

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 23, 2021

CLAIM NO. 201860230

YRC FREIGHT INC.

PETITIONER

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE**

DWIGHT FREEMAN
and HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. YRC Freight Inc. (“YRC”) appeals from the March 3, 2021, Opinion, Order, and Award and the April 13, 2021, Order denying its Petition for Reconsideration of Hon. John H. McCracken, Administrative Law Judge (“ALJ”). The ALJ awarded Dwight Freeman (“Freeman”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical expenses for a work-related left shoulder injury.

On appeal, YRC asserts that the ALJ's findings concerning a left shoulder injury are not supported by substantial evidence. YRC also contends the ALJ committed an abuse of discretion by awarding benefits for the left shoulder injury.

BACKGROUND

The Form 101 in Claim No. 2018-60230 alleges Freeman sustained work-related injuries to "multiple body parts" on September 29, 2018, in the following manner: "Plaintiff suffered injury to his left upper extremity/shoulder when his truck dropped into a sunken roadway and his left arm/shoulder were jerked causing a harmful change resulting in permanent impairment by the 5th Edition AMA Guides."

The Form 101 in Claim No. 2019-00259 alleges Freeman sustained a work-related injury to his "Shoulder(s)" on December 8, 2017, in the following manner: "Plaintiff suffered cumulative trauma injury to his left shoulder repetitively pushing and pulling as well as driving which presented for evaluation December 8, 2017. Plaintiff suffered injury resulting in permanent impairment by the 5th Edition AMA Guides."¹

YRC filed its Form 111 denying Freeman's claim for the following reasons: "(a) There is a dispute concerning the amount of compensation owed to the plaintiff. (e) The alleged injury did not arise out of and in the course of employment. (g) The plaintiff did not give due and timely notice to employer of the injury."

¹ By Order dated August 24, 2020, the Form 101 for Claim No. 2019-00259 was ultimately amended to reflect the correct date of injury as December 18, 2017.

Freeman introduced Dr. Jules Barefoot's November 15, 2019, Independent Medical Examination ("IME") report. He performed a physical examination and a medical records review and provided the following "Diagnostic Impression":

1. History of cumulative trauma to the left shoulder culminating with an evaluation by Dr. McClure on December 18, 2017, with a history of an MRI done November 17, 2017, that showed a supraspinatus tendon tear.
2. September 30 [sic], 2018: Acute left shoulder injury.
3. November 7, 2018: MRI of the left shoulder demonstrated a SLAP tear without a rotator cuff tear.
4. February 26, 2019: Left shoulder arthroscopic surgery with a rotator cuff repair, subacromial decompression, and biceps tenodesis.
5. July 29, 2019: Left shoulder MRI demonstrated partial-thickness recurrent tear of the supraspinatus tendon, with a partial-thickness tear of the infraspinatus tendon with muscle atrophy.

Dr. Barefoot diagnosed the following: "Mr. Freeman sustained a cumulative trauma injury to his left shoulder culminating with his initial visit to Dr. McClure on December 18, 2017. **He then experienced an acute injury to his left shoulder on September 29, 2018.**" (Emphasis added). Dr. Barefoot opined the above diagnoses are due to "his workplace activities." He rejected the notion Freeman suffered from a pre-existing left shoulder condition at the time of the September 29, 2018, work incident explaining:

Mr. Freeman had sought treatment for cumulative trauma to his left shoulder, as evidenced by his visit with Dr. McClure on December 18, 2017.

He received treatment for that condition, which included injection therapy.

His condition improved, and he was able to return to work in an unrestricted capacity.

He then sustained an acute injury to his left shoulder on September 29, 2018.

For that acute injury, he eventually underwent surgery by Dr. McClure on February 26, 2019.

By the medical records available and the history from Mr. Freeman, he had no active, impairment-rateable [sic] condition present in his left shoulder prior to the September 29, 2018, workplace incident.

He continued as follows:

Mr. Freeman had undergone a prior MRI before the September 29, 2018, workplace incident, which did show a supraspinatus tendon tear.

After receiving treatment from Dr. McClure, it appears that this condition improved, and at the time of his workplace injury on September 30, 2018, he had no active, impairment ratable condition present in his left shoulder.

Only because of that September 29, 2018, workplace accident has the condition in his left shoulder been activated into its symptomatic, impairment-ratable condition.

He opined that Freeman reached maximum medical improvement (“MMI”) on August 2, 2019, found no impairment rating due to cumulative trauma, but found a 5% whole person impairment rating resulting from the September 29, 2018, work-related left shoulder injury pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). He stated that **“100% of the current 5% whole person impairment is**

solely attributable to the September 29, 2018, workplace accident.” (Emphasis added).

