

OPINION ENTERED: JANUARY 4, 2013

CLAIM NO. 201168516

AISIN AUTOMOTIVE

PETITIONER

VS.

**APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE**

CRAIG MILLER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

SMITH, Member. Aisin Automotive Casting, Inc., ("Aisin") appeals from the July 2, 2012 Opinion and Order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Craig Stephen Miller ("Miller") permanent partial disability ("PPD") benefits and medical benefits for a work-related injury occurring on November 1, 2010. Aisin also appeals from the ALJ's July 24, 2012 order denying its petition for reconsideration.

Aisin argues the ALJ erroneously adopted the opinions of Dr. Jared Madden who assessed a 35% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") for a work-related bilateral carpal tunnel syndrome injury prior to Miller achieving maximum medical improvement ("MMI"). Consequently, Aisin argues no substantial evidence exists to support the ALJ's decision.

Miller, now age 51, is a resident of London, Kentucky, who has been employed by Aisin since January 2004. On December 27, 2011, he filed a Form 101, Application for Resolution of Injury Claim, alleging "cumulative trauma due to the repetitive use of both wrists." He testified by deposition on March 12, 2012 and at the final hearing conducted June 25, 2012. He also introduced and relied upon the medical records and reports of Dr. Alam Khan, Dr. Madden, Dr. Ronald Dubin, and Dr. Ronald C. Burgess.

Miller testified he was employed in 2004 to pick up parts, inspect and deburr them. He explained as follows:

When the parts are cast and the casting -- the dye is closed and some flash made [sic] squeeze out and -- and come out on the edges as very thin metal. It's very sharp and just take a file and deburr that metal off the part.

Miller stated he handled 700-725 parts a day. Then, in October 2010, he began having pain in his wrist. He saw Dr. Khan, who treated him conservatively and sent him for a nerve conduction test. Later, in September 2011, he saw Dr. Khan again with the same problem. Dr. Khan advised him the condition was work-related and he needed surgery. Miller notified his supervisors and underwent surgery with Dr. Burgess on November 10, 2011 on the right hand and December 1, 2011 for the left hand.

Despite having surgery, Miller continues to have pain symptoms in both hands and wrists. He uses splints at night but does not take medication. His hands are numb continually "which I'm still dropping things and there's loss of strength in the thumb area of both hands". He does not believe he can return to the job he was doing before he discovered the cause of the symptoms.

Dr. Khan first examined Miller on October 15, 2010 for "numbness on right hand, thumb and first two digits... drops objects, wakes up at night with numbness and pain, right greater than left. . . onset for 1 1/2 years, changed line for three years and had better, then back." In December 2010, Dr. Khan noted "NCV bilateral moderate carpal tunnel syndrome." He performed a right carpal tunnel cortisone injection and recommended nighttime splints. Miller

returned on September 29, 2011 for symptoms of worsening carpal tunnel syndrome ("CTS") bilaterally. Dr. Khan noted an NCV study confirmed bilateral severe right and moderate left CTS that would require surgical release. He referred Miller to Dr. Belevue.

Dr. Madden evaluated Miller on February 2, 2012. Miller reported to Dr. Madden that his job required "lots of repetitive motion and intense hands-on work." Miller first sought treatment in the fall of 2010 and "eventually had a nerve conduction study that confirmed carpal tunnel syndrome with the right worse than the left, but both positive for compression neuropathy." Miller had undergone surgery in November 2011 for the right hand and December 2011 for the left. His chief complaint subsequent to the surgeries was numbness, pain and weakness.

Dr. Madden reviewed Miller's treatment records from the offices of Dr. Khan, Dr. Lester, and Dr. Burgess. He conducted a physical examination and diagnosed severe bilateral carpal tunnel syndrome and insomnia. He opined, within reasonable medical probability, Miller's injury was the cause of his complaints. In explaining the causal relationship between the injury and Miller's work, Dr. Madden stated as follows:

The patient reports an eight year history of assembly line work with significant fine manipulation of small objects in a repetitive fashion. The cumulative trauma effectively resulted in bilateral severe/moderate carpal tunnel syndrome. The patient continues to suffer from carpal tunnel syndrome, causing problems with various activities of daily living and sleep disturbance. He suffers from continued tingling/numbness, weakness of the affected musculature, and restricted range of motion. He is developing additional symptoms that are concerning for CRSD/chronic pain syndrome. Mr. Miller is unable to return to his previous job at this time due to the symptoms and restrictions place [sic] by his surgeon. Carpal tunnel release rehabilitation can require extensive amounts of time, perhaps 6-24 months for full recovery (if additional trauma is not incurred). Following long term recovery, if successful, it may be necessary to institute permanent work restrictions to avoid recurrence.

