb opined no further treatment is necessary for the work-related injury, and found Howlett attained MMI four to six months following each shoulder surgery. Dr. Loeb restricted Howlett from lifting over twenty pounds and from lifting over-the-chest level other than the weight of the arm on both the left and right sides. Dr. Loeb noted the restrictions are based on the overall condition of both shoulders, which is a combination of her pre-existing and work-related apportionment, and would be impossible to separate.

Welch also filed the job description for a hand binder, which requires the ability to lift over fifty pounds.

A benefit review conference (“BRC”) was held on June 13, 2018. The BRC order reflects the following contested issues: Whether Howlett retains the physical capacity to return to work, benefits per KRS 342.730, unpaid or contested medical expenses, TTD, permanent total disability, and intervening injury.

In the August 21, 2018 opinion, the ALJ found Howlett credible and afforded “great weight” to her testimony. The ALJ was convinced by Howlett’s testimony that “she had no significant change in the relevant symptoms from the intervening automobile accident and rejects the theory that the intervening accident contributed to the assessed impairment relied upon herein.” The ALJ found Dr.

Barefoot's opinion is most consistent with Howlett's testimony regarding her left shoulder symptoms and limitations, and Dr. Byrd's opinion is most consistent regarding her right shoulder.

The ALJ adopted Dr. Byrd's 7% impairment rating for Howlett's right shoulder. The ALJ further stated, "Dr. Byrd also concluded that the Plaintiff did not retain the physical capacity to return to her prior employment. This opinion has convinced the ALJ." Regarding the left shoulder, the ALJ adopted Dr. Barefoot's 13% impairment rating, wholly attributable to the work injury. The ALJ also noted as follows:

Dr. Barefoot also found that the Plaintiff would have trouble using her left arm above shoulder level and that she continued to be symptomatic. He opined that she would need ongoing treatment and that the Plaintiff did not retain the physical capacity to return to her prior employment. The ALJ also finds these opinions to be credible and convincing.

The ALJ found Howlett sustained a combined 19% impairment rating due to the work injury. The ALJ found Howlett entitled to TTD benefits from April 16, 2014 to May 6, 2014, and from April 7, 2015 to June 7, 2015. The ALJ found Howlett entitled to medical expenses/benefits for the work-related bilateral shoulder injury.

Welch filed a petition for reconsideration arguing it was unreasonable for the ALJ to find Howlett did not retain the physical capacity to return to her pre-injury work due to her work injuries. It noted Howlett had been released to regular duty for her right shoulder by Dr. Bonnarens and was "on pace" for a similar release for her left shoulder. It further asserted the intervening MVA and cervical surgery

prevented her from making a full return. Welch asserted Dr. Barefoot's report is incomplete and cannot be relied upon by the ALJ. Welch requested additional findings, including the following: whether Howlett's cessation of employment with Welch was due to her bilateral shoulder injuries or her cervical surgery/injury; specify the evidence upon which he relied in finding she did not retain the physical capacity to return to her prior employment due to her work-related bilateral shoulder injury; and whether the ALJ found Dr. Bonnarens' October 7, 2014 record credible in which he released Howlett to regular duty work for her right shoulder. The ALJ denied the petition on October 15, 2018.

On appeal, Welch argues the ALJ erred as a matter of law in finding the three multiplier applicable since his findings on this issue are unreasonable, arbitrary and capricious. Welch also argues this error is so flagrant as to cause gross injustice, and the decision to apply the three multiplier is not in conformity with KRS Chapter 342. In support of its arguments, Welch asserts the ALJ did not support his finding that Howlett's current lack of the physical capacity to perform her pre-injury work is due to the work-related shoulder injuries. According to Welch, Howlett's lack of physical capacity is due to a combination "of her longstanding degenerative processes and primarily her subsequent, unrelated intervening (neck) and progression of other untreated conditions." Welch asserts Howlett returned to work in the same position doing job duties and responsibilities as before, and was on track to return to full duty for both shoulders until the intervening, non-work-related neck surgery. Welch points to Howlett's deposition testimony where she acknowledged she stopped working in April 2016 due to her neck injury, and argues

this testimony bars the application of the three multiplier. Welch also argues it was unreasonable for the ALJ to rely upon the opinions of Drs. Byrd and Barefoot, and because the decision did not address the shoulders as separate, distinct injuries.

Welch also argues the ALJ did not have a thorough and accurate understanding of the evidence since he did not discuss Howlett's inability to work due to the intervening neck injury. Welch also argues the ALJ erroneously stated Dr. Barefoot determined Howlett did not retain the physical capacity to return to her prior employment. Welch argues Dr. Barefoot never made this statement, and only assigned restrictions.

As the claimant in a workers' compensation proceeding, Howlett had the burden of proving each of the essential elements of her cause of action, including entitlement to the three multiplier. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Howlett was successful in his burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, supra. "Substantial evidence" is 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); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that 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 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).

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. . .