Freeman introduced multiple medical records of Dr. Scott McClure. Relevant to the issue on appeal is the October 23, 2018, medical record reflecting Freeman complained of a left shoulder injury. Dr. McClure recorded the following history:

59 y.o. male patient who presents for evaluation of his left shoulder. He was at work, driving his truck on September 29 when the truck ‘dropped’ in a DIP and the road. This caused his arm to ‘snap.’ He tells me that he felt a sharp, stabbing pain in the front of the shoulder. Since this injury, he has been unable to raise the left arm without the assistance of his right. Describes his pain as severe, constant and burning. **The pain is much worse than that which she [sic] was experiencing prior to this injury. He reports clicking and popping in the shoulder associated with the pain. His last injection for the left shoulder was 3 months ago. He tells me that this was working well until the injury.** (emphasis added.)

Dr. McClure diagnosed an acute left shoulder rotator cuff tear and recommended an MR arthrogram. His review of a previous MRI of the left shoulder revealed the following:

His previous MRI left shoulder is reviewed along with the associated report. There is moderate subacromial/subdeltoid bursitis and acromioclavicular arthritis. He appears to be have [sic] a high-grade partial interstitial tear of the supraspinatus tendon. There is no clear extension all the way through to the articular or bursal side but the tear appears to involve greater than 90% of the thickness of the tendon. There is mild glenohumeral arthritis and mild-to-moderate biceps tendinitis.

Dr. McClure’s November 28, 2018, medical record indicates he would try an intra-articular injection and some physical therapy and keep Freeman on work

restrictions. A record dated December 31, 2018, indicates the injection and the physical therapy did not help. A record dated January 14, 2019, notes Freeman's left shoulder pain is "severe, constant and aching....He has tried therapy which did not help. He has had several injections."

A February 8, 2019, medical record reveals Dr. McClure performed a left shoulder arthroscopy with rotator cuff repair, labral debridement, and biceps tenotomy.

Included within Dr. McClure's medical records is the February 8, 2019, report relating to an MRI of Freeman's left shoulder which contains the following impression: "1. Small SLAP tear of the superior labrum with an intact biceps tendon anchor. 2. No evidence of a fracture or osseous contusion. 3. No rotator cuff tear."

Dr. McClure was deposed on August 14, 2020. He first saw Freeman on December 18, 2017, due to a complaint of left shoulder pain. His interpretation of an MRI performed of Freeman's shoulder on November 7, 2017, is as follows: "He had a full thickness rotator cuff tear. He also had significant arthritis in a joint on top of his shoulder probably acromioclavicular joint. The last thing that looked like it was a significant finding was he had a – appeared to have a split tear of his biceps tendon."² He continued as follows:

Q: Okay. And, Doctor, did you also note that he had a complex degenerative tear of his labrum?

A: Yes.

² The Board is unable to locate the pre-injury MRI report in LMS.

Q: Okay. And, Doctor, when you say 'rotator cuff tear,' is that the same as a supraspinatus tendon tear?

A: The same, yes.

Q: Okay. So in your note where it says, 'One centimeter near full thickness supraspinatus tendon tear,' that's the equivalent of a rotator cuff tear, correct?

A: Correct.

Dr. McClure believed Freeman's left shoulder condition was symptomatic and impairment ratable on December 18, 2017, but he did not assign an impairment rating. Dr. McClure recommended arthroscopic surgery at the time, but Freeman opted only for pain relief through Cortisone injections. Freeman returned several times for injections, including in July 2018.³ Concerning the presence of an impairment rating prior to the subject injury, he testified:

Q: Doctor, had I asked in July of 2018 to assign an impairment rating, would you have been [sic] to assign one?

A: Yes.

Q: Okay. Based on your notes that you have here today, are you able to do that?

...

A: I could by consulting the AMA Guidelines, yeah.

However, Dr. McClure did not assess an impairment rating.

Dr. McClure testified as follows regarding his October 22, 2018, evaluation:

Q: Okay. And what symptoms did he report to you at that time?

³ The Board is unable to locate these pre-injury records in LMS.

A: At that time, he reported – he presented for a new left shoulder injury. He reported a work injury on September 29th.

Q: And what were his symptoms at that time?

A: He presented with a similar complaint of – of pain and weakness, albeit worse. He also reported clicking and popping at the time.

Q: And, Doctor, your diagnosis was acute trauma and chronic tear. By this, do you mean that his tear has progressed or worsened?

A: Yes. That was my suspicion at the time.

