OPINION ENTERED: March 21, 2012

CLAIM NO. 200980044

AMY POWELL PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

UNITED PARCEL SERVICE
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Amy Powell ("Powell") seeks review of the decision rendered November 18, 2011 by Hon. R Scott Borders, Administrative Law Judge ("ALJ"), dismissing her claim for benefits for a lower back injury and awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for a right

knee injury she sustained while working at United Parcel Service ("UPS") on December 13, 2008. No petition for reconsideration was filed. On appeal, Powell argues the ALJ committed reversible error in dismissing her lower back claim by misinterpreting the medical and lay evidence on record, as a whole.

The ALJ dismissed Powell's lower back injury claim finding no causal connection between her lower back injury and the work-related incident occurring on December 13, 2008. In so finding, the ALJ relied upon Powell's testimony and the medical opinions of Dr. Bonnarens and Dr. Best. Powell's right knee injury is not at issue. We affirm.

Powell testified by deposition on July 9, 2010 and again at the hearing held September 20, 2011. Powell is a resident of Louisville, Kentucky and was born on December 5, 1956. Powell earned her GED and obtained vocational training in printing. Powell became employed as a package handler by UPS in 1998 and was acting in that capacity on December 13, 2008. As a package handler, Powell loaded and unloaded packages to and from airplanes, which required her to push, pull, pack and lift up to 70 pounds.

Powell testified on December 13, 2008, she felt immediate pain in her right knee and leg when she "got out of the truck too hard" and "jammed" her whole body. When

asked to describe the pain she experienced on December 13, 2008, Powell testified as follows at her deposition:

> A: Yeah. When I hit the ground I felt it. It hurt really bad. I felt something - - I felt something go across my back too. It felt on my lower back like lightning or something. But it went straight away, and as soon as it went away I felt my knee hurting real bad. That's all that hurt. It really hurt bad.
>
> . . . .
>
> Q: What was it that you felt in your lower back at that time?
>
> A: Like it felt like a lightning strike or something, you know, like - - I don't know how to explain it.
>
> Q: But that went away immediately, you just felt it for a second and it went away?
>
> A: It did, and I never thought no more about it. They sent me to Baptistworx.
>
> . . . .
>
> Q: You said when this first happened December 13, 2008 you felt this like lightning in your lower back and then it just went away?
>
> A. Yeah. Right when I hit it's just like a real quick thing, you know, it just felt like it just shot against my back and it was gone.
>
> Q: When was that next time after that though that you - -
>
> A: I never felt that again. Never felt that again.

> Q: But when is the first time you had back pain after that.
>
> A: After I had my surgery when I got off all my pain medicine that I have been taking, I still didn't feel right. I still felt like I couldn't get up and walk normally. And that is it.
>
> Q: So the first time you felt the pain in your back was sometime after you quit taking the pain meds after the knee surgery?
>
> A: Yea, really.
>
> Q: Other than when you first stepped out of the truck you felt this like lightning across your lower back, and then you didn't feel pain in your back until after the knee surgery at some point?
>
> A: Yes.

At the hearing, Powell again testified that on December 13, 2008, she experienced a sensation in her back which immediately went away. She further testified:

> Q: Okay, and then after the knee surgery, you started feeling pain in your back at that point?
>
> A: No, not really - - no, honestly, I - - for a long time I didn't feel too much pain. I felt it mostly through my legs and my feet. It was like - - it was like a charlie horse running up your leg, you know. You could actually see my veins popping up in my leg when it would happen.

> Q: Now, are you saying this was in both legs, these symptoms?
>
> A: No just the - - charlie horse type pain was in this leg, but I've had some pain in this leg too because I've had to compensate probably for the other leg and my back. . .
>
> . . .
>
> Q: And that charlie horse in the right leg and then the symptoms in the left leg, those came up after the knee surgery?
>
> A. No, they came up right when I had the incident.

Powell testified she immediately informed her supervisor she had injured her right knee and leg, but admitted she did not report a back injury. Powell went to Baptistworx on December 13, 2008, where she received treatment for her right knee and began physical therapy, during which time Powell was restricted to light duty work. Approximately three to five months later, Powell informed UPS her right knee was worsening and she subsequently went to Baptist East Hospital in June 2009. Baptist East referred her to Dr. Reutlinger, an orthopedic surgeon, who performed right knee surgery on September 11, 2009. Powell testified she was off work from August 21, 2009 to November 15, 2009, and returned to work for approximately one week. During this time, Powell pulled muscles in her right knee

and subsequently could not return to work. Powell attempted to work again for a couple of days in December, but her leg pain worsened. Powell has not returned to work for UPS or anywhere else since that time.