We find substantial evidence supports the ALJ's determination that Howlett does not retain the physical capacity to return to her pre-injury work based upon her work-related bilateral shoulder injuries. The ALJ relied upon Howlett's testimony, and the reports of Drs. Byrd and Barefoot. Dr. Byrd addressed Howlett's

right shoulder injury in the October 23, 2014 report, and opined it warranted a 7% impairment rating. In the attached medical questionnaire, Dr. Byrd opined Howlett had attained MMI and imposed permanent restrictions of no lifting or carrying over ten pounds with the right arm. He also indicated Howlett is unable to return to her pre-injury work activities due to her impairment and limitations.

Dr. Barefoot addressed Howlett's left shoulder injury in the May 10, 2017 report and attached medical questionnaire. Howlett reported both the right and left shoulder injuries, and subsequent treatment rendered primarily by Dr. Bonnarens. Dr. Barefoot noted that after the second surgery, Howlett was involved in a MVA in July 2015, which resulted in a cervical injury. He noted Howlett underwent a multilevel anterior cervical fusion in April 2016. Dr. Barefoot also noted Howlett last worked for Welch in April 2016. Dr. Barefoot reviewed the treatment records and reports of Baptistworx, Dr. Bonnarens, Dr. Byrd, and Dr. Loeb. He performed an examination of the upper extremities, noting marked tenderness and loss of strength and mobility in both shoulders, and recorded range of motion measurements. He determined the left shoulder injury was work-related, warranting a 13% impairment rating. Dr. Barefoot opined Howlett will have difficulty using her left arm at or above shoulder level, will not be able to operate machinery requiring hand controls or with pushing or pulling, and is not able to safely work at heights, on ladders or on scaffolding. In the attached medical questionnaire, Dr. Barefoot further indicated Howlett has attained MMI and restricted her from lifting or carrying five pounds frequently and ten pounds occasionally. He checked "yes" to the following question: "As a result of my

client's resulting functional impairments and limitations, do you believe more likely than not that my client is now medically disqualified from returning to the pre-injury work activities?"

Howlett testified that after the February 6, 2014 injury, there was never a time she returned to regular duty work, and she was always under light duty restrictions for one or both of her shoulders. At her November 11, 2014 deposition, Howlett testified she had returned to her pre-injury job following the first surgery, but explained there were some job tasks, such as rolling glue and lifting boxes or product over her weight restrictions, she could no longer perform while working light duty for Welch. Similarly, at the hearing, Howlett testified she returned to her normal job, but was assigned the lighter job tasks that fell within her restrictions. Howlett provided the following testimony regarding her return to work after each shoulder surgery:

Q: . . . Did you ever at any point return back to your regular duty without restriction there at [Welch]?

A: No, I did not.

Q: Did you continue to work after the motor vehicle accident?

A: Yes, for a short period of time, for about a year.

Q: Okay. And did you have restrictions during that time?

A: I don't think I ever came off of restrictions and light-duty on the shoulders.

. . . .

Q: Up until the car accident, you were on light-duty restrictions for your shoulders; is that correct?

A: Yes.

Q: Did your restrictions change after your car accident?

A: No.

Q: Prior to that car accident, you had returned to work, though; is that correct? Work on light duty?

A: Yes, before and after the accident.

As pointed out by Welch, at the October 19, 2017 deposition, Howlett testified as follows:

Q: So the reason you stopped working was due to the neck injury, correct?

A: Yes. Became disabled.

At the hearing held June 26, 2018, Howlett similarly stated she did not return to work after the cervical surgery stating, "I believe with everything combined and - - I believe my heart problems came into play a little bit. I was put on a heart monitor, and a lot of things were going on. They were keeping up with me."

Howlett provided the following testimony regarding her ability to return to pre-injury work based upon her bilateral shoulder condition only:

Q: Okay. But notwithstanding the neck surgery, just based on your shoulders, do you think that you could go back to doing the hand binding work?

A: No. No. Uh-uh, not for the amount of work that they want you to do. I couldn't do all that repetitiveness at all. No, there's no way.

Q: Okay. What about the heavy lifting?

A: Oh, no, that's out of the question. No.

An ALJ may give weight to a claimant's own testimony regarding her retained physical capacity and occupational disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The claimant's own testimony is competent evidence regarding whether the claimant 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). Although acknowledging she stopped working primarily due to the unrelated neck injury, Howlett testified she is unable to return to her regular job solely due to her shoulder conditions.

Based upon the above, the opinions of Drs. Byrd and Barefoot, in conjunction with Howlett's testimony, constitute substantial evidence supporting the ALJ's determination she does not retain the physical capacity to return to her prior employment with Welch due to her work-related bilateral shoulder conditions. In the opinion, the ALJ summarized the evidence regarding the subsequent cervical injury and found that, based upon Howlett's testimony, she had no significant change in her shoulder symptoms from the intervening MVA. We also note the record does not contain any medical opinion that Howlett is unable to return to her pre-injury work based solely on the intervening cervical injury. Further, Welch's critique of Dr. Barefoot and Dr. Byrd's opinions go to the weight of the evidence, and are not an adequate basis to reverse on appeal.

Accordingly, the August 21, 2018 Opinion and Order, and the October 15, 2018 Order on petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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