Dr. Madden assessed a 35% whole person impairment rating pursuant to the AMA Guides. However, he added the following cautionary paragraph:

The patient is unable to return to his previous job at this time. I agree with the continued work restrictions place [sic] by his orthopedic surgeon, Dr. Burgess. It is common for recovery from carpal tunnel syndrome to take extensive amounts of time with appropriate therapy and no further injury (i.e. appropriate work restrictions/light duty). I do not feel that Mr. Miller is currently at MMI according to the guidelines of the AMA 5th ed. Guides to the Evaluation of Permanent Impairment. Mr. Miller's

current symptomatology is however concerning for failure of the carpal tunnel release (through no fault of the surgeon or the patient, it is just a very difficult condition to treat once one has reached the severity of Mr. Miller's condition prior to intervention). I am concerned that Mr. Miller will not be able to return to his previous employment, at least not without significant risk of recurrence of symptoms within a minimal amount of time following return to full, unrestricted duty. With that noted, if Mr. Miller is to be considered at MMI at this time, then the above mentioned impairment rating is appropriate.

Dr. Burgess, an orthopedic surgeon, treated Miller from October 31, 2011 through May 9, 2012. He performed a right hand carpal tunnel release on November 10, 2011 and left hand carpal tunnel release on December 1, 2011. However, Dr. Burgess testified Miller had significant complaints in January 2012, indicating he had no feeling whatsoever in his thumb, index and middle fingers. He also had severe pain in his left wrist. Dr. Burgess advised Miller that recovery could take up to six months or more. He testified that in his opinion, Miller reached MMI on May 9, 2012.

Dr. Burgess agreed with Dr. Madden that Miller was not at MMI on February 2, 2012 when Dr. Madden examined him. However, he disagreed with Dr. Madden's assessment of a 35% whole person impairment. Dr. Burgess further agreed Miller was not at MMI when Dr. Dubin saw him on March 5, 2012.

Dr. Ronald Dubin evaluated Miller on March 5, 2012. He reviewed medical records which reflected Miller had developed carpal tunnel syndrome as a result of work-related repetitive use of his upper extremities. An EMG/NCV study was abnormal, consistent with severe right and moderate left carpal tunnel syndrome. He also noted Miller had undergone left and right carpal tunnel release at the end of 2011. Dr. Dubin noted:

Patient says that on his right hand he still has carpal tunnel syndrome like problems including numbness in the distal phalanx of his thumb index and middle finger which was his preoperative status. His left wrist shows that he has numbness over the palm of his left hand which was not present prior to surgery.

On March 5, 2012, Dr. Dubin conducted a physical examination and diagnosed bilateral carpal tunnel syndrome more severe on the right side. He then stated:

I do concur with his ability to be on light duty work only and not to return to repetitive types of activities. I understand that he has had a new EMG NCV since his surgery by Dr. BURGESS [sic] but this is not available. I do feel that the bilateral carpal tunnel syndrome is a result of the accumulative [sic] trauma that he sustained from working on an assembly line. I do feel that he will be unable to perform repetitive types of work that he did previously to [sic] the carpal tunnel syndrome. Based upon table 16-10, page 482 in the 5th edition AMA guides for

evaluation patient has a 40% permanent impairment to the right upper extremity, which is the patient's dominant extremity; and 20% permanent impairment to the left upper extremity totaling 60% upper extremity impairment. Based upon table 16-3 this would equate to 36% whole person impairment to the upper extremities including his left and right wrist.