Powell testified after her knee surgery, Dr. Reutlinger referred her to Dr. Djurasovic, an orthopaedic surgeon, for her lower back complaints. He also recommended chiropractic treatment which Powell received three or four times. Dr. Djurasovic ordered a lumbar MRI, recommended lumbar fusion surgery and referred her to pain management. Powell testified the back surgery was denied by the workers' compensation insurer. Powell testified she informed all medical providers of her right leg pain, describing it as feeling like a "charlie horse," which she later experienced in her left leg.

Both Powell and UPS submitted medical records from Baptistworx and Dr. Reutlinger. Powell presented at Baptistworx on December 13, 2008 complaining of right knee pain after she stepped out of a truck at work. Baptistworx diagnosed a right knee strain, ordered x-rays, and referred Powell to physical therapy. Medical notes dated December 17, 2008 indicated her right knee condition had improved, but stated Powell still had pain with radiation below the knee, and leg pain which she described as a "charlie horse".

On January 7, 2009, Powell was released to work with no restrictions.

Powell presented at Baptist East Hospital emergency room in June 2009 for right knee complaints. Thereafter, she was referred to Dr. Reutlinger and began treatment on August 19, 2009 for her right knee injury. Dr. Reutlinger diagnosed a torn medial meniscus, chondromalacia of the patella, osteoarthritis and thinning of the cartilage. On September 11, 2009, Dr. Reutlinger performed a partial medial meniscectomy. Thereafter, Powell returned for several follow-up visits and began physical therapy. Dr. Reutlinger indicated she may require right knee replacement surgery due to her pre-existing osteoarthritis.

On December 8, 2009, Powell complained of a new injury occurring two weeks prior when she returned to work and experienced pain from her posterior right proximal thigh to the top of her foot. Dr. Reutlinger ordered NIVS and an EMG, both of which were normal, and opined she suffered a self-limiting, soft tissue injury.

On January 22, 2010, Dr. Reutlinger noted Powell's right knee had improved but she still experienced intermittent giving away. Dr. Reutlinger then noted:

> she tells me now that she has hurt her back in the past and did tell her work that she had a back problem; however

> this was not recently. This raises the question of some form of stenosis or something else in the lower lumbar spine that could intermittently cause her to have giving away.

After lumbar x-rays were completed, Dr. Reutlinger diagnosed grade I spondylolisthesis at the L5-S1 and degenerative changes. After continued complaints, Dr. Reutlinger noted he was waiting approval for a lumbar spine MRI and he referred Powell to the Leatherman Spine Center. On February 26, 2010, Dr. Reutlinger noted:

> it is conceivable that when she fell and hurt her knee, she could have hurt her back at the same time. The knee pain was the most predominant complaint and therefore caught all of the attention.

Dr. Reutlinger also noted it was difficult to differentiate between where Powell's right knee problem ended and her spinal problems began. In letters dated December 1, 2009 and March 29, 2010, Dr. Reutlinger opined Powell had reached maximum medical improvement ("MMI") regarding her right knee and assigned a 1% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), due to the torn meniscal cartilage and partial meniscectomy.

Powell submitted the medical records of Dr. Mladen Djurasovic from Norton Leatherman Spine Center, with whom she began treating on April 28, 2010. He noted Powell complained of pain beginning in her back, radiating into the left buttock and into the right leg, with numbness and tingling. Dr. Djurasovic notes Powell's symptoms all began when she stepped out of a work truck in 2008 and jammed her leg. After performing diagnostic testing, Dr. Djurasovic diagnosed L4-5 and L5-S1 degenerative spondylolisthesis with spinal stenosis and he treated with physical therapy and three epidural blocks. On November 30, 2010, Dr. Djurasovic noted her back symptoms were work-related since the symptoms started with the December 2008 incident, and she did not have any prior back problems. After she failed to improve, Dr. Djurasovic recommended a lumbar decompression and fusion surgery.

Powell submitted the medical report of Dr. Bilkey who evaluated her on September 20, 2010. Dr. Bilkey noted initial treatment concentrated on Powell's right knee, although she advised she suffered from bilateral leg pain with cramping and pain radiating into her foot since the December 13, 2008 accident. Dr. Bilkey diagnosed a strained medial meniscus tear and aggravation of degenerative joint disease requiring arthroscopic surgery. Regarding her lower

back, Dr. Bilkey diagnosed lumbar strain resulting from either the December 13, 2008 work injury or resulting from an additional injury that occurred after her return-to-work release by Dr. Reutlinger. Dr. Bilkey opined Powell had reached MMI for her right knee, but not for her lower back. Dr. Bilkey assessed a 3% impairment rating for her right knee and a 5% impairment for her lumbar spine pursuant to the AMA Guides. He further noted the impairment rating for the lower back injury was applicable only if Powell was denied further treatment for her lower back.