Q: Okay. So, essentially, when he came to see you in December of 2017, he had a tear now in October of 2018, you're assuming or suspecting that that tear has progressed or worsened; is that correct?

A: Yes.

Q: And this was based upon the symptoms in your physical examination, correct?

A: Yes. And the patient's history.

...

Q: Okay. And what did you attribute the worsening of the tear to?

A: New injury.

Q: Okay. And that's the work incident he told you about?

A: That's correct.

Freeman had another MRI on November 7, 2018, and Dr. McClure noted that it did not contain a description of a rotator cuff tear. He testified this either meant the pre-injury MRI was incorrect or the post-injury MRI was incorrect.

At the follow-up appointment on November 28, 2018, Freeman elected to continue with conservative treatment of his left shoulder.

Dr. McClure testified that, at the January 14, 2019, appointment, he was able to review the November 2018 MRI film. He testified as follows:

A: So, again, the report mentioned no rotator cuff tear, but when I read the – the imagines themselves, it appeared to me that he had a full – near full thickness rotator cuff tear.

Q: Okay. And isn't that the same diagnosis that he had in December 2017?

A: Yes.

Q: All right. Well, let's talk about the other diagnoses, Doctor. The biceps tendinopathy was seen in November of 2017 MRI; is that correct?

A: A spilt [sic] tear was seen at the time, but it's a very similar diagnosis, yes.

Q: Okay. So with this diagnosis, can you say that it was caused by the September 29, 2019 alleged work incident?

A: I cannot say that, no.

Q: All right. And what about the labral tear? This was also seen on the November 2017 MRI; is that correct?

A: That is correct.

Dr. McClure was unable to state that, within reasonable medical probability, that the labral tear and AC arthritis were caused by the alleged September 29, 2018, work incident. He elaborated further:

Q: Okay. Can you state or tell us within reasonable medical probability that the proximate cause of the rotator cuff tear is related to the September 29, 2018 alleged work incident?

A: The tear itself pre-dated that work injury, but could it have gotten worse? That's possible.

Q: Okay. How did it get worse?

A: With the work incident?

Q: Yes.

A: I will have to go back and reference my notes. Give me just a minute. And I'm almost there. Sorry. Okay. So on the date of his evaluation, October 22nd, he reported to me that he was at work driving his truck, and then the truck dropped in a dip in the road, and he says that somehow it caused his arm to snap, and that that's when he felt a sharp stabbing pain in the shoulder.

Q: Okay. Doctor, I –

A: And so – so he – he reported to me that somehow that incident on the road caused him to torque his arm awkwardly and – and injured the shoulder worse.

Q: Okay. But you have no diagnostic evidence that the tear had actually worsened, do you?

A: Well, I mean, objectively, he had increased pain and weakness on his exam at that time.

Q: But diagnostically, on a MRI, there's nothing that shows that his condition had worsened; is that correct?

A: No. In comparing the two MRIs, it really didn't look like the tear had gotten a whole lot bigger.

Regarding the worsening of Freeman's pain following the September 29, 2018, work incident, Dr. McClure continued as follows:

Q: ... I think, just to kind of follow up on what you were just talking about, as far as the worsening of pain or the acute onset of pain and worsening of weakness, Mr. Freeman has also testified that within 24 to 36 hours after this September 29 – sorry – yeah, 2018 work injury, he was also just unable to lift that arm. Is that consistent

with his report of worsening to you and with a worsening of his condition?

A: Yes. And when he presented in the office, he had very limited painful motion.

Q: Okay. Thank you. I'm going to – you talked a lot about what his condition was like from 2017 when he initially presented to you up until September of 2018 in this work injury, and I know surgery had been recommended and discussed on multiple occasions. Was Mr. Freeman able to continue functioning during that time period with the Cortisone injections?

A: Yes.

Q: Did he have a change in his functioning after the September 2018 work injury?

A: Yes.

Q: Is it possible to you to tell us, within reasonable medical probability, did the September 2018 work injury hasten the need for surgery? Would he have been able to continue to maintain for some period with injections but for that September 2018 injury?

A: Well, we – he had been getting by fairly well with the injections prior to the incident. And then following the incident, we attempted the same course of treatment briefly, and he did not respond to that treatment at that point.

Dr. McClure performed left shoulder surgery on February 26, 2019.

YRC introduced Dr. Jerry Magone's March 18, 2020, IME report.

