

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 24, 2020

CLAIM NO. 201793746

WILLIAM MCBEE

PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE**

BLUE LINX AND
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

BORDERS, Member. William McBee (“McBee”) appeals from the December 23, 2019 Opinion, Order, and Award, and the January 17, 2020 Order on Reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”). The ALJ awarded McBee temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits based on a 9% impairment rating, and

medical benefits. The ALJ declined to enhance the award of PPD benefits by the multiplier contained in KRS 342.730(1)(c)1.

On appeal, McBee argues the ALJ failed to outline the weight she gave to the opinions of Dr. Steven Wunder, who felt McBee did not retain the physical capacity to return to work. He also argues the ALJ failed to consider McBee's testimony regarding the deficits resulting from the surgery, and she did not adequately consider Dr. Wunder's critique of Dr. John L. Larkin's opinion. For reasons to be set forth herein, we affirm.

McBee testified by deposition, and at the final hearing. He is a 46 year old high school graduate with no specialized training or vocational skills. His work history consists of installing insulation, in the banking industry in collections and personal finance, as a dump truck driver hauling asphalt, as a self-employed landscaper, and as a material handler for Blue Linx. He began his job at Blue Linx in 2016, where he was required to lift up to 100 pounds and had to lift overhead. On February 10, 2017, he suffered a traumatic injury to his left shoulder when he attempted to lift a heavy piece of material and felt a pop in his left shoulder and the immediate onset of pain. He gave notice to his supervisor and received medical care from Dr. Adam V. Metzler who performed surgery on the left shoulder on June 20, 2017. McBee worked for Blue Linx, with restrictions from February 10, 2017 through June 20, 2017. McBee received TTD benefits while off work recuperating from shoulder surgery from June 20, 2017 through November 11, 2017. He was eventually released and he returned to work without restrictions. He was terminated by Blue Linx for absences unrelated to his work injury.

McBee's testimony was found by the ALJ to be somewhat inconsistent. McBee testified when he returned to work after surgery, he earned less wages, but when confronted with evidence indicating otherwise, he admitted he earned more. In addition, at the final hearing, McBee did not believe he could return to his job at Blue Linx, but in fact did so, apparently without difficulty, until he was terminated in April 2018 for reasons unrelated to his work accident.

James Long ("Long") testified by deposition. Long is the warehouse manager for Blue Linx and was McBee's direct supervisor. Long was aware of McBee's work injury of February 19, 2017, which was reported to him. He testified McBee worked light duty after his left shoulder injury until he underwent surgery on June 20, 2017. Long testified that McBee returned to work after his surgery on November 6, 2017, and worked through April 2018, without restrictions, and without any difficulty, until he resigned for health issues unrelated to his shoulder injury.

The medical records from St. Elizabeth Hospital emergency department were considered. McBee was seen at that facility, being referred there by Concentra, for treatment of his left shoulder injury on February 10, 2017. McBee was treated and released to follow up with Concentra.

The medical records from Concentra were considered. McBee received conservative care for his left shoulder and was allowed to continue working on a restricted basis. The records indicate a referral to OrthoCincy for evaluation and treatment.

The EMG/NCV report from Neurology and Neurodiagnostic Clinic, was considered. The test indicated plexopathy and/or radiculopathy in the left upper extremity. The medical records from St. Elizabeth Hospital, consisting of the operative note from the left shoulder surgery were likewise considered.

Medical records from Commonwealth Orthopedics/OrthoCincy were considered. McBee was referred for an orthopedic evaluation of his left shoulder. He underwent diagnostic testing, consisting of an MRI, and was diagnosed with a SLAP tear of the left shoulder. McBee was treated conservatively and eventually underwent a distal clavicle resection, biceps tenodesis, labral debridement, and subacromial decompression performed by Dr. Metzler in June 2017. The records indicate post-operative treatment consisting of therapy, and on October 25, 2017, McBee was anticipated to be released to return to work at full duty.

Medical reports and records of Dr. Metzler were considered. Dr. Metzler initially opined that McBee retained a 0% functional impairment rating and could return to work without restrictions. Thereafter, Dr. Metzler was supplied the report of Dr. Larkin, who assessed a 9% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”), and opined he agreed with Dr. Larkin’s assessment of impairment. Dr. Metzler did not alter his opinion regarding the assessment of restrictions.

