

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 20, 2022

CLAIM NO. 201892642

BAPTIST HEALTH SYSTEMS, INC.

PETITIONER

VS.

APPEAL FROM HON. GREG ALLEN,
ADMINISTRATIVE LAW JUDGE

ASHLEY UNDERWOOD
and HON. GREG ALLEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * *

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

STIVERS, Member. Baptist Health Systems, Inc. (“Baptist Health”) appeals from the February 3, 2022, Opinion, Award, and Order and the February 17, 2022, Order on Petition for Reconsideration of Hon. Greg Allen, Administrative Law Judge (“ALJ”). The ALJ awarded Ashley Underwood (“Underwood”) temporary total disability (“TTD”) benefits, permanent partial disability benefits, and medical

benefits for work-related injuries to her face, right upper extremity, right ankle, and foot.

Importantly, and as noted by the ALJ in the February 3, 2022, Opinion, Award, and Order, at no point during the pendency of the litigation did Baptist Health enter an appearance. Only after the February 3, 2022, Opinion, Award, and Order did Baptist Health enter an appearance when it filed a Petition for Reconsideration.

On appeal, Baptist Health asserts the ALJ erred by allowing Underwood to revise her stipulated average weekly wage (“AWW”). Baptist Health further asserts Dr. Jules Barefoot’s impairment rating cannot be relied upon by the ALJ because he did not expressly state Underwood had achieved maximum medical improvement (“MMI”).

The Form 101 alleges Underwood sustained work-related injuries “to her Face, Right Upper Extremity (Shoulder, Elbow and Wrist) and Right Ankle/Foot” on February 25, 2018, “when she slipped going into the building.”

Attached to the Form 101 is Dr. Barefoot’s June 10, 2021, Independent Medical Examination report. After performing a physical examination and a medical records review, Dr. Barefoot diagnosed a “[w]orkplace fall with an injury to the right wrist and right shoulder.” Dr. Barefoot opined that the cause of Underwood’s right wrist and right shoulder injuries as well as the need for surgery is the February 25, 2018, workplace injury. Dr. Barefoot further opined as follows regarding additional treatment Underwood may need for her work-related injuries:

Ms. Underwood does have evidence of an ongoing right-sided ulnar neuropathy.

She does have evidence of loss of grip strength in her right hand as well [sic] loss of sensation.

My recommendation would be for referral to a Hand Surgeon for further evaluation of this condition.

Additionally, she continues to have complaints of ongoing pain with loss of motion in her right shoulder and right wrist that may need further Orthopedic treatment.

Dr. Barefoot assessed a 17% whole person impairment rating for Underwood's "upper extremity impairment" pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides") with 100% attributable to the February 25, 2018, work injury. We note Dr. Barefoot's impairment rating includes a rating assessed for ulnar nerve neuropathy.

Several medical records of Dr. Keith Douglas were filed in the record. Pertinent to the issue on appeal is the June 9, 2020, record in which Dr. Douglas opined Underwood had reached MMI for her right wrist and hand condition. Dr. Douglas elaborated, in part, as follows:

We discussed findings with Ms. Watson today. Her MRI showed changes consistent with somebody who has had an ulnar shortening osteotomy. I do not see anything on the MRI that we would recommend intervention for any further surgery or treatment at this time. Her EMB study was normal. She could have some mild carpal tunnel syndrome symptoms that do not show up on the EMG study, although this is quite likely unrelated to her work. We discussed she could buy an over-the-counter wrist splint for this. **At this point, we discussed that she has reached MMI.** She can continue with regular duty work. She understands if she has any persistent issues with this wrist, we would be happy to see her back. Otherwise, at this point we can leave [sic] her follow up as needed. (emphasis added.)

The January 11, 2022, Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: permanent income benefits per KRS 342.730, TTD benefits, ability to return to work, vocational rehabilitation, unpaid or contested medical expenses, and proper use of the AMA Guides. Under “other contested issues” is the following: “entitlement to mileage reimbursement; effect of defendant’s failure to file notice of disclosures and notice of claim acceptance or denial (form 111); Plaintiff is claiming additional TTD between February 2021 and April 2021. Also, Plaintiff claims possible underpayment of TTD as to rate during all periods of TTD.” Under stipulations, AWW is listed as \$267.20.

At the January 26, 2022, hearing, regarding her pre-injury earnings, Underwood testified as follows:

Q: Okay. I want to talk a little bit about your earnings. Prior to your injury back in February of 2018, before the injury, how much were you making per hour?

A: 13.03.

Q: Was that 13.03?

A: Yes, sir.

Q: And that’s per hour?

A: Yes, sir.

Q: Okay. And on average – I know it could – it could vary, but on average about how many hours a week were you working?

A: Around 24 hours –

...

A: - week.

Q: When I do quick math of 13.03 per hour times 24 hours per week, I get a total of about \$312.72. Does that seem to be an accurate representation of what you were earning per week prior to your injury?

A: Yes, sir.

Later in the hearing, the following discussion took place between the ALJ and counsel for Underwood:

ALJ: All right. I don't believe there's any other witnesses that were listed. Are there any other changes, Mr. Evensen, we need to do with the BRC before we take your final arguments in the case?

Counsel: I don't believe so, Your Honor.

ALJ: We did have an average weekly wage stipulation. Are you still good with that, sir?

Counsel: Did we have – what – I think her testimony today is, average weekly wage of 312.72.

ALJ: And the stipulation was 267.20. Are you asking for that to be revised?

