

RENDERED: DECEMBER 20, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000337-WC

MARCUS MILLER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-16-81441

LETCHER FIRE AND RESCUE;  
HON. GRANT S. ROARK, ADMINISTRATIVE  
LAW JUDGE; AND THE WORKERS'  
COMPENSATION BOARD

APPELLEES

AND  
NO. 2018-CA-000416-WC

LETCHER FIRE AND RESCUE

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-16-81441

MARCUS MILLER; HON. GRANT S.  
ROARK, ADMINISTRATIVE LAW  
JUDGE; AND THE WORKERS'  
COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, LAMBERT, AND SPALDING,<sup>1</sup> JUDGES.

ACREE, JUDGE: Marcus Miller petitions for review from an opinion of the Workers' Compensation Board (Board) affirming the opinion and order of the Administrative Law Judge (ALJ), which denied Miller permanent partial disability benefits. Letcher Fire and Rescue (Letcher) cross appeals, claiming the Board erred by *sua sponte* raising an issue Miller failed to preserve. Because the evidence in this case does not compel an opposite result, we affirm on both accounts.

**BACKGROUND**

Marcus Miller works as an emergency medical technician (EMT) for Letcher. On June 3, 2016, he and his partner were working a dialysis run and took

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<sup>1</sup> Judge Jonathan R. Spalding concurred in this opinion prior to the expiration of his term. Release of this opinion was delayed by administrative handling.

a patient home. The patient was an amputee who utilized an electric wheelchair. Upon arrival, Miller and his partner could not immediately locate the wheelchair. The patient suggested asking his son, who was in the house. Miller and his partner removed the patient from the ambulance, and Miller went to the front door to talk to the son. The son answered the door, but a dog ran from the house and jumped up Miller's leg. The dog bit Miller on his lower right abdomen and then on the top of his hand.

While Miller fought with the dog, his partner shouted from around the house that he found the wheelchair. Miller went to help his partner with the patient. Miller used his left hand to press a trigger that lowered the gurney. Simultaneously, the dog started coming at Miller again, distracting him from lowering the gurney. As the gurney lowered, Miller felt something pop in his arm.

Immediately after finishing his duties with the patient, Miller went to the hospital where he received a tetanus shot and had betadine put on his wounds. Several days later, he began having numbness and tingling in his left forearm and elbow radiating down through his fingers. Miller was referred to Dr. Sujata Gutti, who prescribed neurological medications and performed a nerve conductivity test. From there, Dr. Gutti referred Miller to an orthopedic doctor, Dr. Steven Carawan, who administered injections into Miller's arm. Miller also had an MRI, x-rays, and physical therapy. All the while, Miller did not miss any work because of his

injuries. However, he still complains of pain, numbness, and tingling in his left forearm, elbow, hand, and fingers.

This matter came before an ALJ, resulting in the entry of an opinion and order on October 23, 2017. At the hearing, the ALJ heard testimony from Miller's expert, Dr. William Kennedy. Dr. Kennedy assigned a 33% upper extremity impairment but failed to establish an AMA<sup>2</sup> whole-person impairment rating. On the other hand, Letcher's expert found a 0% AMA rating in accordance with the AMA Guides. Because Miller provided no AMA whole-person impairment rating, coupled with mild symptoms, the ALJ found Miller did not "carry his burden of proving compensable impairment." The ALJ was unpersuaded by Dr. Kennedy, concluding the doctor did not properly utilize the AMA Guides in determining Miller's impairment. The ALJ also found, "Quite simply, the medical record establishes [Miller] had only mild symptoms of lateral epicondylitis and Dr. Kennedy's impairment rating is not in keeping with plaintiff's [Miller's] minimal findings." The ALJ did not award any permanent disability income benefits and further found Letcher is not liable for Miller's medical expenses based on Dr. Daniel Primm's opinion that Miller did not require further treatment for his injuries. Miller appealed this order to the Workers' Compensation Board.

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<sup>2</sup> American Medical Association.

The Board affirmed the ALJ's findings as to permanent disability but remanded for a determination as to Miller's entitlement to medical benefits. The Board concluded substantial evidence supported the ALJ's findings. This appeal followed.

### **STANDARD OF REVIEW**

Our standard of review in workers' compensation claims differs depending on whether we are reviewing questions of law or questions of fact. "As a reviewing court, we are bound neither by an ALJ's decisions on questions of law or an ALJ's interpretation and application of the law to the facts. In either case, our standard of review is *de novo*." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009).

As to questions of fact, "[t]he ALJ as fact finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence." *LKLP CAC Inc. v. Fleming*, 520 S.W.3d 382, 386 (Ky. 2017) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985)).

Furthermore:

KRS 342.285 gives the ALJ the sole discretion to determine the quality, character, and substance of evidence. As fact-finder, 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 party's total proof. KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the

ALJ “acted without or in excess of his powers;” whether the decision “was procured by fraud;” or whether the decision was erroneous as a matter of law. Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion.

*Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 753-54 (Ky. 2011) (footnotes omitted).

In short, appellate courts may not second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. *Medley v. Board of Education, Shelby County*, 168 S.W.3d 398, 406 (Ky. App. 2004). Discretion is abused only when an ALJ’s decision is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). Generally, “arbitrariness” arises when an ALJ renders a decision on less than substantial evidence, fails to afford procedural due process to an affected party, or exceeds her statutory authority. *K & P Grocery, Inc. v. Commonwealth, Cabinet for Health Services*, 103 S.W.3d 701, 703-04 (Ky. App. 2002). “Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

## ANALYSIS

Miller contends the ALJ's and the Board's rulings were clearly erroneous because there was reliable, probative, and material evidence contained in the record showing Miller suffered a permanent disability. Miller argues the ALJ improperly based its findings on the opinions of Dr. Primm, who only examined Miller once. Miller's arguments do not persuade this Court.

The extent and duration of disability arising from the work injury must be determined by the ALJ considering the evidence as a whole. Both expert doctors testified to their opinions of competing permanent impairment ratings. Ultimately, the ALJ found Dr. Primm's testimony more compelling.

Permanent partial disability is defined in KRS<sup>3</sup> 342.0011(11)(b) as "the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work[.]" Additionally, "work" is defined as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy[.]" KRS 342.0011(34). The definition does not require the worker be rendered homebound by his injury but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000).

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<sup>3</sup> Kentucky Revised Statutes.

Additionally, KRS 342.0011(35) defines permanent impairment rating as the “percentage of whole body impairment caused by the injury or occupational disease as determined by the ‘Guides to the Evaluation of Permanent Impairment[.]’” The assignment of a permanent impairment rating is a question appropriately reserved to the medical experts, while the weight and credibility of medical evidence is a question exclusively within the province of the fact-finder. *George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288, 294 (Ky. 2004).

The ALJ, rather than the reviewing court, is the fact-finder. KRS 342.285. Therefore, the ALJ has sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. *Burkhardt*, 695 S.W.2d at 419. The ALJ has the discretion to choose whom and what to believe. *Addington Res., Inc. v. Perkins*, 947 S.W.2d 421, 422 (Ky. App. 1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party’s total proof. *Caudill v. Maloney’s Disc. Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may identify to a reviewing court evidence which would support a conclusion contrary to the ALJ’s decision, such evidence can serve as the basis for reversal only when there is a total absence of substantial evidence to affirm it. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). “[A]n ALJ may pick and choose

among conflicting medical opinions and has the sole authority to determine whom to believe.” *Copar, Inc. v. Rogers*, 127 S.W.3d 554, 561 (Ky. 2003) (citing *Pruitt v. Bugg Brothers*, 547 S.W.2d 123 (Ky. 1977)).

Where the decision of the fact-finder is in opposition to the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence was so overwhelming it compelled a finding in his favor and that no reasonable person could have failed to be persuaded by it. *Mosely v. Ford Motor Co.*, 968 S.W.2d 675, 678 (Ky. App. 1998). To clear this threshold, evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

After review of the record, we are not persuaded by Miller’s argument. Miller simply points out the evidence favorable to him and argues the ALJ should have sided with his expert. It is not the function of this court to reweigh the evidence. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). That role belongs to the ALJ. *Pruitt*, 547 S.W.2d at 124. The ALJ provided a thorough summary of the medical opinions and articulated its reasoning, finding Dr. Primm the most persuasive. Therefore, we agree with the ALJ’s and the Board’s conclusion that Miller suffered an injury, but not one that rises to the level of

permanent partial disability. We affirm the ALJ's finding as to permanent partial disability.

However, our analysis does not end there. Letcher also appeals. Letcher contends the Board exceeded its scope of review by *sua sponte* raising an issue of entitlement to medical expenses. Letcher argues Miller waived any argument regarding medical expenses because he failed to present the argument to the Board. We disagree.

The Board is permitted to raise issues *sua sponte*. *Christman*, 125 S.W.3d at 294; *see Whittaker v. Reeder*, 30 S.W.3d 138 (Ky. 2000). Here, the ALJ determined Miller required “no further treatment at this time” but made no determination for future medical treatment for what the ALJ determined was a work-related injury. Because Miller incurred a “temporary injury,” he is entitled to a period of medical benefits. Furthermore, the absence of an impairment rating does not preclude the ALJ, upon reopening, from awarding future medical benefits. *FEI Installation, Inc., v Williams*, 214 S.W.3d 313 (Ky. 2007). The Board did not make any specific findings or advocate for a specific outcome. It merely remanded the issue for the ALJ to make further determinations to ensure the conclusion is supported by the record. We affirm.

**CONCLUSION**

Based on the foregoing, we affirm the ALJ's and Workers' Compensation Board's opinions and orders.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE:

Daniel F. Dotson  
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BRIEF FOR APPELLEE/CROSS-  
APPELLANT:

W. Barry Lewis  
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