OPINION ENTERED: June 4, 2012

CLAIM NO. 201000501

ABS GLOBAL, INC.
D/B/A GENUS PLC
D/B/A PIC NORTH AMERICA PETITIONER

VS. **APPEAL FROM HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE**

KIMBERLY NICOLE DRAPER
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. ABS Global, Inc. d/b/a Genus PLC d/b/a PIC North America ("ABS") seeks review of the opinion and award on remand rendered December 12, 2011 by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ") awarding Kimberly Draper ("Draper") permanent partial disability

("PPD") benefits and medical benefits for a work-related cervical injury. ABS also appeals from the order denying its petition for reconsideration entered January 27, 2012.

On appeal, ABS argues the ALJ erred in reversing his opinion entered December 20, 2010 originally dismissing Draper's claim. ABS also argues the ALJ's determination Draper's cervical condition is causally related to her work is not supported by substantial evidence. Finally, ABS argues it cannot be held responsible for any disability attributable to medical treatment for which it was unaware. We affirm.

In an opinion rendered December 20, 2010, the ALJ dismissed Draper's claim, stating as follows:

> The ALJ found the report and deposition of Dr. Kriss persuasive in rebutting the testimony of Dr. Taleghani, the cumulative trauma, and work-relatedness of Plaintiff's cervical condition. The ALJ finds that Plaintiff has not met her burden of proving that her cervical condition is work-related.

On December 29, 2010 Draper filed a petition for reconsideration stating Drs. Kriss, Taleghani and Barlow all opined her cervical condition was either due to the work injury or due to physical therapy undertaken for the work injury. Draper also argued the ALJ failed to address the compensability of her right elbow condition. Finally,

Draper argued the ALJ was required to make sufficient findings to apprise the parties of the basis of his opinion. In his order on reconsideration issued February 1, 2011, the ALJ stated he was, "persuaded by the report of Dr. Kriss, and supported by the treating medical records, that Plaintiff's cervical condition was not work related." The ALJ proceeded to award temporary total disability ("TTD") benefits, PPD benefits, and medical benefits for the right elbow injury.

An appeal to this Board followed. In a decision entered August 12, 2011 vacating and remanding the ALJ's decision, this Board held as follows:

> As a general rule, causation is a factual issue to be determined within the sound discretion of the ALJ as fact finder. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969). Nevertheless, it is well settled that where the matter being considered involves a question of medical causation that is not obvious to a layperson, it must be established by expert medical testimony. Elizabeth-town Sportswear v. Stice, *supra*; Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Where the injury at issue is alleged to have resulted from cumulative trauma, questions involving causation are subject to more stringent evidentiary standards. Hill v. Sextet

Mining Corp., 65 S.W.3d 503, 507 (Ky. 2001).

In dismissing this case on work-relatedness grounds, the ALJ found significant the fact there was no mention in the medical records of work causing Draper's cervical condition. The ALJ also noted the only mention of the etiology of Draper's cervical complaints by a physician occurred when Dr. Taleghani testified on August 17, 2010, four months after the claim was filed, stating Draper's neck condition was work-related. The ALJ also found significant, in dismissing the claim, the fact Draper's Form 101 did not have attached a medical report which included a medical opinion establishing a causal relationship between the work and Draper's cervical condition. In addition, the ALJ noted he found the medical report and deposition of Dr. Kriss persuasive in rebutting the testimony of Dr. Taleghani concerning the work relatedness of Draper's cervical condition.

As noted above, Draper filed a petition for reconsideration requesting additional findings. In her petition, Draper pointed out Dr. Kriss "admitted that plaintiff probably sustained a surgical injury while in physical therapy for work-related neck pain." Draper then stressed the other two physicians taken in this case both attributed Draper's cervical condition to work-related cumulative trauma. In denying the petition for reconsideration, the ALJ merely reiterated the same reasons he gave in his original opinion and order in dismissing Draper's application. However, nowhere in the order denying in pertinent part the petition for reconsideration did the ALJ address Draper's request for

additional findings in regard to Dr. Kriss' opinion concerning the possible causal relationship between Draper's work, her muscular aches and pains to her neck, the May 2009 physical therapy session, the cervical disc herniation and the need for cervical surgery.

