

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 31, 2014

CLAIM NO. 201279265

GO HIRE EMPLOYMENT DEVELOPMENT, INC.

PETITIONER

VS.

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

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

RESPONDENTS

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Go Hire Employment Development, Inc. ("Go Hire") seeks review of the September 4, 2013, opinion and order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Shirley Miller ("Miller") sustained work-related low back and carpal tunnel syndrome injuries and awarding permanent partial disability ("PPD") benefits and

medical benefits. Go Hire also appeals from the September 30, 2013, order overruling its petition for reconsideration.

On appeal, Go Hire challenges the ALJ's award of income and medical benefits for carpal tunnel syndrome. Therefore, we will only discuss the evidence relating to that aspect of the award.

In the course of delivering lunches in a company van on July 3, 2012, Miller was involved in a motor vehicle accident ("MVA") which she alleged resulted in injuries to her chest, back, right arm, and both legs. As previously noted, there is no dispute the MVA caused a low back injury resulting in a compensable 5% impairment. At the time of the injury, Miller was working as a cook at Caney Creek Rehabilitation Center which entailed preparing and delivering the food.

Miller testified she was driving to Go Hire's Breathitt County center when a vehicle pulled onto the highway and struck the right side of the van. Upon impact, she swerved hitting a building and a pole located beside the building. Miller testified the right fender and the driver's door had extensive damage. The seatbelt cut into her shoulder and her glasses were knocked off. Miller was

taken by ambulance to the hospital in Breathitt County.¹ She testified her back, neck, leg, and chest hurt and her right arm was numb.

During her June 24, 2013, deposition, Miller testified she was still having pain and problems in her lower back and legs. As to whether she injured any other body parts, Miller provided the following testimony:

Q: Did you injure any other parts of your body such as your neck or your upper back?

A: No.

Q: Did you injure your arms or your wrist in any way?

A: No.

Q: Do you have any pain or symptoms in your neck or your arms?

A: No.

Q: Do you have any pain or symptoms in your elbows?

A: No.

Q: Do you have any pain or symptoms in your wrists?

A: No.

Q: Any numbness or tingling in your arms?

A: No.

¹The Kentucky River Medical Center.

Miller missed no work as a result of the accident. After the Caney Creek Rehabilitation Center closed on March 30, 2013, in April she began assisting clients at the Go Hire centers in Breathitt and Owsley Counties. The job to which she transferred is much lighter duty and does not involve any manual labor, bending, lifting, or carrying. Miller testified she is working full-time without any restrictions on her activities. Miller acknowledged she has diabetes and a thyroid disorder.

At the August 29, 2013, hearing, Miller testified she continues to experience back and leg pain. On direct, Miller provided the following testimony relative to her right wrist problems:

Q: Are you experiencing problems with your right wrist?

A: In my hand here and then there's - there's a knot right through there.

Q: And, did - is - is the car accident where that began? Had you noticed it before, Shirley?

A: No, I haven't noticed it before the accident - uh-uh.

On cross-examination, Miller testified as follows:

Q: Now, as to your wrist condition, you - you did not injure your right wrist in the accident did you?

A: This one - the ambulance driver asked me was I hurt and I told him both of my hands was [sic] hurting and numb and both of my legs were numb.

Q: Did you tell any doctor that you went to see after the accident that you had injured your right wrist?

A: I told him that both of my hands were numb, as far [sic] I could remember, and I told him both of my legs were numb.

Q: Okay - do you remember giving a discovery deposition in this case back at your attorney's office on June 24, 2013?

A: If I remember?

Q: Yes, ma'am.

A: It's been such - way back I can't - I do know my hand hurts.

Q: Okay.

A: And, as far as I can remember I know my hand was hurting. I also had a lot of numbness and tingling.

[text omitted]

Q: Ms. Miller, I asked you the following question, "Did you injure your arms or your wrists in any way?" Answer, "No." Do you remember giving that testimony?

A: Yes, I believe I do.

Q: Okay.