After performing a physical examination and a medical records review, Dr. Magone diagnosed the following: "The claimant is status post a left shoulder rotator cuff repair, biceps tenodesis, and subacromial arch decompression." Dr. Magone opined there is not a causal connection between Freeman's left shoulder condition and the events of September 29, 2018, explaining:

No. It is my opinion within reasonable medical certainty that the mechanism as described on September 28 [sic], 2018 was not the proximate cause of his left shoulder condition. As discussed above, in my opinion his rotator cuff pathology is likely related to aging and natural deterioration. It should also be noted that he had a known rotator cuff tear prior to the date of injury that was managed conservatively.

Dr. Magone opined Freeman achieved MMI six months after his shoulder surgery and assessed a 3% impairment rating pursuant to the AMA Guides, none of which is attributable to the September 29, 2018, work incident. He believed the impairment rating is due to “natural deterioration and aging.” Dr. Magone did not assign an impairment rating for a pre-existing left shoulder condition.

Freeman was deposed twice. However, as noted by the ALJ in the March 3, 2021, Opinion, Order, and Award, the first deposition was never filed in LMS. Freeman’s second deposition, taken March 13, 2020, pertains only to his symptoms and wages following his return to YRC on August 26, 2019, and has no relevance to the issues on appeal.

Freeman testified at the January 6, 2021, hearing. He first started working for YRC in May of 2005 as a pickup and delivery driver and a dock worker. In the 2017/2018 time frame, he was working as an over-the-road driver. When Freeman was first seen by Dr. McClure in December of 2017, he was having a “painful stinging feeling” and some weakness in the “upper, left-hand part” of his left shoulder. At that time, the pain was constant. Dr. McClure treated the pain with Cortisone injections. Freeman testified as follows:

Q: Did you have cortisone injections then?

A: I did. I had three of them.

Q: Were they helpful?

A: Yes, they took away the pain. About two days later, all the pain was gone and I had full function of my arms – of my arm. I'm sorry.

Q: During that time, even before you had your cortisone injections, were you having any problems doing any of your work for YRC Freight?

A: No.

Q: Had you missed any work because of your shoulder?

A: No.

He described his symptoms following the September 29, 2018, work incident:

Q: When you went back to work on Monday, what happened?

A: I generally carry things in my right hand. Like I had a cup of coffee with me that my wife had made me, and I set it on top of the car when I got up to the yard. I got my bag or my box out, whatever it was I [sic] using that particular night, and I carried it in my right hand. I reached – or I tried to reach to the top of the car where I had set my cup of coffee and my arm would not bend at the shoulder and so my arm – my elbow was at my left side. It would not leave my left side to reach up to get my cup of coffee, so I went inside and said, 'I think I have a problem.'

Q: Was that the first time over the weekend that you had realized that your – you weren't able to lift your arm?

A: Yes.

Q: Talk to us about what your weekend was like before – before that Monday.

A: Well, I knew I had pain so I was taking it easy and I was trying to use ice thinking that would heal the pain. I was not doing any heavy work during the weekend, but I had pain through the weekend. Again, I thought it

would just go away because I was able to use my arm before but it seemed to hurt worse so I was trying to heal it with ice but it did not work.

Q: Okay. Had you ever had any kind of symptom or sensation like that, unable to lift your arm, prior to September of 2018?

A: I'm so sorry. No.

Q: Were there any other differences in your symptoms in your left shoulder that you noticed from before and after the concrete job?

A: It was just more painful, I think. It hurt to sort of hold my – my arm up. I did a lot of leaning over onto my thigh with my arm to sort of let it rest. It felt like my shoulder joint was sort of pulling a lot. So it was – it was difficult to hold my arm up. It seemed to hurt a lot, so I thought maybe if I just relaxed it, it would take away some of the pain.

Freeman was restricted from driving by BaptistWorx. He testified that even without those restrictions in place he would not have been able to drive. He elaborated, “I don’t believe that I would be able to handle the steering wheel. It just hurt so much. When I lifted my arm, my shoulder was hurting quite terribly.”

The December 17, 2020, Benefit Review Conference Order and Memorandum lists the following contested issues: “work-related injury/causation, notice as to 2017 injury, permanent income benefits per KRS 342.730, average weekly wage, TTD benefits, wages upon return to work, current wages, exclusion for pre-existing impairment, credit for TPD, and unpaid or contested medical expenses.”

By Order dated March 3, 2021, the ALJ deconsolidated Claim No. 2019-00259 and 2018-60230.

The March 3, 2021, decision contains the following findings of facts and conclusions of law which are set forth, in relevant part, *verbatim*:

Cumulative Trauma.

KRS 342.0011(1), defines “injury” as any work-related traumatic event or series of traumatic events, including cumulative trauma arising out of and in the course of employment which is the proximate cause producing a harmful change to the human organism evidenced by objective medical findings. KRS 342.0011(1).

