

RENDERED: OCTOBER 4, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000478-WC

HYDRO ALUMINUM NORTH AMERICAN.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-91098

MELISSA GREENWELL; HON.
DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

COMBS, JUDGE: Hydro Aluminum North America petitions for review of an opinion of the Workers' Compensation Board that affirmed the decision of the Administrative Law Judge (ALJ). The ALJ awarded Melissa Greenwell temporary total disability benefits (TTD), permanent partial disability benefits (PPD), and

medical benefits for a work-related injury. Hydro Aluminum contends that the Board erred by affirming the award based upon an impairment rating of a university evaluator. Finding no error, we affirm the award.

Greenwell was born in 1980; she has a high school diploma. Greenwell began working for Hydro Aluminum's recycling plant in 2008. She reported a work-related injury to her right arm, shoulder, and neck on May 14, 2009. After receiving treatment, Greenwell returned to work with a light-duty restriction. However, after August 2, 2010, Hydro Aluminum could no longer accommodate the restriction.

Dr. Erdogan Atasoy, an orthopedic surgeon and Greenwell's treating physician, eventually diagnosed Greenwell with right thoracic outlet compression. He also identified nerve irritation in the carpal tunnel region. He recommended major surgery to decompress the thoracic outlet space.

In September 2010, Greenwell underwent an independent medical examination conducted by Dr. Amitava Gupta, an orthopedic surgeon. Dr. Gupta agreed that Greenwell could be suffering with thoracic outlet compression. Nevertheless, Hydro Aluminum denied Greenwell's application for the resolution of her injury claim.

In November 2010, Greenwell submitted to a second independent medical examination. This examination was conducted by Dr. Timothy Kriss, a neurosurgeon. Dr. Kriss diagnosed Greenwell with "some type of muscololigamentous sprain complicated by some right ulnar nerve irritation at the

right elbow (capital tunnel).” He reported that muscle strain was consistent with Greenwell’s report of injury and indicated that “[u]lnar neuritis is the best explanation for the right upper extremity numbness and tingling.” Dr. Kriss firmly rejected thoracic outlet syndrome as a possible diagnosis. He calculated Greenwell’s whole person impairment due to right ulnar neuritis at 2% and recommended that Greenwell be treated by a neurologist.

In August 2011, Greenwell was examined by Dr. Satish Shah, a neurologist. In his summary of the examination, Dr. Shah wrote that Greenwell “definitely has thoracic outlet syndrome. . . .” Dr. Shah also diagnosed ulnar neuropathy at the right elbow and identified significant muscle damage associated with Greenwell’s work-related injury.

In December 2011, the ALJ, on his own motion ordered that Greenwell be referred for a university evaluation. In January, the ALJ reported that neither the University of Louisville nor the University of Kentucky had a physician available to provide a neurological evaluation of the claimant. As a result, Greenwell submitted to a university evaluation conducted by Dr. Craig Roberts, an orthopedic surgeon. In March 2012, Dr. Roberts diagnosed Greenwell with right thoracic outlet syndrome. In his deposition, Dr. Roberts explained that thoracic outlet syndrome can often appear as ulnar neuritis, and he reported that he had observed decreased sensation in the ulnar nerve distribution. Dr. Roberts calculated Greenwell’s whole person impairment at 16% and concluded that Greenwell could not return to her pre-injury work.

Following the evaluation conducted by Dr. Roberts, Hydro Aluminum deposed Dr. Kriss for a second time in July 2012. In his deposition, Dr. Kriss disputed the diagnosis of thoracic outlet syndrome made by Dr. Roberts, and he elaborated further upon his conclusion that Greenwell suffered from ulnar neuritis. Comparing the work of orthopedists to neurologists, Dr. Kriss explained that “we can end up both being able to take care of people with, say, an ulnar nerve or a thoracic outlet problem, but we come at it from very different directions.”

Deposition at 5.

Following a final hearing, the ALJ concluded that Greenwell suffered with ulnar neuritis. While he specifically rejected Dr. Roberts’s diagnosis of thoracic outlet syndrome, he assessed a 16% permanent, partial impairment based upon the results of the university evaluation undertaken by Dr. Roberts. The ALJ also concluded that Greenwell lacked the physical capacity to return to her pre-injury work. Consequently, the ALJ determined that Greenwell was entitled to the three multiplier provided for in Kentucky Revised Statutes(s) (KRS) 342.730(1)(c)(1) and an award of vocational rehabilitation benefits.