A: But I don't remember that far back about hurting. I do know I remember that I was numb and had tingling in my hands and arms and legs.

[text omitted]

A: My memory is not good.

Q: Okay.

A: Especially that morning. I was shaken up.

[text omitted]

Q: Ms. Miller if you could read along.

A: Uh-huh.

Q: I asked you the question, "Do you have any pain or symptoms in your wrists?" Answer, "No." Do you remember giving that testimony?

A: No, I don't.

Q: You don't recall it?

A: No.

Q: Question two forty-nine I asked you, "Any numbness or tingling in your arms?" Answer, "No."

A: Yes, I do have numbness and tingling in my feet, and hands, and legs.

Significantly, Miller testified her current average weekly wage ("AWW") is the same as it was on July 3, 2012, the date of injury.

Miller introduced the Form 107 completed by Dr. Arthur Hughes on April 23, 2013. He noted Miller stated she was transported by ambulance to the hospital and was

experiencing low back pain, and numbness in her arms, hands, and leg. With respect to symptoms in her hands, Dr. Hughes noted as follows:

Her hands were numb at first but she no longer has much problem here. Though she does note some tingling in both hands and the right forearm and hands bother her when she drives but do not awaken her. Her hands were okay prior to the accident. She has tended to drop things with either hand.

After conducting a records review, performing a physical examination, and reviewing MRIs of the cervical and lumbar spine, Dr. Hughes diagnosed right carpal tunnel syndrome.² With respect to causation, he noted "the symptoms of right carpal tunnel syndrome accompanied by physical findings of such were not present prior to the MVA and had been present since." Pursuant to the 5th Edition of the American Medical Association, Guides to Evaluating Permanent Impairment ("AMA Guides"), Dr. Hughes assessed a 6% impairment for right carpal tunnel syndrome attributable to the MVA. He opined Miller had no active impairment prior to the injury. With respect to the date maximum medical improvement ("MMI") was reached, Dr. Hughes stated as follows:

²Dr. Hughes also diagnosed: 1) Lower back w/o radiculopathy status post motor vehicle accident; 2) Paresthesias of both legs, mechanism uncertain.

She had not yet reached maximum medical improvement as she has had no treatment for the right carpal tunnel syndrome, though this is mild. If no further treatment for this is approved, then she is at maximum medical improvement as of this date.

Dr. Hughes believed Miller retained the capacity to perform the type of work she performed at the time of the injury. He suggested Miller "avoid repetitive right wrist motion and could use a wrist brace at times if needed." Dr. Hughes provided no other restrictions.

Go Hire introduced the July 31, 2013, report of Dr. David Jenkinson. Upon review of the July 3, 2012, records of Kentucky River Medical Center Emergency Department, Dr. Jenkinson noted Miller apparently reported her arms and elbows were sore and she just wanted to go to the hospital to be checked out. Miller complained of chest and right elbow pain. Pursuant to the AMA Guides, Dr. Jenkinson assessed a 5% impairment for the low back injury. Concerning Dr. Hughes' diagnosis of carpal tunnel syndrome and the impairment rating, Dr. Jenkinson stated as follows:

I am puzzled by this diagnosis and the impairment rating. At this current evaluation Ms. Miller did not describe any symptoms in her right hand that would be consistent with carpal tunnel syndrome. She did not complain of any symptoms in the right forearm or hand and I found nothing in the medical records to suggest that she had a

carpal tunnel syndrome. Carpal Tunnel Syndrome is a chronic compressive neuropathy of the median nerve and would not be caused by a single acute injury unless there was a major trauma to the wrist such as a displaced wrist fracture. I therefore must respectfully disagree with Dr. Hughes in that I find no evidence for carpal tunnel syndrome and therefore no basis for that impairment rating.