In Haycraft v. Corhart Refractories, 544 S.W.2d 222 (Ky. 1976) the court held that a cumulative trauma injury could be proven by showing the nature and duration of the work probably aggravated a degenerative disc condition to the degree that it culminated in an active physical impairment sooner than would have been the case had the work been less strenuous, and to that extent the pre-existing condition is itself an injury.

The Administrative Law Judge 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). The Administrative Law Judge 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 adverse party’s total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Freeman asserts that on December 18, 2017 he sustained cumulative trauma injury to his left shoulder due to his driving for Defendant and the physical duties attendant with that job. Freeman testified at the hearing as to his job duties that required use of his left shoulder and arm. However, the only doctor to diagnose him with work-related cumulative trauma is Dr. Barefoot. Dr. McClure, his treating physician, did not diagnose with cumulative trauma injury to the left shoulder. Dr. Magone stated that he did not suffer cumulative trauma injury to his left shoulder. He believed the process of natural aging and degenerative change produced the rotator cuff tear, labral tear, and bicep tendonesis as seen in the 2017 MRI. Dr. McClure believed the diagnoses he made on December 18, 2017 were likely the result normal

degenerative conditions since he was not advised of any trauma.

Dr. Barefoot's opinion that Freeman sustained work-related cumulative trauma is not supported by any facts from the history in his report of Freeman's job duties. The history provided appears to involve the September 29, 2018 incident, not cumulative trauma.

The ALJ finds that Freeman has not met his burden in proving that he sustained work-related cumulative trauma to the left shoulder on December 18, 2017, or at any other time while working for Defendant. The ALJ relies on Dr. Magone to find that the diagnoses made by Dr. McClure on December 18, 2017 to Freeman's left shoulder were caused by natural aging and deterioration associated with aging. The ALJ dismisses Freeman's claim for work-related cumulative trauma injury to the left shoulder.

September 29, 2018 left shoulder injury/prior active/causation.

Freeman asserts that on September 29, 2018, while operating his tractor truck for Defendant, he ran over a dip in the road that jerked his left arm while holding onto the steering wheel. Freeman stated that within a couple of days following this incident, he had difficulty raising his arm and even lifting a cup of coffee. Defendant states that the diagnosis by Dr. McClure was the same after the September 29, 2018 incident as it was in 2017. Defendant correctly points out that Dr. McClure had discussed surgery with Freeman in 2017, which according to Dr. McClure was the same surgery that he performed on Freeman on February 26, 2019. Defendant asserts that the September 29, 2018 incident did not cause any injury within the meaning of the KRS 342.0011(1).

Freeman testified that he the cortisone injections Dr. McClure provided following the December 2017 office visit helped his left shoulder pain. He continued to work in his same job. Freeman testified that the cortisone shots took his pain away. Dr. McClure's records support Freeman's statements that the cortisone shots helped relieve Freeman's left shoulder symptoms. The ALJ notes that Dr. McClure offered surgery to Freeman in

December 2017, and the months following that office visit. Freeman declined surgery at that time.

Dr. Magone stated that the September 29, 2018 work incident did not cause Freeman's left shoulder condition. He believed that the left shoulder condition was all pre-existing and unrelated to Freeman's work incident. Dr. Magone stated that he believed that immediately prior to September 29, 2018, Freeman's left shoulder was both symptomatic and impairment ratable. However, he could not provide an impairment rating according to the Guides to the Evaluation of Permanent Impairment, Fifth Edition, due to no measurements of the left shoulder being recorded in any medical records prior to this work incident. Dr. McClure stated that Freeman's left shoulder was symptomatic prior to September 29, 2018, but that he did not have the Guides to state what impairment existed. Dr. McClure stated that he believed that on September 29, 2018, Freeman had both a chronic and acute injury to the left shoulder. Dr. McClure believed that the work incident increased Freeman's symptoms. The ALJ agrees with Dr. McClure. The ALJ is not persuaded by Dr. Magone's opinions that all of Freeman's left shoulder symptoms following the September 29, 2018 work incident were preexisting and unrelated to his job. Freeman's testimony is uncontradicted that his left arm and shoulder symptoms saw a significant increase in physical limitations following the 2018 event. These symptoms continued and ultimately caused Freeman to change his mind on having surgery. On February 26, 2019, Freeman underwent left shoulder surgery to repair the rotator cuff, labrum and biceps tendon. Dr. McClure testified that this was the same surgery he recommended in 2017; however, Freeman's symptoms were not bad enough to cause him to decide to undergo the surgery. That changed after the September 2018 work accident. Dr. McClure testified that objectively, Freeman had an increase in pain and weakness on his examination following the September 29, 2018 incident.