Dr. Gabriel evaluated Miller on April 9, 2012. He first took a detailed history, noting Miller's carpal tunnel treatment with Dr. Khan and Dr. Burgess. He also reviewed Dr. Dubin's medical report. He then conducted a physical examination and diagnosed chronic/residual/recurrent bilateral carpal tunnel syndrome. He also noted Miller had multiple medical problems including morbid obesity, long-standing tobacco use, and newly diagnosed diabetes. He opined Miller "has the body habitus and medical risk factors that may dispose him to carpal tunnel syndrome" however the condition was aggravated by work activities and therefore is work-related. Dr. Gabriel noted Miller had enjoyed little to no improvement from the bilateral carpal tunnel releases. Dr. Gabriel recommended "at least redo surgery" should be attempted.

Dr. Gabriel did not believe Miller had reached MMI. He stated:

At this time, I do not feel that Mr. Miller has reached maximum medical

improvement. It would be premature to determine a final permanent partial impairment. However if using *The AMA Guides to Evaluation of Permanent Impairment*, (Fifth Edition) at this time, a 5% upper extremity impairment is determined for each hand, to equal a 10% total bilateral upper extremity impairment, and a 6% whole person impairment (page 495, CTS). Restrictions at this time remain: No repetitive use, no impact or vibratory tools, maximum lift of 20 pounds.

Dr. Gabriel supplemented his opinion on June 19, 2012 after reviewing nerve studies performed April 24, 2012. He determined those studies confirmed the plaintiff's physical findings and recalculated the plaintiff's impairment to 13% based upon the AMA Guides. He also continued to recommend repeat surgery.

Regarding the issues on appeal, the ALJ issued the following findings of fact and conclusions of law in an opinion rendered July 2, 2012:

3. What is the extent and duration of the plaintiff's permanent impairment? The plaintiff argues that he has sustained a 35 or 36% whole person impairment as a result of bilateral carpal tunnel and failed surgery. The defendant argues that the plaintiff has sustained a 12-13% whole person impairment.

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*,

253 S.W.3d 59 (Ky. 2008). In the present case the ALJ finds most persuasive the opinion of Dr. Madden. His well-structured and thoroughly-explained opinion more closely represents the plaintiff's level of disability than the opinions of the other physicians. I therefore find that the plaintiff sustained a 35% whole person impairment.

Next, the ALJ addresses the question of enhancement. *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an AWW equal to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.

In the present case, all the physicians agree that the plaintiff cannot return to his pre-injury job. He has missed no work due to this injury but he now works at permanent light duty, the defendant finding tasks for him. He works no overtime. He continues to have pain that wakes him in the night and numbness that affects his ability to lift, grasp and drive. Based on all the evidence, the ALJ is not convinced that the plaintiff can continue to earn the same or greater wages. I therefore find that he is entitled to the triple multiplier.

Aisin filed a petition for reconsideration arguing first that the ALJ erroneously stated Dr. Khan advised

Miller his symptoms were work-related in October 2010. Miller's actual testimony did not exactly state that.

Next, Aisin argued the ALJ erroneously failed to consider the deposition testimony of the treating orthopedic surgeon, Dr. Burgess, despite the deposition transcript being specifically listed as a defense exhibit.

Further, Aisin argued the following:

It is fact-finding error for the ALJ to have issued an award based upon an impairment rating assigned before the Plaintiff had reached MMI. Dr. Madden, upon whom the ALJ relies, expressly stated that he did not believe Mr. Miller had reached MMI by the time of his 2/8/12 medical examination. There is simply no opinion of record to contradict Dr. Madden on MMI. In fact, Dr. Burgess expressly agreed that plaintiff continued to show significant improvement after 2/8/12, and this is reflected in the objective, diagnostic nerve conduction test plaintiff underwent in February, 2012 and April 24, 2012. Defendant-employer respectfully requests the ALJ reconsider this error. Defendant-employer specifically requests findings of fact that on 2/8/12 plaintiff was not at maximum medical improvement, and that he did not reach maximum medical improvement until 5/9/12.

Finally, Aisin took issue with the ALJ's assessment of the three multiplier. Aisin noted Miller admitted that he continues to work for the same employer at the same or greater wages.

On July 24, 2012 the ALJ issued an order on reconsideration in part as follows:

2. In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky. 1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. There are no patent errors here and the defendant is attempting to reargue the case.

. . .