Go Hire introduced the August 20, 2013, report of Dr. Russell Travis based upon a review of medical records and imaging studies. With respect to Dr. Hughes' diagnosis of carpal tunnel syndrome, Dr. Travis stated the medical records made no mention "of a suggestion of carpal tunnel syndrome" until Miller was examined by Dr. Hughes. Dr. Travis explained carpal tunnel syndrome is not caused by trauma unless there was a fracture in the wrist area or bleeding in the carpal tunnel. He found it significant Miller had both a hyperthyroid and diabetic condition. Dr. Travis noted carpal tunnel syndrome is fifteen times more common in people with diabetes than in the general population. He also noted hyperthyroidism has a strong association with carpal tunnel syndrome. Accordingly, Dr. Travis concluded Miller did not suffer an injury to the wrist or hand in the MVA and disagreed with Dr. Hughes' assessment of an impairment rating for carpal tunnel syndrome.

Based on the opinions of Dr. Hughes, the ALJ made the "factual determination" Miller sustained injuries to her back, right arm, and legs as a result of the MVA. In basing the award of income benefits upon an 11% impairment, the ALJ made the following findings of fact and conclusions of law:

In this case, I make the factual determination that the plaintiff's sworn testimony was very credible and convincing. I also make the factual determination that the medical evidence from Dr. Hughes was credible and persuasive. I note that Dr. Hughes stated that the plaintiff would sustain a permanent whole person impairment of 11% under the AMA Guides, Fifth Edition. Dr. Hughes states that the plaintiff had not reached maximum medical improvement. I also make the factual determination that the evidence from Dr. Jenkinson was to the effect that at the time he examined the plaintiff on July 31, 2013 he found that there was no reason why she should have any work restrictions or limitations due to her July 3, 2012 work injuries. In other words, according to Dr. Jenkinson, she reached maximum medical improvement on July 31, 2013. I make the factual determination that Dr. Jenkinson's finding that the plaintiff had reached maximum medical improvement on July 31, 2013 is credible and convincing. The plaintiff's sworn testimony was that since April, 2013 she has received the same pay as she did at the time of her work injuries back in July, 2012. Since the plaintiff is now earning the same average weekly wage that she earned at the time of her work injuries and since

Dr. Hughes stated that she retains the physical capacity to return to the type of work which she performed at the time of her injuries, I make the determination that the plaintiff is entitled to recover permanent partial disability benefits from the defendant and its workers' compensation insurer based upon an 11% whole person permanent impairment due to her July 3, 2012 work injuries. I also make the factual determination that the plaintiff is likely to be able to continue earning the wage that equals or exceeds the wage which she had at the time of her injuries for the indefinite future. In other words, based upon the totality of the evidence, both lay and medical, I make the determination that the plaintiff's recovery for permanent partial disability benefits is limited to the 1 multiplier and that she is not entitled to make an enhanced permanent partial disability recovery. Of course, if her physical impairment and occupational disability should worsen, she has the option to move to reopen pursuant to KRS 342.125.

Go Hire filed a petition for reconsideration requesting further findings of fact regarding the issue of whether the 6% impairment rating for carpal tunnel syndrome is causally related to the MVA. It specifically requested the ALJ to review Miller's deposition testimony previously recited herein. The ALJ overruled the petition for reconsideration stating the opinion and order thoroughly discussed all of the contested issues raised by the parties.

On appeal, Go Hire argues the award of income and medical benefits for carpal tunnel syndrome is not supported by substantial evidence. Go Hire again cites to Miller's deposition testimony that she did not injure her arm or wrist and had no pain or symptoms in her wrist, arms, and elbows. Although the ALJ stated he considered Miller's testimony, Go Hire asserts further findings of fact are required since "under any reasonable interpretation of [Miller's] testimony, the carpal tunnel syndrome claim would have to be dismissed." It contends the ALJ's fact-finding regarding the carpal tunnel syndrome is deficient.