An employer may be responsible for reasonable and necessary medical expenses when a subsequent work related event causes a worsening or progression of a pre-existing active condition. Derr Construction Company v. Bennett, 873 S.W.2d 824 (Ky. 1994).

In order to be characterized as an active condition, an underlying pre-existing condition must be symptomatic and have impairment pursuant to the AMA Guides immediately prior to the occurrence of the work related injury. In Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), the Court dealt with the situation wherein an individual's pre-existing scoliosis made her more likely to suffer injury. The Court noted the Administrative Law Judge must determine whether the pre-existing condition was permanently or temporarily aroused by the work injury and further noted that to be characterized as an active condition; an underlying pre-existing condition must be symptomatic and have impairment pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. In order to qualify for permanent partial disability 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, but also required to prove that the harmful change resulted in a permanent disability as measured by an AMA impairment.

The ALJ agrees that with Freeman and Dr. McClure that the September 29, 2018 work incident increased his pain and weakness in the left shoulder. Freeman's symptoms were not alleviated by treatment until he underwent surgery. The ALJ relies on Freeman, Dr. McClure and Dr. Barefoot to find that on September 29, 2018, Freeman sustained a permanent injury to the left shoulder while operating a truck for Defendant.

After reviewing the impairments provided, the ALJ agrees with Dr. Magone's opinion that Freeman sustained a 3% impairment. Freeman testified that on August 29, 2019, he returned to his regular job. The ALJ finds that Dr. Magone's impairment more closely represents Freeman's impairment than the 5% assessed by Dr. Barefoot.

The ALJ finds that Defendant has not proven that Freeman had a "pre-existing active" impairment as set forth in Finley, supra. First, none of the doctors were able to state what percentage of impairment they believed that Freeman had with respect to the left shoulder immediately prior to the September 29, 2018 work accident. Second, Dr. Magone does not discuss Freeman's statements that the series of cortisone shots

provided in 2017 and 2018, prior to the September 29, 2018 work accident relieved his shoulder symptoms. Dr. McClure stated that they were beneficial to Freeman. Freeman stated that the injections took his pain away. Therefore, there is insufficient proof that his left shoulder was symptomatic immediately prior to September 29, 2018. The last medical record the ALJ found filed on LMS relating to his treatment of the left shoulder, prior to September 2018, was the July 2018 office visit with Dr. McClure where he received another injection. While the ALJ readily admits that Dr. McClure agrees that the same diagnosis in the left shoulder that existed in 2017 also existed at the time of the 2019 surgery, and that he proposed the same surgery to Freeman both before and after the work injury, this does not necessarily mean that Freeman's condition was a pre-existing active condition within the meaning of Finley.

The ALJ believes, and finds, that the September 29, 2018 work incident created a new injury that is in addition to the prior diagnoses as determined by Dr. McClure. Dr. McClure stated that the 2018 incident increased Freeman's pain and weakness. The ALJ relies on Freeman and Dr. McClure to find that a new injury occurred as a result of this incident that caused Freeman to undergo the previously recommended, but declined, surgery.

Benefits pursuant to KRS 342.730.

Freeman testified that he is back working the same job he worked prior to September 29, 2018. There is no proof that he has retained his job due to a fear of not being able to be re-employed should he lose this job, or that he is not capable of continuing to work his job for the foreseeable future due to his injury. Neither Dr. Magone, Dr. McClure nor Dr. Barefoot stated that Freeman did not retain the physical capacity to return to the type of work he performed at the time of injury in 2018. Therefore, the ALJ relies on Freeman, Dr. Barefoot, Dr. McClure and Dr. Magone to find that he has not met his burden to prove that he is entitled to multipliers pursuant to KRS 342.730(1)(c)(1).

The ALJ awarded TTD benefits in the amount of \$933.25 from October 1, 2018, through August 25, 2019; PPD benefits at the rate of \$13.65 for 425 weeks beginning on September 28 [sic], 2018, interrupted by TTD payments; and medical benefits for the September 29, 2018, left shoulder work injury, including the February 26, 2019, left shoulder surgery.

YRC filed a Petition for Reconsideration arguing Freeman did not meet the requisite threshold of proving the September 29, 2018, work incident caused his left shoulder condition.

In the April 13, 2021, Order denying the Petition for Reconsideration, the ALJ set forth the following additional findings which are provided *verbatim*:

Defendant filed a Petition for Reconsideration asserting that there was no finding of how the September 29, 2018 work incident could have caused the left shoulder condition and requested additional findings of fact on that issue.