The Independent Medical Evaluation (“IME”) report of December 27, 2018, from Dr. Wunder was considered. Dr. Wunder saw McBee on his behalf for evaluation. He received a history of the February 10, 2017 work injury to McBee’s

left shoulder, and the medical treatment he received to date. He performed a detailed physical examination and reviewed all medical records and diagnostic testing performed to date. Dr. Wunder diagnosed McBee as suffering from a SLAP tear, partial rotator cuff tear, and aggravation of pre-existing moderate AC joint arthropathy of the left shoulder, caused by the work incident of February 10, 2017. Dr. Wunder assessed McBee with a 12% impairment rating pursuant to the AMA Guides and opined McBee did not retain the physical capacity to perform his prior work. A report of Dr. Wunder dated October 25, 2019 was also considered. Dr. Wunder reviewed the report of Dr. Larkin for comment. Dr. Wunder disagreed with some of Dr. Larkin's opinions and reiterated his belief that his impairment rating and the restrictions he imposed were accurate.

The IME report of Dr. Larkin dated April 22, 2019, was considered. Dr. Larkin evaluated McBee at the request of Blue Linx. He received a history of the work-related left shoulder injury occurring at work on February 10, 2017, and the medical treatment, including surgery, received as a result. Dr. Larkin reviewed all medical records and diagnostic studies performed to date and performed a detailed physical examination. Dr. Larkin diagnosed McBee as being post-surgery, distal clavicle resection, biceps tenodesis, labral debridement, and subacromial decompression caused by the work accident of February 10, 2017. Dr. Larkin assessed McBee with a 9% impairment rating per the AMA Guides. He also opined McBee was at MMI, and retained no restrictions as he was operating a landscaping company without issues. Dr. Larkin issued a second report dated October 7, 2019 clarifying McBee achieved MMI in November 2017. A third report from Dr. Larkin

dated October 7, 2019, was also considered. Dr. Larkin was supplied a copy of McBee's job description, and opined McBee was physically capable of performing the job.

A final hearing was held on October 29, 2019. The ALJ rendered her Opinion and Award on December 23, 2019, determining McBee suffered a work-related left shoulder injury on February 10, 2017, warranting a 9% whole person impairment, and retained the physical capacity to perform his prior job and therefore did not apply the three times statutory multiplier. The ALJ found McBee entitled to TTD benefits from the date of surgery, June 10, 2017 through November 6, 2017, the date he attained MMI. The ALJ made the following findings of facts and conclusions of law:

D. Benefits per KRS 342.730, multipliers.

To qualify for an award of permanent partial benefits under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, she is also required to prove the harmful change resulted in a permanent disability as measured by an AMA impairment. KRS 342.0011(11), (35), and (36). 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 the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined. KRS 342.730 (1)(c)(1). KRS 342.730(1)(c)(2) encourages those who retain the physical capacity to return to the same type of work and earn the same or greater wage to receive a double income benefit during any period of time that employment at that wage level ceases.

Most of the evidence indicates that McBee did not return to the same wage and, in fact, returned to a lower wage. The parties have stipulated to a preinjury

wage of \$543.43 and Defendant argues the post injury wage is \$204.86. In his deposition, McBee testified he earned \$14.50 preinjury and \$14.20 post injury but he worked somewhat sporadically. The evidence is not clear enough to make a determination on post injury wage beyond these simple factors. As Plaintiff always has the burden of proving every aspect of his case, he has not met his burden of proving he returned to a greater AWW.

It is also found that when he returned to his job, he was able to do the work to the same level as he had prior to the shoulder injury. The evidence on this issue is all across the board and even Plaintiff's own testimony at one point is that he did return to the job as material handler and that he could do his job. He was released to full duty by Dr. Metzler in October of 2017 and he did return as material handler. While that does not mean he was able to do this job which required lifting including overhead lifting in excess of what McBee says he was capable, the record does not include restrictions or any request for light duty work after he reached MMI. His supervisor, James Long, testified that he witnessed McBee performing his same preinjury job duties without restrictions and that McBee presented him with no documentation to indicate he needed to work with restrictions.

McBee and Blue Linx both submitted Petitions for Reconsideration.

Blue Linx petitioned to correct typographical errors contained in the Opinion.

McBee petitioned seeking additional findings regarding the failure of the ALJ to apply the three multiplier to the PPD benefits awarded. The ALJ entered the following Order on Reconsideration:

This matter comes before the undersigned administrative law judge (ALJ) pursuant to the Petitions for Reconsideration filed by Plaintiff and Defendant requesting the ALJ reconsider the Opinion and Order dated December 23, 2019.

Defendant has noted three typographical errors that need to be corrected. Plaintiff's surgery took place June 20, 2017 but in two places (pages 6 and 12) the opinion incorrectly references surgery on June 10, 2017. The other error is on page 13 where there is a mistaken reference to the injury to the "low back" when the injury is "left shoulder." All three errors are corrected with this Order. The injury was to the left shoulder and surgery was conducted on June 20, 2017. The correction in the date of surgery effects the date for payment of TTD to begin.