Go Hire also argues even though the ALJ determined Miller's testimony and Dr. Hughes' opinions were credible, the two are inconsistent and the ALJ never resolved this inconsistency. Consequently, the ALJ must provide "a sufficient basis for rationally resolving conflicts in the record." Go Hire notes its petition for reconsideration requested the ALJ provide specific findings of fact and state the basis for the award of benefits for carpal tunnel syndrome. However, the ALJ merely provided form language stating the evidence had thoroughly been reviewed. It argues it has never been provided an

explanation of the basis for the award of benefits for carpal tunnel syndrome.

Go Hire requests the opinion and order and the order overruling its petition for reconsideration be reversed and the matter remanded for entry of an order dismissing the carpal tunnel syndrome.

Miller, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including causation. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Miller was successful in that burden, the question on appeal is whether there was substantial evidence of record to support 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).

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). An 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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The

Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We first address the award of income benefits for carpal tunnel syndrome of the right wrist. Only Drs. Hughes and Jenkinson conducted a physical examination of Miller. Dr. Jenkinson noted Miller voiced no complaints regarding her hand and arm. On the other hand, Dr. Hughes obtained a history from Miller of hand and arm symptoms. Although Dr. Hughes assessed a 6% impairment rating, his impairment rating is not in accordance with the AMA Guides, since Dr. Hughes stated and the ALJ expressly found Miller had not attained MMI at the time of Dr. Hughes' examination. In the Form 107, Dr. Hughes opined Miller had not reached MMI since she had received no treatment for the carpal tunnel syndrome. However, he qualified that opinion by stating if further treatment was not approved then Miller was at MMI. The record is silent as to whether Miller received any further treatment of this condition. Thus, the record does not establish if Miller ever attained

MMI. This is confirmed by the ALJ's finding that Dr. Hughes stated Miller had not reached MMI.

The most significant finding by the ALJ is that Miller attained MMI on July 31, 2013, when Dr. Jenkinson examined Miller. Consequently, at the time Dr. Hughes examined Miller on April 23, 2013, she had not attained MMI. That being the case, pursuant to the AMA Guides, a permanent impairment rating could not and should not have been assessed at the time of Dr. Hughes' examination. Our holding is consistent with the mandates of the AMA Guides as it directs as follows:

2.4 When Are Impairment Ratings Performed?

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the

individual's activities of daily living.³

(emphasis added).

Because Dr. Hughes stated Miller was not at MMI, and there is no indication in the record as to whether Miller sought further treatment of her carpal tunnel syndrome, and the ALJ determined MMI was attained on July 31, 2013, Dr. Hughes' 6% impairment rating does not constitute substantial evidence supporting the award of income benefits for carpal tunnel syndrome. As there is no other medical evidence which supports an award of income benefits for carpal tunnel syndrome, the award must be reversed.

We next address the determination regarding the alleged carpal tunnel syndrome and the award of medical benefits for the condition. Even though Miller is not entitled to income benefits, she is entitled to an award of medical benefits if her alleged carpal tunnel syndrome is causally related to the July 3, 2012, MVA. We note the ALJ made no specific finding the MVA caused carpal tunnel syndrome in the right wrist. Rather, he found based on Miller's testimony and the "persuasive medical evidence from Dr. Hughes," Miller sustained injuries to her back,

³ See page 19 of the AMA Guides.

right arm, and legs due to the MVA. Miller's testimony relative to the existence of carpal tunnel syndrome is clearly circumspect. Without question, during her deposition taken two months after she saw Dr. Hughes, Miller denied sustaining an injury to her wrists and hands and that she experienced any symptoms which would support a finding of carpal tunnel syndrome due to the July 3, 2012, MVA. Conversely, Miller's testimony at the hearing and Dr. Hughes' report could constitute substantial evidence in support of a finding she developed carpal tunnel syndrome as a result of the MVA. However, based on the ALJ's findings, we are unable to determine the basis of his determination the MVA caused carpal tunnel syndrome. As noted by Go Hire, the determination Miller's testimony was very credible and convincing provides no guidance as to what portion of Miller's testimony the ALJ relied upon in determining the MVA caused the carpal tunnel syndrome. Therefore, the ALJ's determination regarding Miller's alleged carpal tunnel syndrome and the award of medical benefits must be vacated.