On October 23, 2018, Freeman told Dr. McClure that on September 29 the truck he was driving “dropped” in a dip in the road and caused his arm to “snap”. Freeman stated that since that time his pain was much worse than before this injury and that he had been unable to raise the left arm without assistance. Freeman reported clicking and popping.

Dr. McClure testified that the history Freeman presented to him in the October 2018 office visit of being unable to lift his arm was consistent with the report of worsening of his condition. Dr. McClure stated he had very limited painful motion and a change in his functioning following the September 2018 work injury. Dr. McClure was asked in his deposition if the September 2018 work injury hastened the need for surgery. He stated that Freeman had been getting by fairly well with the injections prior to the incident and then after the incident, Dr. McClure attempted the same

course of treatment briefly and Freeman did not respond to that treatment.

Dr. McClure stated Freeman told him that he was driving his work truck and it hit a dip in the road, which caused his arm to snap, and he then felt a sharp stabbing pain in the shoulder. In response to a question as to whether Dr. McClure had any diagnostic evidence that the tear had actually worsened he stated that objectively Freeman had increased pain and weakness on examination. He stated that in comparing the prior shoulder MRI to the current one, that he did not believe the tear “had gotten a whole lot bigger”. Dr. McClure also testified that acute tears typically develop immediate pain. Freemans testimony and history provided to Dr. McClure are consistent with the production of immediate pain.

The ALJ recognizes that the September 29, 2018 work accident did not cause the initial rotator cuff tear. However, Dr. McClure stated that following that work accident, Freeman exhibited objective increased pain and weakness on examination. Dr. McClure’s statement that the tear had not gotten a whole lot bigger does not mean that the tear was the same as before. The inverse of this is that the tear became larger, not by much, but larger non-the-less. This coupled with the history Freeman provided to Dr. McClure and his statements that Freeman no longer responded to treatment that had previously worked before September 29, 2018 lead the ALJ to conclude that the September 29, 2018 truck incident caused injury to the left shoulder. The ALJ relies on Freeman and Dr. McClure to find that the September 29, 2018 work truck incident cause injury to his left shoulder.

To the extent that the Petition requests that the Opinion, Award and Order be reversed, or altered in result, the ALJ denies that request.

YRC first contends the ALJ’s finding of an acute work-related left shoulder injury on September 29, 2018, is not supported by substantial evidence. It takes issue with the ALJ’s reliance upon Dr. McClure, asserting that his opinions are equivocal and cannot constitute substantial evidence. We affirm.

ANALYSIS

A claimant has the burden of proving each of the essential elements of her claim, including causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Freeman was successful in that burden, the question on appeal is 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).

As the fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ also has the sole authority to determine the weight to be accorded and the inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). 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). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

As an initial matter, we emphasize that no physician of record assessed an impairment rating for Freeman's pre-existing left shoulder condition which included, pursuant to Dr. McClure's deposition, a torn rotator cuff. Consequently, the ALJ's conclusion that YRC failed to prove Freeman had a pre-existing "active"

left shoulder condition as defined by Finley v. DBM Technologies, 217 S.W. 3d 261 (Ky. App. 2007) is correct.

The ALJ stated that he relied upon Drs. McClure and Barefoot as well as Freeman's testimony to conclude he sustained a September 29, 2018, work-related acute left shoulder injury.⁴ The ALJ specifically stated as follows: "The ALJ relies on Freeman, Dr. McClure and Dr. Barefoot to find that on September 29, 2018, Freeman sustained a permanent injury to the left shoulder while operating a truck for Defendant." Significantly, Dr. Barefoot's opinions, *standing alone*, constitute substantial evidence supporting the determination Freeman sustained an acute work-related injury to his left shoulder on September 29, 2018. In his November 15, 2019, IME report, Dr. Barefoot opined that Freeman "experienced an acute injury to his left shoulder on September 29, 2018." Dr. Barefoot assessed a 5% impairment rating pursuant to the AMA Guides for Freeman's left shoulder condition which is entirely attributable to the September 29, 2018, work incident. Dr. Barefoot's opinions standing alone constitute substantial evidence supporting the ALJ's conclusion regarding the causal connection between the September 29, 2018, work incident and Freeman's left shoulder condition. Consequently, we must affirm.

