

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 1, 2022

CLAIM NO. 201980382

ZACHARY MORRIS-KIRKPATRICK

PETITIONER

VS.

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

HITACHI and
HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

MILLER, Member. Zachary Morris-Kirkpatrick (“Kirkpatrick”) appeals from the November 1, 2021 Opinion and Order dismissing his claims for physical and psychological injuries and the December 6, 2021 Order overruling the Petition for Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge (“ALJ”).

On appeal, Kirkpatrick argues the ALJ abused his discretion in finding there was no work-related injury on May 19, 2019. Kirkpatrick additionally believes the parties had stipulated to a work-related injury of May 19, 2021. For the reasons set forth below, we affirm.

BACKGROUND

Kirkpatrick testified by deposition on January 10, 2020 and January 14, 2021, and again at the final hearing held September 2, 2021. Kirkpatrick was born on July 12, 2000. He graduated from high school in 2019. He was an avid weightlifter. At the time of his deposition on January 10, 2020, he was enrolled at Eastern Kentucky University. Kirkpatrick began working for Hitachi in January 2019, while he was in high school as a co-op student. At Hitachi, he loaded, unloaded, and delivered parts to the lines. He picked up empty totes from the lines and placed them on a cart known as a water spider. The water spider is a long and tall wheeled cart with shelves. After emptying the totes, he picked up parts, bases, and baseplates and loaded them on the water spider to deliver to the lines. He also picked up chemicals that weighed up to fifty pounds per solder bar. Kirkpatrick is right hand dominant.

On May 19, 2019, Kirkpatrick was picking up computer motherboards from a loading station and placing them onto the water spider. He testified at the September 2, 2021 final hearing:

I was taking the totes out to line FA-11 and 12. I got them out there. I went to pick up a tote off of the cart, and there was one pop. Whenever I went to move it--the pop in my wrist. It hurt but wasn't excruciating pain or anything. I'm trying to adjust the tote to be able to pick it up. Whenever I get it to the edge of the water spider to

pick it up to load, the line on A-11, there was a second pop in my wrist. At his January, 2021 deposition he testified the wrist was black and purple and very swollen.

At his January 10, 2020 deposition, he testified his arm “popped, and like it was numb, it hurt”. He felt instant pain and numbness. He testified, “I left my cart sitting there and I went straight into the gray room.”

He reported the incident to supervisory personnel and went to the Emergency Room at Ephraim McDowell Haggin Hospital in Harrodsburg. The ER notes reflect the event at Hitachi as “left wrist and forearm pain. States was lifting boards at work heard arm pop twice”. It discussed a history of a broken radius and ulna three years prior. The report notes swelling and tenderness, distal forearm – ulnar side, full ROM of fingers, neuro vascular intact. Imaging of the forearm was normal.

Kirkpatrick saw his primary care provider, Dr. Joshua S. Wiglesworth, on May 20, 2019. Dr. Wiglesworth took X-rays which were interpreted as negative. Kirkpatrick was advised to rest and was provided an off-work statement and referral to an orthopedic doctor. On this visit, there was continued swelling in his arm but no change in the color of his hand.

Kirkpatrick treated with Dr. Shelby T. White, Danville Orthopaedics, on May 28, 2019. Dr. White recommended an MRI and placed him off work until the MRI could be evaluated. Dr. White evaluated the MRI on June 13, 2019 and noted it was “unremarkable” and recommended physical therapy. He placed restrictions of no use of his left hand if Kirkpatrick were to return to work. During a July 25, 2019 visit, Dr. White noted Kirkpatrick, “says he feels enough better that he

wants to return to work.” He was released to return to work as needed. On August 8, 2019, Dr. White had no firm diagnosis.

Kirkpatrick returned to work for Hitachi on the weekend of July 28, 2019. He worked full duty that weekend but did not return to this job thereafter. He was a full-time student at EKV. He drew disability benefits from the Long Term Disability Insurance provided by Hitachi.

Kirkpatrick returned to the University of Kentucky Emergency Room on August 9, 2022. He stated he sought treatment because bruising and swelling had returned to the left wrist and was progressing. He had seen Dr. White the day before with no mention of bruising. He was referred to Dr. Anil Duggal. Dr. Duggal removed Kirkpatrick from work until September 5, 2019, when he was to return to work on one-handed duty until reassessment. Dr. Duggal reassessed Kirkpatrick on October 2, 2019. He noted Kirkpatrick complained of paresthesia. Examination revealed swelling along the distal aspect of the ulnar forearm, tender to palpitation. He recommended an EMG. Dr. Duggal re-examined Kirkpatrick on March 4, 2020. He noted Kirkpatrick had ulnar branch dorsal sensory nerve irritation. Dr. Duggal stated he could not comment on the cause of the clicking, popping, and numbness described by Kirkpatrick in his left wrist. He stated the June 6, 2019 MRI indicated thickening involving the abductor pollicis longus and tendons of the first dorsal compartment, which is consistent with mild tendinopathy. However, Kirkpatrick did not present with symptoms toward the thumb, which would have been expected from the MRI, but rather with symptoms on the ulnar side of the wrist. An EMG

also did not explain his symptoms. Dr. Duggal gave some potential causes for his treatment of Kirkpatrick and could not state whether it was related to work.