Dr. Bilkey concluded the lower back injury to be work-related because there was no history of lower back symptoms prior to December 13, 2008. He noted a new injury was documented by Dr. Reutlinger on December 8, 2009 when she returned to work and further noted, given the nature of her knee injury, low back pain was expected. Dr. Bilkey recommended continued treatment with Dr. Djurasovic and restricted her from lifting over 30 pounds, and avoid squatting, crawling, kneeling, lengthy carrying, repetitive bending of the trunk or knee and limit stair climbing. Dr. Bilkey opined these restrictions preclude her from being able to resume work as a package handler at UPS.

Powell was evaluated by Dr. Bonnarens, an orthopedic surgeon, on March 15, 2010 at UPS' request. Dr.

Bonnarens noted the initial accident occurred on December 13, 2008. Powell stated when she returned to work in December 2009 or January 2010 following her right knee surgery, she experienced pain in her leg when she was pulling a can loaded with packages. Regarding Powell's right knee, Dr. Bonnarens diagnosed her as status post partial medial meniscectomy with pre-existing degenerative joint disease. He assessed a 1% impairment rating pursuant to the AMA Guides and found her to be at MMI. Regarding her back, Dr. Bonnarens reviewed medical records and noted:

> Patient has an L5-S1 grade I spondylolisthesis, which is something that occurred when she was in [sic] an adolescent. She additionally had degenerative changes noted on the back, however, there is no evidence of herniated disc . . . . There is no objective evidence of problem related to her back that is related to a work injury. The patient has numerous comorbid and preexisting conditions including the generalized DJD, obesity, etc.

Dr. Bonnarens noted Powell can return to work without restriction for both knee and back injuries and needs no further treatment beyond over-the-counter medication for her knee.

UPS also submitted the medical report of Dr. Michael Best, an orthopedic surgeon, who evaluated her on

June 29, 2011. Dr. Best notes Powell stated she experienced right knee pain and momentary back pain on December 13, 2008. Dr. Best reviewed medical records and performed an evaluation. He then diagnosed a work-related right knee injury occurring on December 13, 2008, resulting in a medial meniscus tear, status-post arthroscopy and partial medial meniscectomy, pre-existing chondromalacia patella, malignant obesity and chronic low back pain with mild degenerative change. Dr. Best opined the December 13, 2008 accident was the cause of Powell's right knee problems from which she had reached MMI. Dr. Best assessed a 1% impairment rating for her knee pursuant to the AMA Guides and opined she is capable of returning to unrestricted work activities. Regarding her lower back, Dr. Best opined:

> [T]here is no medical evidence that would support that the patient's low back pain is related to her work injury. Clearly, there was no complaint of back pain for one year after the work injury. There is no new or acute process. There is no disc herniation or nerve root impingement. There is chronic change, but there is no evidence to support that this degenerative change was worsened by the work injury.

Dr. Best also noted Powell's back problems were not an arousal of a dormant condition. Dr. Best related her back problem to her weight and recommended she lose at least 75

pounds, be more active and perform an aggressive rehabilitation program. He also opined no additional diagnostic testing or surgical procedures, including the recommended fusion, were necessary for her back problems.

In his decision rendered November 18, 2011, the ALJ awarded TTD benefits, PPD benefits based upon a 1% impairment rating and medical benefits for her right knee injury. The ALJ found Powell retains the physical capacity to return to the type of work she was performing at UPS prior to December 13, 2008, due to the effects of her right knee condition only. The ALJ then found Powell did not meet her burden of proving her lumbar spine condition is causally connected to the December 13, 2008, work-related incident. In his decision, the ALJ stated:

> The first issues for determination are whether the Plaintiff suffered an injury as defined by the Act and whether or not her lumbar spine condition is causally related to the December 13, 2008, work-related incident.
>
> KRS 342.0011 (1) defines injury as meaning, "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings."
>
> The Plaintiff bears the burden of proof and risk of non-persuasion in each

and every element of her case. *Snawder vs. Stice*, 576 SW 2d 276 (KY App. 1979) *Jones vs. Newberg*, 890 SW 2d 284 (KY 1994).

Ms. Powell argues that on December 13, 2008, when she stepped off the truck she felt the immediate onset of right knee pain like lightning going through her lumbar spine. However, she testified that the back pain immediately went away and she did not report a back injury to UPS.

Ms. Powell testified that she continued working for UPS through August of 2009 when she came under the care of Dr. Reutlinger, who performed surgery on her right knee on September 9, 2009. She testified that thereafter, after coming off of the narcotic pain medication, then she began to realize that she had low back pain that was radiating into her lower extremities. The medical records from Dr. Reutlinger in January of 2010 indicate that she has a back problem. On February 26, 2010, Dr. Reutlinger states it is conceivable that when she fell and hurt her knee she could have hurt her back at the same time.