Plaintiff has requested additional finding, with the first request for the ALJ to consider Dr. Wunder's opinion. Dr. Wunder's opinion is summarized on pages 7 – 8 of the opinion and is also referenced in the section where Dr. Larkin commented on Dr. Wunder's rating. What does appear to be absent is a direct reference to Dr. Larkin's 9% rating as most persuasive, although it is implied in the calculation on page 12, and is clearly based on Dr. Larkin's 9% as he is the evaluator who provided the 9% rating. While there were various ratings, and Dr. Wunder's rating was considered, Dr. Larkin was relied upon. Dr. Wunder last evaluated Plaintiff on December 27, 2018 and, although he reviewed additional records which he discussed in an October 25, 2019 letter, Dr. Larkin evaluated Plaintiff four months later on April 22, 2019 and found improvement in range of motion which impacted his opinion regarding the rating.

Likewise, the remainder of Plaintiff's Petition requests the ALJ reweigh the evidence already considered. The Petition itself raises issues that stem from what is discussed in the opinion on pages 11 and 12 that in various places, McBee contradicts his own testimony, and brought into question his own credibility. It cannot be determined whether Plaintiff intentionally mislead or, on the other hand, was a poor historian. But the reality is that this contradictory testimony made the case extremely difficult to decide.

Pursuant to *Magic Coal Co. v. Fox* , 19 S.W.3d 88 (Ky. 2000), 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. This process was employed out of necessity more in this case than most. There is nothing found in Plaintiff's Petition that would lead to a change in the Opinion issued on December 23, 2019.

IT IS HEREBY ORDERED, Defendant's Petition for Reconsideration is SUSTAINED. Plaintiff's Petition for Reconsideration is DENIED.

On appeal, McBee argues the ALJ erred by failing to consider or identify what weight she gave to the opinions of Dr. Wunder, who opined McBee could not return to work at Blue Linx. McBee also asserts the ALJ erred in failing to consider McBee's testimony regarding his deficits as well as erred in not considering Dr. Wunder's critique of Dr. Larkins's opinion that McBee did not have work restrictions.

As the claimant in a workers' compensation proceeding, McBee 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 he was unsuccessful in proving entitlement to the three multiplier, 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 that is 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 the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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).

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 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). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal.

McBee argues the ALJ did not properly weigh the medical and lay evidence in determining he was not entitled to application of the three times multiplier to the award of PPD benefits. McBee argues the findings of the ALJ are insufficient to apprise the parties of her conclusions and to allow for meaningful appeal. We disagree.

The evidence in this case was very conflicting and contradictory. Three physicians addressed the issue of whether McBee retains the physical capacity to return to the type of work he was performing at the time of his left shoulder injury. McBee's evaluating physician, Dr. Wunder, opined McBee does not retain the physical capacity to return to his prior work and assessed him permanent restrictions which would prevent him from returning. Dr. Wunder reviewed McBee's job description in making his determination. Dr. Larkin, Blue Linx's evaluating physician, disagreed with Dr. Wunder and opined McBee did retain the physical capacity to return to his prior work. Dr. Larkin reviewed the same job description. Dr. Metzler, McBee's treating surgeon, likewise agreed with Dr. Larkin regarding his assessment of impairment and regarding McBee's ability to return to work.

The lay evidence was likewise conflicting. Long testified McBee returned to work after his shoulder surgery in November 11, 2018, without restrictions. Long observed McBee working full duty without difficulty or restrictions through April 2018, when McBee resigned his employment at Blue Linx for medical reasons unrelated to his work injury. McBee's own testimony was also inconsistent. He testified in his deposition that he did retain the physical capacity to return to work, but in his hearing testimony said he could not. Based on these, and other inconsistencies, the ALJ questioned McBee's credibility.

The ALJ properly exercised her discretion as the fact-finder in this case, and simply chose to believe the opinions of Dr. Larkin, Dr. Metzler and Mr. Long, which clearly constitute probative and substantial evidence. The ALJ chose to disregard the opinions of Dr. Wunder, and the conflicting testimony from McBee, in

determining he retains the physical capacity to return to the type of work he was performing at the time of his injury. This falls squarely within the ALJ's discretion, and she adequately set forth the reasoning for her decision which will not be disturbed on appeal.

Therefore, the Opinion, Order, and Award rendered by the Hon. Jane Rice Williams, Administrative Law Judge, on December 23, 2019, and the Order on Reconsideration rendered on January 17, 2020, are **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER: **LMS**

HON HALEY S STAMM
2500 CHAMBER CENTER DR, STE 300
FORT MITCHELL, KY 41017

COUNSEL FOR RESPONDENT: **LMS**

HON DOUGLAS P DAWSON
920 LILY CREEK ROAD, STE 102
LOUISVILLE, KY 40243

ADMINISTRATIVE LAW JUDGE: **LMS**

HON JANE RICE WILLIAMS
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601