The law is well-settled parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This is especially true when the ALJ failed to address an issue contained in Draper's petition for reconsideration which Draper has currently raised on appeal to this Board. For these reasons, we vacate and remand this matter for the ALJ to address the issue raised in Draper's petition for reconsideration. The ALJ is directed to make a finding based on the record whether there is a causal relationship between Draper's work, her muscular aches and pains in her neck, the May 15, 2009 physical therapy session, the cervical disc herniation, and the need for cervical surgery.

In Elizabethtown Sportswear v. Stice, *supra*, a claimant suffered a work-related back injury for which she received treatment for recurring pain up until July, 1984 when she was hospitalized for a lumbar myelogram. Within 24 hours of this procedure, the claimant lapsed into a coma and died. The only medical evidence before the Board clearly demonstrated the myelogram was treatment for the work injury and the worker's death was caused by an allergic reaction to the

dye used in the procedure. The Court, in Stice, pointed out there was no evidence from which the Board could conclude otherwise. In determining the death was compensable, the Court, in Stice, noted as follows:

> Professor Larson tells us that it is now uniformly held that aggravation of the primary injury by necessary medical or surgical treatment is compensable. He cites numerous examples, including exacerbation of a claimant's condition, or death, resulting from antibiotics, antitoxins, sedatives, pain-killers, anesthesia, electrical treatments, or corrective or exploratory surgery. A. Larson, *Workmen's Compensation Law*, Vol. 1, sec. 13.21 (1985).

We feel an injury sustained during physical therapy to treat Draper's work condition, if so found by the ALJ, should be treated no differently. PIC, in its brief to the Board, however, citing to Transport Associates v. Butler, *supra*, argues under Kentucky law it should not be held responsible for any disability attributable to medical treatment for which it is unaware. We reject this argument on two grounds. It is clear from the record on the date the physical therapy was administered, no medical expert had yet connected Draper's neck condition to her work. Moreover, there has been no indication the physical therapy was unreasonable, unnecessary or not appropriate. Notwithstanding the above, regardless of whether an employer participates in the selection of medical treatment, it is liable for disability due to the aggravation of a

> work-related injury as a result of the medical treatment. Transport Associates v. Butler, *at* 299.
>
> Therefore, if the ALJ determines from the record, (1) Draper suffered from work-related muscular aches and pains to her neck, (2) she was referred by her physician for physical therapy to treat this work-related neck condition, (3) she sustained an injury during the May 15, 2009 physical therapy session resulting in a herniated disc to her cervical spine, and (4) as a result of this injury sustained at physical therapy, she underwent a cervical fusion, as a matter of law, the evidence compels a finding of compensability. However, if the ALJ determines from the record there is no causal relationship between Draper's work, her referral to physical therapy, the herniated disc in her neck, and the need for surgery, he is to so state the reasons with specificity. We remind the parties we are not a fact finding body. We also note we are not compelling any particular result.

In his opinion on remand rendered December 12, 2011, the ALJ determined Draper sustained a cervical injury requiring surgery due to the physical therapy she underwent for treatment of a work-related cervical sprain. The ALJ found as follows:

> On the basis of his review on remand, and concluding that Dr. Barlow actually indirectly agreed with Dr. Taleghani that Plaintiff's symptoms in September/ October 2008 were work related when he said "and 10% due to her job-related

activities." Even though Dr. Kriss' criteria was not met, the ALJ finds that the sprain, as found by Dr. Kriss, was work-related. He did not question that Plaintiff had pain in performing her work. The ALJ further finds that the reason for Plaintiff's referral to physical therapy was the sprain as diagnosed by Dr. Kriss and during treatment for that sprain during PT, in lifting weights, Plaintiff sustained a rupture of the C5-6 disc, necessitating fusion surgery performed by Dr. Taleghani. The mechanics of cervical disc rupture injury during treatment at PT were agreed upon by Drs. Taleghani, Kriss and Barlow. Under the case law cited by the Board and Plaintiff, the ALJ finds the ruptured disc, treatment, and impairment related thereto is compensable.