Ms. Powell thereafter came under the care of Dr. Djurasovic, who opined that he believes her back condition arose from the December 2008 work-related incident. However, Dr. Djurasovics[sic] records indicate that her symptoms started at that time which caused him to think it is related to her work-related accident. This is contrary to Ms. Powell's testimony that she did not begin having back pain until after her knee surgery in September of 2009 when she came off of the narcotic pain medication.

Ms. Powell also supports her argument with testimony from Dr. Bilkey, who opines that her low back problems are due to her work-related injury based on the fact that there is no history of the low back pain problem in existence prior to the December 13, 2008, work-related injury.

UPS argues that Ms. Powell has not met her burden of proving that her low back condition was caused by the December 13, 2008, incident. In support of this position, UPS submitted medical records from Baptist Worxs[sic] that show no complaints whatsoever of the low back problem at [sic] time of the initial accident. They[sic] also submit medical records from Dr. Reutlinger reflecting that he treated her from August 2009 to January 2010 without complaints of back pain.

In addition UPS submitted medical proof from Dr. Best and Dr. Bonnarens, both who opined Ms. Powell's lumbar spine condition is not related to the December 13, 2008, work incident and is likely due to her morbid obesity, she stands 5 feet half-inch tall, and her weight 298 pounds.

In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge is simply not persuaded that Ms. Powell has met her burden of proving that her lumbar spine condition is causally connected to the December 13, 2008, work-related incident.

In so finding, the Administrative Law Judges[sic] persuaded by the opinion of Dr. Bonnarens and Dr. Best. In addition, Ms. Powell did not complain of [sic] in the [sic] low back problems until January of 2010, over a year after

> the initial injury to her right knee. The condition in her lumbar spine for which the surgeons want to operate consist of Grade I spondylolisthesis which is a congenital condition.
>
> The Administrative Law Judge is therefore of the opinion that the evidence simply does not substantiate the Plaintiff's arguments[sic] that her current lumbar spine condition was causally related to the effects of the December 13, 2008, work-related injury. Therefore, her claim for Worker's Compensation benefits resulting from a low back injury shall be dismissed.
>
> Therefore, due to the foregoing findings the issues of whether or not Ms. Powell is entitled to future medical benefits for her low back condition, whether she gave due and timely notice of her low back condition, and whether or not she is entitled to TTD benefits as a result of her low back condition are deemed moot.

Powell did not file a petition for reconsideration. Therefore, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is any substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the

ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

As the claimant in a workers' compensation proceeding, Powell had the burden of proving each of the essential elements of her cause of action including causation/work-relatedness of the injuries alleged. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Powell was unsuccessful before the ALJ regarding causation, the question on appeal is whether the evidence compels a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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). Although a party may note evidence supporting a different outcome than 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 200). 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 79 (Ky. 1999).

That said, we find the evidence does not compel a finding Powell's lower back condition was caused by her work. The ALJ relied upon Powell's testimony and the expert opinions of Dr. Bonnarens and Dr. Best. Dr. Bonnarens found Powell has an L5-S1 Grade I spondylolisthesis and degenerative changes. He saw no evidence of a herniated disc and therefore concluded no objective evidence supports her back problems were due to a work injury. Dr. Bonnarens concluded she had numerous comorbid and pre-existing

conditions including generalized degenerative joint disease and obesity.

Dr. Michael Best noted on December 13, 2008, Powell experienced right knee pain and momentary back pain. Regarding her back, Dr. Best diagnosed malignant obesity and chronic lower back pain with mild degenerative change. Dr. Best opined there was no medical evidence which supports Powell's lower back pain is related to the work injury. In support of his conclusion, Dr. Best noted Powell had no complaint of back pain for one year after the work injury, no new or acute injury, and no disc herniation or nerve root impingement. Dr. Best noted Powell had chronic changes, without evidence to support it worsened or constituted a dormant condition aroused by the work injury. As noted by the ALJ, Powell testified on December 13, 2008, she felt a sensation momentarily across her back, which immediately went away, which she did not report to her supervisor. Powell testified she did not have back problems until after the knee surgery on September 11, 2009. The medical records do not mention lower back problems until January 2010.

We believe the ALJ's decision finding a lack of causation between Powell's lumbar spine condition and the December 13, 2008 work-related incident is supported by substantial evidence, and no contrary result is compelled.

Accordingly, the ALJ's decision rendered November 18, 2011 is hereby **AFFIRMED**.

ALL CONCUR.

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