Dr. Ronald Burgess evaluated Kirkpatrick on July 12, 2019 at the request of Hitachi. Dr. Burgess received a history of the May 19, 2019 event. Examination revealed no visible abnormality of the ulnar aspect of the forearm and Kirkpatrick had a full range of motion in the left wrist. Dr. Burgess stated Kirkpatrick had no objective abnormality in his left wrist. Dr. Burgess opined Kirkpatrick was self-limiting. He believed he could return to work without restrictions, required no further treatment, and had a zero (0) percent impairment rating according to the 5th Edition of the American Medical Association, Guides to Evaluation of Permanent Impairment (“AMA Guides”). In a January 28, 2020 report, Dr. Burgess stated Kirkpatrick’s ongoing symptoms are unrelated to the May 19, 2019 event. Dr. Burgess answered a questionnaire on February 10, 2020 after a review of additional records. He reiterated his finding there is no objective medical findings supporting Kirkpatrick’s complaints nor relating them to the May 19, 2019 reported injury.

Dr. Frank Burke evaluated Kirkpatrick on December 30, 2019 and in September 2020. He diagnosed acute injury to the left distal forearm involving the ECU at its extensor compartment, along with soft tissue scarification of the left dorsal ulnar cutaneous branch of the ulnar nerve with residual dysesthesias. He placed Kirkpatrick at maximum medical improvement (“MMI”) and assessed a 1% impairment rating due to upper extremity impairment for chronic dysesthesias present in the distal branch of the ulnar nerve. He assessed an additional 5% impairment rating for the left wrist loss of motion. He assigned a total 3%

impairment rating to the body as a whole. He recommended no repetitive gripping, and no crawling or climbing. In a September 28, 2020 supplemental report, Dr. Burke stated Kirkpatrick sustained an acute injury to the left distal forearm/wrist on May 19, 2019, with an injury to the ECU and ulnar side of the wrist. He reviewed a July 14, 2020 MRI and a December 19, 2019 EMG. He again placed him at MMI and revised his prior impairment rating to 7%.

Dr. Dennis Sprague, psychologist, evaluated Kirkpatrick on October 29, 2020. He reviewed medical records, performed a series of tests, and conducted a psychological evaluation. Dr. Sprague diagnosed a depressive disorder and an anxiety disorder both due to a general medical condition post status injury of May 19, 2019. He assessed a 5% impairment rating utilizing the 2nd and 5th Editions of the AMA Guides.

Dr. Paul Ebben, psychologist, evaluated Kirkpatrick on January 26, 2021. His report was filed, and deposition taken. He performed several psychological tests including a SIMS test that measures potential malingering. He stated individuals who score higher than a 14 on the test are identified as possible malingering individuals. Kirkpatrick scored a total of 20. Dr. Ebben diagnosed an unspecified anxiety disorder and an unspecified depressive disorder. Dr. Ebben assessed a 0% impairment rating and recommended no psychological restrictions regarding his ability to work. Dr. Ebben opined Kirkpatrick may have some depression and anxiety, but not as a result of the May 19, 2019 injury. There were several factors dating to childhood which were discussed. He noted Kirkpatrick was functioning well at the university, working, and had relationships.

At the hearing, Kirkpatrick testified about his limitations. He stated he is unable to pick anything up with his left hand due to pain. Tasks like carrying groceries or doing the dishes are painful and he is unable to lift weights at the gym. He drives with his right arm. He amended his claim to include depression due to his inability to perform his regular activities. He denied having anxiety or depression prior to May 19, 2019. Currently, he is taking Lexapro, prescribed by his family physician.

After leaving Hitachi at the end of July, 2019, he found other employment at Dominos briefly and then at Walmart. At the time of the final hearing, September 2, 2021, he was attending college and working full-time at Campbellsville University moving furniture for students. He testified he continues with pain in the wrist and limited ability in his left hand. He sought treatment for the mental toll the injury had caused him.

No temporary total disability benefits were paid, and medical expenses were paid for a few months after the work event.

After reviewing the evidence of record the ALJ issued the following, *verbatim*:

Ultimately, Kirkpatrick has the burden to prove that he sustained an injury at work on May 19, 2019. The ALJ relies on Dr. Burgess and Dr. Duggan¹ to find that the diagnosis from the June 6, 2019 left wrist MRI were not caused by any event on May 19, 2019 while Kirkpatrick worked for Hitachi. The ALJ relies on Dr. Duggan and Dr. Burgess to find that any median nerve findings on the EMG were not caused by the accident. He had no symptoms consistent with this finding according to Dr. Duggan.

¹ The ALJ referred to Dr. Duggan at times in his Opinion; however, the correct spelling is Dr. Duggal.