The ALJ states that with his detailed study of Dr. Barlow's report in Paragraph 6, in which he stated that 10% of Plaintiff's impairment was related to "her job-related activities," he obviously was referring to the symptoms experienced by Plaintiff in September/October, 2008. With Drs. Taleghani and Barlow agreeing, and Plaintiff in speculating with her supervisor on the work activities as related to her symptoms (and thus by implication excluding any non-work activities), the ALJ disclaims any reliance on Dr. Kriss' report in which he diagnosed a sprain, stated Plaintiff experienced pain at work, but said there was nothing that [sic] to her work. Certainly, in cumulative trauma, there is not a specific incident. It is now clear to this ALJ that Plaintiff's statement to her supervisor that she thought her symptoms were caused by work "relates" that to the work. Dr. Taleghani said

Plaintiff had mentioned that she thought her work was related. Dr. Taleghani must not have picked upon on these complaints to include it in diagnosis during the time of treatment as he did her elbow.

The ALJ will state again that he did not fully appreciate the role of Dr. Taleghani in failing to diagnose cumulative trauma at the time of his diagnosis of the elbow. His role was that of a treating physician rather than a forensic IME physician as Dr. Kriss, who does IMEs for defendant/ employer's[sic] almost exclusively. Dr. Taleghani does not do IMEs, nor does he calculate and assign impairment ratings. The ALJ practiced law for many years and is aware that at deposition attorneys may get more from a physician in talking to them prior to a deposition. Dr. Taleghani was furnished a detailed job description by Plaintiff's attorney just prior to his deposition. (Dep., P. 7). Unlike physicians that do IMEs regularly, he may not even have given causation any thought, as he is not concerned with any compensation claims. The regulations require that a statement of causation by a physician be filed with the Form 101. This is in there for a reason. Otherwise, an attorney (and the ALJ is not saying Plaintiff's attorney) could file a claim and then shop around for a physician that will diagnose cumulative trauma at some point prior to hearing, and thus require an employer to expend time, effort and expense in defending a baseless claim. The Board mentioned, without comment, the ALJs[sic] concern that the diagnosis came four months after filing the claim. Since the Statute of Limitations does not run until there is a diagnosis, the job

> description should have been presented to Dr. Taleghani before the Form 101 was filed. The ALJ is aware that such a written request might have gotten lost in the shuffle since Dr. Taleghani was no longer treating the patient, and a direct face-to-face discussion prior to deposition may have gotten the doctor's undivided attention, but the ALJ is convinced that 803 KAR 25.010 §5(d)(2) is there for good reason.
>
> The ALJ was persuaded by the report of Dr. Barlow that Plaintiff did not retain the physical capacity to return to the type work that she performed at the time of injury. Therefore, she is entitled to the three multiplier because of her cervical fusion and elbow.
>
> Following the entry of the original decision herein, the parties entered into a settlement for the elbow based on the award and Dr. Barlow's impairment rating. Plaintiff has included in her brief as the relief requested a calculation of benefits based on 25% WPI. He calculated the benefits as follows: 25% x 1.15 ("grid factor")= 28.75% x 3 x 4367.9784 (stipulated compensation rate)= $317.37 x 425 weeks, starting 4/8/2010.

ABS filed a petition for reconsideration on December 27, 2011 asserting the ALJ exceeded his authority on remand. Specifically, ABS argued:

> In categorically rejecting the testimony of Dr. Kriss, the administrative law judge exceeded the scope of his authority and discretion on remand. The sole stated purpose behind the Board's remand was for the

> administrative law judge to identify those specific facts which he found persuasive and relied upon in dismissing the Plaintiff's cervical claim on the basis of causation. The Board did not give the administrative law judge carte blanche to totally disregard his original opinion and start all over again from scratch.