The ALJ rejected the petition for reconsideration filed by Hydro Aluminum, and the employer appealed to the Board. Before the Board, Hydro Aluminum argued that the ALJ’s assessment of a 16% impairment rating was not supported by the evidence. It also argued that Greenwell’s ulnar neuritis did not preclude a return to her former employment. The Board affirmed the ALJ’s award in all respects, and this petition for review followed.

The findings of an ALJ in favor of an injured worker will not be disturbed on appeal where the decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). The ALJ is the finder of fact and “has the sole authority to determine the quality, character, and substance of the evidence.” *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky.1993)(citation omitted). It is true that an ALJ is generally free “to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party’s total proof. . . .” However, the provisions of KRS 342.315(2) direct that the clinical findings and opinions of a designated university evaluator must be afforded presumptive weight by the ALJ. *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15 (Ky. 1977). Upon our review, we may only reverse the Board if it has overlooked or misconstrued the law or if it has flagrantly erred in its evaluation of the evidence so as to cause gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

In this matter, the ALJ heard conflicting testimony with respect to Greenwell’s diagnosis. He evaluated the evidence as follows:

The ALJ agrees with [Hydro Aluminum] that Dr. Roberts’ diagnosis could not have been more weakly supported by his testimony. Dr. Roberts failed to substantiate the diagnosis with any specificity, suggesting the diagnosis was applicable simply because “it’s really a composite of all the data if you want to call it evidence, what have you, that we use. And, you know, I can’t tell you there is any, you know, set criteria.” (p.7). The ALJ found

Dr. Kriss' testimony more convincing than Greenwell's work-related medical diagnosis is [*sic*] ulnar neuritis.

Opinion, Award, and Order at 3-4.

Next, the ALJ considered the calculation of Greenwell's PPD. He found as follows:

. . . the finding on Greenwell's diagnosis does not affect the calculation of her PPD benefits. Even though Dr. Kriss said Dr. Roberts got it wrong on the diagnosis, he said Dr. Roberts got it right on impairment. Even though Dr. Roberts diagnosed thoracic outlet syndrome, *Dr. Kriss conceded that Dr. Roberts had assigned impairment based on the nerve injury and not thoracic outlet syndrome.* [Hydro Aluminum] also conceded this fact in its Brief (pp. 7-8), and did not argue for relief contrary to an award of PPD with a 16% impairment rating.

Opinion, Award, and Order at 4. (Emphasis added.)

Finally, the ALJ concluded that Greenwell was entitled to the 3.0 multiplier of KRS 342.730(1)(c)(1) since she did not retain the physical capacity to return to her pre-injury work. To reach this conclusion, the ALJ relied upon "Dr. Roberts, Greenwell's highly credible testimony, and certain portions of Dr. Kriss' evidence. . . ." *Id.*

Upon its review, the Board evaluated the evidence and determined that the findings of the ALJ were not unreasonable. Recognizing its circumscribed role on review, the Board noted that the ALJ's conclusions and inferences were aptly supported by the evidence.

We, too, have evaluated the evidence in light of the employer's contentions. We conclude that the Board has not erred at all in its evaluation of this evidence – much less so as to cause gross injustice. Nor did it misconstrue or overlook any relevant law. The Board explained that the ALJ's rationale for his assessment of a 16% impairment rating was sufficient to support his findings, and we do not disagree. The ALJ was at liberty to pick and choose what evidence he found persuasive, and his reliance upon Dr. Kriss's determination that Dr. Roberts had assigned an impairment rating on the basis of ulnar neuritis was wholly within his prerogative. While Dr. Kriss and Hydro Aluminum criticized the quality of Dr. Roberts's assessment of Greenwell's impairment, the ALJ was entirely free to accept this university evaluator's opinion. Furthermore, as the Board correctly noted, whether an injured worker retains the physical capacity to return to the type of work performed pre-injury is a question of fact for the ALJ to determine based upon the totality of the lay and medical evidence. *Carte v. Loretto Motherhouse Infirmary*, 19 S.W.3d 122 (Ky. App. 2000). The ALJ's reliance upon the testimony of Dr. Roberts, Dr. Kriss, and the claimant herself with respect to this issue simply cannot be assailed.

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jo Alice Van Nagell

BRIEFS FOR APPELLEES:

None

Lexington, Kentucky