The ALJ is not convinced by Kirkpatrick, or Dr. Burke, that the events of May 19, 2019 caused Kirkpatrick's symptoms. Kirkpatrick's own inconsistencies in testimony of his symptoms following the event simply do not make sense to the ALJ. How could his wrist bruise somewhat black in color minutes after what he alleges occurred, only not to be present at the emergency room a couple of hours later. Or at least, not present enough for a doctor to even note its appearance.

ANALYSIS

As the claimant in a workers' compensation proceeding, Kirkpatrick 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 Kirkpatrick was unsuccessful in his burden, 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 they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ 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); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

The ALJ was confronted with conflicting medical evidence. An ALJ may pick and choose among conflicting medical opinions and has the sole authority to determine whom to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ reviewed the copious medical information, Kirkpatrick's and other lay testimony, and detailed why he dismissed the claim. The ALJ found the lack of bruising at the ER visit of May 19, 2019 and the following week with Dr. Wigglesworth to be pertinent. The opinions of Dr. Burgess and Dr. Duggal that the diagnosis from the June 6, 2019 MRI were not consistent with the symptoms of which Kirkpatrick complained, and the ALJ reached the conclusion the May 19, 2019 work incident did not cause Kirkpatrick's symptoms. The records of Dr.

Burke's reports did not explain to the ALJ how lifting the tote caused the scarring of the nerve.

The ALJ recited the evidence of more than 14 medical providers. He reviewed the deposition testimony of Dr. Duggal. The ALJ reviewed the testimony given on three occasions by Kirkpatrick. The ALJ outlined lay testimony of the Hitachi representatives and the Cigna long term disability documentation. The ALJ fully explained his reasoning for dismissing the claim.

Kirkpatrick contends the ALJ abused his discretion in finding no work-related injury. Kirkpatrick further contends Hitachi stipulated to an injury which the Board deems incorrect. The Benefit Review Conference Order stipulation merely states, "Plaintiff sustained a work-related **alleged** injury or injuries on 5/19/2019." (Emphasis added). Contested issues included: Work-related injury/causation.

Further, the earlier Notice of Disclosure filed by Hitachi lists the following contested issue: Whether the Plaintiff suffered a harmful change in the human organism as evidenced by objective medical findings; Occurrence of a work "injury".

Finally, the Witness List filed by Hitachi listed as contested issues:

1. Whether the Plaintiff suffered a harmful change in the human organism as evidenced by objective medical findings:
2. Causation of current complaints

While Kirkpatrick maintains the wording mandates Hitachi stipulated to a work injury, the pleadings do not support that conclusion. It's clear Hitachi contested whether an injury as defined by KRS 342.0011(1) has been proven.

Kirkpatrick also alleges a psychological impairment which surfaced. Again, there were conflicting opinions from the psychologists. However, since the ALJ did not find a work injury, this issue is moot.

Fundamentally, the question is whether the evidence filed of record compels a different result than found by the ALJ. The Board may only vacate the opinion of the ALJ if the ALJ "made a clearly erroneous finding of fact. Kroger v. Ligon, 338 S.W.3d, 269, 272-73 (Ky. 2011).

Kirkpatrick believes the ALJ improperly focused on whether there was bruising and when, and further at times misread the medical findings. The ALJ explained his findings in detail. He found difficulty with the testimony of Kirkpatrick as to what part of his arm he heard a pop, the wrist, or the arm. He also found wanting the testimony that the bruising comes and goes, sometimes black in color and changes to yellow. The initial ER visit did not note the visible color, nor did some subsequent medical visits, yet Kirkpatrick testified his wrist turned black shortly after the event. The medical testimony from Dr. Duggal was that bruising should not occur periodically without an intervening cause. Both Dr. Burgess and Dr. Duggal opined Kirkpatrick did not have symptoms involving the thumb that would be expected from an injury to the ECU at the extensor compartment.

For Kirkpatrick to prevail, this Board would have to challenge multiple findings of fact reached by the ALJ. This is not an appeal based on the lack

of evidence cited by the ALJ but rather he reached an incorrect determination based on the evidence. There were conflicting medical opinions to which another determination could have been made. Yet, the credibility and weight to be afforded testimony is left to the ALJ. Which medical opinion to believe is left to the ALJ. For there to be an arbitrary or capricious decision or an abuse of discretion, there would need to be a lack of any evidence of probative value to support the determination.

KRS 342 285(2) specifically states, “The board shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on questions of fact.” The 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. Miller v. Go Hire Emp. Dev., Inc. 473 S.W.3d 621, 629 (Ky. App. 2015).

In claims where a full review of the evidence is conducted by the ALJ, conflicting medical opinions on causation are offered, and the reasoning for the opinion of the ALJ is sufficiently explained and supported by substantial evidence, the findings of fact are sacrosanct and cannot be disturbed.

CONCLUSION

Accordingly, the November 1, 2021 Opinion and Order and the December 6, 2021 Order on Petition for Reconsideration rendered by Hon. John H. McCracken, are **AFFIRMED**.

ALL CONCUR.

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