4. In Hill v. Sextet Mining Corporation, 65 S.W.3d 503 (Ky. 2001), the Kentucky Supreme Court emphasized that medical causation is a matter for medical experts and, therefore, the plaintiff cannot be expected to have self-diagnosed the cause of his harmful change as being a gradual injury versus a specific traumatic event and that plaintiff is not required to give notice to his employer that he sustained a work-related gradual injury until he has been informed of that fact by a doctor. Here, the plaintiff testified in his deposition that he informed his supervisor at work of his condition on the date after he was told by Dr. Kahn that his condition was caused by his work. Dr. Kahn had nerve conduction studies performed on the plaintiff and at his next appointment he took the results of his studies to his employer and told them of his medical diagnosis and need for surgery. Based on Mr. Miller's sworn testimony, I made the factual determination that he gave notice of his work-related injuries to his employer as soon as practicable under KRS 342.185.

5. The Administrative Law Judge carefully reviewed and considered the evidence from Dr. Burgess. I saw and heard the plaintiff testify at the hearing on June 25, 2012. He was a credible and convincing witness. Likewise, the medical evidence from Dr. Madden was persuasive and convincing. Based upon Dr. Madden's well-structured and thoroughly expressed opinions, I made the factual determination that his opinion that the plaintiff will sustain a 35% permanent whole person impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, was credible and convincing.

6. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an AWW equal to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.

7. Based upon the totality of the evidence, both medical and lay, I made the factual determination that Mr. Miller cannot return to the type of work which he performed at the time of his work injuries and further that he cannot continue to earn his pre-injury level of wages for the indefinite future, thereby entitling him to enhanced permanent partial disability benefits under KRS 342.730(1)(c)1.

In light of the above findings of fact and conclusions of law, defendant's Petition for Recon-

sideration is hereby overruled and denied.

On appeal, Aisin again argues the ALJ erred in relying on the impairment rating assessed by Dr. Madden. Aisin argues Miller did not reach MMI until May 9, 2012. Thus, the rating assessed by Dr. Madden on February 2, 2012 was made before Miller reached MMI and was improper pursuant to the AMA Guides. Aisin notes the rating was assigned two or three months after the carpal tunnel surgery, well before the minimum six month recovery time specified in the AMA Guides. Aisin notes EMG/NC studies done on April 24, 2012 showed significant improvement and Drs. Gabriel and Burgess placed Miller at MMI on May 9, 2012. Aisin concedes the ratings of Drs. Madden and Dubin may be accurate measures of Miller's temporary impairment at the time they were assessed, but it argues it was unreasonable for the ALJ to use those ratings as a measurement of Miller's permanent impairment.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion with regard to every element of the claim. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). If the party with the burden of proof before the ALJ is successful and the adverse party appeals, the sole issue on appeal is whether the ALJ's

decision is supported by substantial evidence. See Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). Although a party may note evidence that would have supported a contrary conclusion, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974). As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88, 98 (Ky. 2000). Additionally, the ALJ has the discretion to choose which physician's opinion to believe. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

The authority to select an impairment rating assigned by expert medical testimony rests solely with the ALJ. See KRS 342.0011(35) and (36); Staples v. Konvelski, 56 S.W.3d

412 (Ky. 2001). Except under compelling circumstances, where it is obvious even to a lay person that a gross misapplication of the AMA Guides has occurred, the issue of which physician's AMA rating is most credible is a matter of discretion for the ALJ. See REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

Aisin is correct in noting Dr. Madden indicated Miller was not at MMI pursuant to the AMA Guides. It is clear that under normal circumstances, pursuant to the AMA Guides, a minimum of six months of recovery should take place prior to rating carpal tunnel surgery. However, Dr. Madden stated Miller's current symptomatology was concerning "for failure of the carpal tunnel release." He concluded his discussion of impairment by stating ". . . if Mr. Miller is to be considered at MMI at this time, then the above mentioned impairment rating is appropriate." We believe the ALJ could reasonably infer from Dr. Madden's report it is permissible to rate a carpal tunnel release sooner than six months post-surgery where it is determined there has been a "failure of the carpal tunnel release." The ALJ may draw reasonable inferences from the evidence. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). We believe the ALJ was well within his discretion as fact-finder in choosing the impairment rating assigned by Dr. Madden.

Accordingly, the Opinion and Order rendered July 2, 2012 by Hon. William J. Rudloff, Administrative Law Judge, and the July 24, 2012 opinion and order on reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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