Counsel: Consistent with her testimony today, I'm asking that to be revised. And that- that her testimony is 312.72 as the average weekly wage.

In its first argument on appeal, Baptist Health asserts the ALJ erred by allowing Underwood to withdraw and revise her stipulated AWW at the time of the hearing because Underwood did not file a motion pursuant to 803 KAR 25:010 §16(2). On this issue, we affirm.

803 KAR 25:010 §16(2) states as follows:

(2) Upon cause shown, a party may be relieved of a stipulation if the motion for relief is filed at least ten (10) days prior to the date of the hearing, or as soon as practicable after discovery that the stipulation was erroneous.

As the ALJ noted in the February 3, 2022, Opinion, Award, and Order and the February 17, 2022, Order on Petition for Reconsideration, Baptist Health did not make an appearance in this litigation until after rendition of the February 3, 2022, Opinion, Award, and Order. Obviously, Baptist Health did not make an appearance at the January 26, 2022, hearing during which the ALJ, *in his discretion*, allowed Underwood to withdraw and revise her stipulation regarding AWW without filing a motion. While the above-cited regulation does state that a motion should be filed “at least ten (10) days prior to the hearing,” it also includes the following caveat – “or as soon as practicable after discovery that the stipulation was erroneous.” Based upon the exchange between Underwood’s counsel and the ALJ at the hearing, counsel discovered the stipulation regarding AWW was erroneous following Underwood’s testimony. Further, Underwood’s entitlement to TTD benefits, a contested issue, entailed arriving at the correct AWW.

The courts have long held that an ALJ has wide ranging authority to control the taking of evidence. This includes the ALJ relieving a party of a stipulation made at the BRC, particularly when the opposing party has not made an appearance in the litigation. The function of this 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 that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Under the circumstances of this case, we find that the ALJ acted within his discretion in relieving Underwood from her prior stipulation pertaining to AWW.

In its second argument on appeal, Baptist Health claims the ALJ erred by relying upon Dr. Barefoot's impairment rating, as he failed to opine Underwood had reached MMI. On this issue, we affirm.

This Board is fully aware that both the 2nd and 5th Edition of the AMA Guides require the claimant to have reached MMI before a permanent impairment rating is assigned. However, Baptist Health was dilatory in asserting its objections to Dr. Barefoot's impairment rating for the first time in a Petition for Reconsideration and appeal to this Board. That said, assuming, *arguendo*, that Baptist Health had made an appearance in the litigation and contested Dr. Barefoot's impairment rating in a timely manner, the ALJ still could have, in his discretion, relied upon Dr. Barefoot's impairment rating. As noted herein, the June 9, 2020, record of Dr. Douglas indicates he placed Underwood at MMI for her hand injury on that date. Dr. Douglas' finding of MMI rehabilitates Dr. Barefoot's June 10, 2020, impairment rating, at least for Underwood's hand injury. Further, the language of Dr. Barefoot's report regarding additional medical treatment for Underwood's shoulder permits the ALJ to infer that he believed she had reached MMI. As stated by Dr. Barefoot, Underwood "**may** need further Orthopedic treatment" for both her right shoulder and right wrist. (emphasis added.) Use of the word "may" in conjunction with the fact that Dr. Barefoot assessed an impairment rating pursuant to the AMA Guides allows for the ALJ to infer that Dr. Barefoot believed Underwood had reached MMI for her shoulder injury.

Regarding Baptist Health's assertion that Dr. Barefoot's impairment rating cannot be relied upon because he failed to utilize the word "permanent," we

once again note that this argument comes far too late in these proceedings. The appropriate time to have challenged this alleged omission on the part of Dr. Barefoot was during the pendency of the litigation either in the form of an objection, a Motion to Strike or on cross-examination. Further, despite Baptist Health's arguments to the contrary, there is no requirement that physicians use the word "permanent" when assessing an impairment rating. The simple use of a "magic phrase" neither ruins nor redeems a physician's testimony. Rather, it is the substance and essence of a physician's testimony and, in this case, whether the impairment rating was assessed pursuant to the correct edition of the AMA Guides, that determines whether it rises to the level of comprising substantial evidence. Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615 (Ky. 2004). The ALJ was free to infer that Dr. Barefoot's impairment rating is "permanent" due to the fact that he assessed the rating pursuant to the AMA Guides and meticulously cited to the tables and page numbers pertinent to his calculations in his June 10, 2021, report.

This Board is permitted to reach issues even if unpreserved and not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Consequently, the claim must be remanded to the ALJ for additional findings on an issue not raised on appeal. The ALJ's award of medical benefits encompasses the following injuries: "face, right upper extremity (shoulder, elbow, and wrist) and right ankle and foot." However, the ALJ failed to set forth any findings as to the nature of Underwood's alleged injuries to her face and right ankle/foot based upon the medical evidence in the record justifying an award of medical benefits for treatment of those body parts. On remand,

the ALJ must do so. If there is no medical evidence in the record supporting a finding Underwood sustained even temporary injuries to her face and right ankle/foot, the ALJ shall not include these body parts in his award of medical benefits.

Accordingly, on all issues raised on appeal, the February 3, 2022, Opinion, Award, and Order and the February 17, 2022, Order on Petition for Reconsideration are **AFFIRMED**. We **VACATE** the ALJ's award of medical benefits for Underwood's alleged face and right ankle/foot injuries and **REMAND** for additional findings in accordance with the views set forth herein.

ALVEY, CHAIRMAN, CONCURS.

MILLER, MEMBER, NOT SITTING.

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