However, we agree with YRC's characterization of Dr. McClure's opinions as "equivocal." While an extensive discussion of Dr. McClure's opinions is unnecessary due to Dr. Barefoot's opinions firmly substantiating the ALJ's ultimate

⁴ This Board acknowledges that in the April 13, 2021, Order denying YRC's Petition for Reconsideration, the ALJ stated that he just relied upon Dr. McClure's opinions and Freeman's testimony to find that the September 29, 2018, work incident caused an acute injury to Freeman's left shoulder. However, the ALJ was clear in the March 3, 2021, Opinion, Order, and Award that he also relied upon Dr. Barefoot's opinions in reaching his conclusions.

conclusion, we add that Dr. McClure's testimony *may* not, on its own, constitute substantial evidence fully supporting the ALJ's ultimate conclusion.

In his deposition, Dr. McClure testified that at the time of his first examination of Freeman on December 18, 2017, he diagnosed a "full thickness rotator cuff tear," arthritis, and a "split tear" of the biceps tendon within the left shoulder. Dr. McClure testified that despite his recommendation Freeman undergo arthroscopic repair surgery, he opted to receive cortisone injections which provided relief. As Dr. McClure testified, Freeman was "getting by fairly well with the injections" prior to September 29, 2018. This is harmonious with Freeman's hearing testimony and Dr. Barefoot's assessment. After the September 29, 2018, incident, however, Freeman did not respond to the injections and had a marked increase in pain and weakness and a decrease in functionality. This, too, is consistent with Freeman's hearing testimony and Dr. Barefoot's opinions.

YRC's objections to the reliance upon Dr. McClure's opinions focus on his testimony that it is "possible" Freeman's rotator cuff tear could have gotten worse after the September 29, 2018, work incident because of his increased pain and weakness. Dr. McClure also testified as follows:

Q: Okay. And what did the MRI from November 2018 show you?

A: So, again, the report mentioned no rotator cuff tear, but when I read the – the images themselves, it appeared to me that he had a full – near full thickness rotator cuff tear.

Q: Okay. And isn't that the same diagnosis that he had in December 2017?

A: Yes.

Q: All right. Well, let's talk about the other diagnoses, Doctor. The biceps tendinopathy was seen in November of 2017 MRI; is that correct?

A: A spilt [sic] tear was seen at the time, but it's a very similar diagnosis, yes.

Q: Okay. So with this diagnosis, can you say that it was caused by the September 29, 2018 alleged work incident?

A: I cannot say that, no.

Q: All right. And what about the labral tear? This was also seen on the November 2017 MRI; is that correct?

A: That is correct.

Q: All right. And what about the labral tear? This was also seen on the November 2017 MRI; is that correct?

A: That is correct.

Q: Okay. Can you state within reasonable medical probability that this labral tear was proximately caused by the September 29, 2018 alleged work incident?

A: No.

Q: And the AC arthritis, that was also seen on the November 2017 MRI, correct?

A: Yes.

Q: Okay. Can you state within reasonable medical probability that the AC arthritis was proximately caused by the September 29, 2018 alleged work incident?

A: No.

...

Q: Okay. Can you state or tell us within reasonable medical probability that the proximate cause of the rotator cuff tear is related to the September 29, 2018 alleged work incident?

A: The tear itself pre-dated that work injury, but could it have gotten worse? That's possible.

...

Q: Okay. But you have no diagnostic evidence that the tear had actually worsened, do you?

A: Well, I mean, objectively, he had increased pain and weakness on his exam at that time.

Q: But diagnostically, on a MRI, there's nothing that shows that his condition had worsened; is that correct?

A: No. In comparing the two MRIs, it really didn't look like the tear had gotten a whole lot bigger.

While the testimony above may not rise to the level of substantial evidence independently supporting the ALJ's conclusion Freeman sustained a September 29, 2018, acute work-related left shoulder injury, the ALJ could rely upon Dr. McClure's opinions *in conjunction with* those of Dr. Barefoot as well as Freeman's testimony to reach this conclusion. The ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, *supra*. Despite Dr. McClure's somewhat peaked statement that it is only "possible" Freeman's rotator cuff tear could have gotten worse after the September 29, 2018, work incident, his testimony regarding a worsening of Freeman's left shoulder pain and a decrease in functionality in combination with Freeman's corroborating testimony and Dr. Barefoot's decisive statement regarding an acute work-related left shoulder injury constitute substantial evidence supporting the ALJ's ultimate conclusion.

Next, YRC asserts the ALJ's finding of a work-related injury constitutes an abuse of discretion. On this issue, we affirm.

Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which “implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). As substantial evidence supports the ALJ’s determination Freeman sustained an acute left shoulder work-related injury, the ALJ’s findings and award cannot constitute an abuse of discretion.

Accordingly, on all issues on appeal, the March 3, 2021, Opinion, Order, and Award and the April 13, 2021, Order are **AFFIRMED**.

ALL CONCUR.

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