On remand, the ALJ must provide the specific portions of Miller's testimony he relies upon in determining whether she developed work-related carpal tunnel syndrome. This is essential since in its petition

for reconsideration Go Hire requested additional findings of fact regarding the ALJ's determination the carpal tunnel syndrome was causally related to the MVA, and the ALJ provided no additional findings of fact. The ALJ must also consider the fact that at the time Dr. Hughes diagnosed carpal tunnel syndrome, Miller had not attained MMI and also noted her condition was mild. Based on this statement by Dr. Hughes and his conclusion Miller had not reached MMI, if the ALJ determines the carpal tunnel syndrome is work-related, he must also determine whether it is a temporary or permanent condition.

Further, two months and one day after Miller saw Dr. Hughes, she testified she did not injure her arm or wrist, had no pain or symptoms in her wrists, and had no numbness or tingling in her arms. Miller's testimony is consistent with Dr. Jenkinson's July 31, 2013, report in which he noted Miller did not describe any symptoms in her right hand that would be consistent with carpal tunnel syndrome nor did she complain of any symptoms in the right forearm or hand. The ALJ must consider all of the above in determining whether the MVA caused carpal tunnel syndrome in the right hand and, if so, whether the condition is temporary or permanent. In the event the ALJ determines the carpal tunnel syndrome is either temporary or

permanent, an award of the appropriate medical benefits is necessary.

Accordingly, those portions of the September 4, 2013, opinion and order awarding income benefits for carpal tunnel syndrome and the September 30, 2013, order ruling on the petition for reconsideration reaffirming the award are **REVERSED**. Those portions of the September 4, 2013, opinion and order finding Miller sustained work-related carpal tunnel syndrome and awarding medical benefits for the condition, and the September 30, 2013, order ruling on the petition for reconsideration and reaffirming that determination and award are **VACATED**. On remand, the ALJ shall enter an amended opinion and award determining whether Miller has work-related carpal tunnel syndrome and whether that condition is temporary or permanent. Should the ALJ determine Miller sustained temporary or permanent work-related carpal tunnel syndrome, he shall determine the medical benefits to which Miller is entitled. The ALJ shall dismiss Miller's claim for income benefits for carpal tunnel syndrome and enter an amended award of income benefits based upon the 5% impairment assessed for the low back injury and an award of the appropriate medical benefits.

Finally, based on our review of the ALJ's findings we conclude the ALJ determined KRS 342.730(1)(c)1 is not applicable. However, it is apparent the ALJ determined Miller returned to work earning the same AWW she earned at the time of the injury. Therefore, KRS 342.730(1)(c)2 is applicable.

Since the ALJ found Miller returned to work at the same weekly wage she was earning at the time of the injury, and that finding is not contested, KRS 342.730(1)(c)(2) is applicable subject to the conditions set forth in Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d (Ky. 2010). Therefore, the ALJ's failure to provide for enhancement of the award by the two multiplier in his opinion and award, subject to the conditions set forth in Chrysalis House, Inc., supra and Hogston, supra, is error.

At some point during the 425 weeks Miller receives income benefits, her employment may cease due to reasons which relate to the disabling injury or a previous work-related injury. See Chrysalis House, Inc., supra and Hogston, supra. This may have already transpired. If Miller's employment ceases due to reasons which relate to the disabling injury or a previous work-related injury, she

is entitled to have her income benefits enhanced by the two multiplier upon a properly filed motion to reopen. See Chrysalis House, Inc., supra and Hogston, supra. This is consistent with KRS 342.730(1)(c)4 which allows a claim to be reopened in order to modify or "conform" the "award payments" with the "requirements of subparagraph 2," i.e., the two multiplier. On remand, the ALJ must include this language regarding applicability of the two multiplier in the amended opinion and award. While neither party has raised this issue on appeal, this Board may raise it *sua sponte*.

ALL CONCUR.

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