In the alternative, ABS argued if the ALJ did not exceed the scope of his authority, it could not be liable for disability stemming from treatment for which it was unaware. Specifically, ABS argued as follows:

> Even if the administrative law judge had the authority to completely reverse his causation finding on remand, PIC contends that the discreet cervical injury of May 15, 2009 still should not be regarded as a compensable work-related event. Under Kentucky law, a defendant-employer such as PIC is not responsible for any disability attributable to medical treatment that it is totally and completely unaware of. ***Transport Associates v. Butler***, 892 S.W.2d 296, 299 (Ky. 1995).

We will first address ABS' contention the ALJ exceeded his authority in altering his determination regarding causation of Draper's cervical complaints. In our previous opinion, we vacated the ALJ's decision regarding causation, and specifically directed the ALJ to:

> make a finding based on the record whether there is a causal relationship between Draper's work, her muscular aches and pains in her neck, the May

> 15, 2009 physical therapy session, the cervical disc herniation, and the need for cervical surgery.

In directing the ALJ to make a determination regarding causation based upon a proper review of the evidence, this Board did not direct any particular result. On remand, after conducting an analysis, the ALJ made a determination regarding causation of Draper's cervical condition as he was instructed to do.

The vacating of an opinion, in essence, renders it null and void. Vacate is defined as, "to nullify or cancel, make void, invalidate" Black's Law Dictionary 1388(9th ed. 2009). Thus, with regard to a finding that has been vacated, the earlier finding is without force or effect, as if it never existed. Vacating an ALJ's decision is one of the authorized directives from a reviewing body. Skelton vs. Roberts, 673 S.W.2d 733 (Ky. App. 1984). The effect of our directive was to set aside the ALJ's ultimate conclusions.

On remand, we believe the ALJ followed our directives, understood and accurately addressed the issues presented for determination, and supported his conclusions with adequate findings of fact supported by the evidence. Under these circumstances, his decision should not and will not be disturbed on appeal. KRS 342.285; Wolf Creek

Collieries vs. Crum, 673 S.W.2d 735 (Ky. App.1984); Special Fund vs. Francis, 708 S.W.2d 641 (Ky. 1986); and McCloud vs. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Therefore, we affirm the ALJ's determination of work-relatedness of the cervical condition and the award of PPD benefits and medical benefits based upon that determination.

ABS also argues that the ALJ's determination the cervical condition was causally related to her work was not supported by substantial evidence. "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). As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ PepsiCo, Inc., 951 S.W. 2d 329 (Ky. 1997). The 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). 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Contrary to ABS's assertion, substantial evidence supports the conclusion Draper's cervical condition stemmed from treatment she received for her work-related neck strain thereby making it compensable. This is supported by Dr. Taleghani and to a lesser extent by Dr. Kriss who indicated surgery was performed due to further injury she sustained in physical therapy. Specifically, Dr. Kriss testified as follows:

> Q. Looks like she might have suffered a herniated disc at the hands of the physical therapist while the physical therapist - -
>
> A. Yeah, that's quite - -
>
> Q. - - was treating her for neck pain?
>
> A. That is - - yes, that is quite possible. That actually makes the most sense.

We therefore believe substantial evidence exists to support the ALJ's determination, and we therefore affirm.

Finally, ABS argues based upon Transport Associates v. Butler, 892 S.W.2d 296 (Ky. 1995), it cannot

be held responsible for any disability attributable to medical treatment of which it was unaware. We previously rejected this argument in our opinion rendered August 12, 2011, and we do so again. We adopt the analysis we previously set forth in our opinion entered August 12, 2011 as set forth above. The ALJ, on remand, determined Draper's surgery was necessitated by further injury she received in physical therapy for treatment of a work-related cervical strain. This is supported by Dr. Kriss' testimony. We therefore believe in accordance with Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986), the ALJ did not err by determining on remand ABS was responsible for all treatment and impairment resulting from her cervical condition which culminated in surgery.

Accordingly, the ALJ's decision on remand rendered December 12, 2011, and order on reconsideration entered January 27, 2012 are hereby **AFFIRMED**.

ALL CONCUR.

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