OPINION ENTERED: April 19, 2013

CLAIM NO. 201079253

BENJAMIN MCCRAY PETITIONER

VS. **APPEAL FROM HON.GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

KENTUCKY STATE POLICE
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Benjamin McCray ("McCray") appeals from the November 19, 2012, opinion and order and the January 3, 2013, order overruling McCray's petition for reconsideration of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). In the November 19, 2012, opinion and order, the ALJ resolved an issue which had been bifurcated and determined McCray's post-traumatic stress disorder ("PTSD")

is not an "injury" as defined by KRS 342.0011(1). McCray filed a petition for reconsideration, asserting the ALJ failed to "recognize that the Plaintiff's injury was to a human organism, the brain. Thus, the Plaintiff sustained a physically traumatic event resulting in injuries that have left him permanently and totally disabled." By order dated January 3, 2013, the ALJ denied the petition for reconsideration stating as follows:

> This matter comes before the Administrative Law Judge upon the plaintiff's Petition for Reconsideration of the Opinion & Order rendered in this matter on November 19, 2012. In his Petition, plaintiff argues it was error to conclude plaintiff suffered no physically traumatic event of any kind and, as such, his resulting psychological condition cannot be compensable as a matter of law. In support of his position, plaintiff puts forth the novel theory that he did suffer a physical injury; that his post-traumatic stress disorder suffices as an actual injury to the brain. As such, plaintiff argues he suffered a change in the human organism sufficient to allow his claim for benefits pursuant to KRS 342.0011(1).
>
> Having considered plaintiff's argument, it is determined plaintiff's Petition does not raise any patent errors to allow the Administrative Law Judge to alter the finding that his claim must be dismissed. Even in his Petition, plaintiff does not argue that his PTSD was caused by a brain injury. Instead, he suggests that experiencing the

> horrific events of the night of the shooting caused PTSD which has created a chemical or other quantifiable change to plaintiff's brain. Even if accepted as true, this argument suggests only that plaintiff's putative brain injury was caused by his PTSD which, again, is not a physically traumatic event as KRS 342.0011(1) requires. Again, it may be an appellate body with authority to interpret legislative intent might be persuaded by plaintiff's arguments. However, the Administrative Law Judge is not persuaded it is within his authority to conclude anything other than that plaintiff's PTSD is not compensable because it was not caused by a physically traumatic event as required by KRS 342.0011(1). Accordingly, plaintiff's Petition for Reconsideration is denied.

On appeal, McCray again asserts the ALJ erred by failing to find he suffered a physical injury as defined by KRS 342.0011(1), as the work-related event "caused a harmful change in the human organism and that human organism is the brain."

The Form 101, filed April 11, 2012, alleges on September 25, 2009, while in the employ of the Commonwealth of Kentucky, Department of State Police ("KSP"), McCray sustained the following injury: "psychological trauma, severe ptsd." McCray described how the injury occurred as follows: "shot and killed a man pointing a gun at me and threatening me."

On May 25, 2012, KSP filed a motion to bifurcate to resolve the issue of whether the statute of limitations barred the claim and whether McCray sustained an injury under the Act. KSP's motion was sustained by order dated September 4, 2012.

The September 4, 2012, benefit review conference ("BRC") order reflects "injury as defined by the ACT" was the contested issue and indicates the hearing was only to resolve the sole bifurcated issue.

McCray testified by deposition on June 5, 2012, and at the September 18, 2012, hearing. In his deposition, McCray testified concerning the September 25, 2009, incident as follows:

> Q: And so you got called to report to a home for a domestic complaint?
>
> A: Yes.
>
> ...
>
> Q: Can you describe for me when you pulled up at that home what was going on and what happened after that?
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> A: When I pulled in there was a man sitting on the front porch, and I seen [sic] him get up and when he got up, he grabbed a pistol. And I come [sic] out of my cruiser and told him to put the gun down, put the gun down. He kept walking out and he walked in front of my car, and he raised the pistol above his head like a Samurai warrior or something would, and he said that he

was going to kill me and anybody else that came up on that hill where he lived. And he started down with the gun and I pulled the trigger.

Q: How far away were you from him when this happened?

A: Thirty-seven feet.

Q: Did he fire any shots at you at any time?

A: No, he did not.

Q: And after you pulled the trigger, what happened after that?

A: The first couple of rounds, I missed. Then when I finally hit him, he dropped to his knees and he said that didn't hurt, is that all you've got. And he turned and wheeled the pistol towards me again, and I shot another volley of rounds and dropped him. And then hollered for Post, told them what was going on. There was [sic] more people in the house. I stepped to the rear of my car, I got my M-16 out of the trunk and went up into the woodline [sic] and just ducked down and waited for cover, or waited for backup.

Q: Did he shoot at you at any point in time during that exchange?

A: No.

Q: Did any substances come into contact with you during that?

A: What do you mean by substances?

Q: Were you hit by any glass, any blood, anything at all?

A: I don't think so.

When asked if he was physically injured at any point during the encounter, McCray answered "I don't think so." A "short time" after the incident, McCray treated with a psychiatrist who prescribed Cymbalta, Xanax, and two other medications. He was experiencing paranoia, outbreaks of rage and anger, and could not sleep. McCray returned to full-duty two weeks after the September 25, 2009, incident. He was paid his regular salary during his two weeks leave. McCray finally stopped working in April 2010 due to anger issues. McCray explained:

> It was just several things that just kept building and building, and it got to the point to where I was going to end up hurting somebody that didn't need to be hurt.

At the hearing, McCray again confirmed he did not sustain a physical injury as a result of the September 25, 2009, incident. He was not hit, bruised, cut, or scraped, and he did not fall or bump into anything.

Among the records attached to the Form 101 are records generated by Dr. Gary Patton. On July 21, 2010, Dr. Patton recorded in part, the following symptoms:

> Panic: Occur in public, particularly when he sees someone he considers a thug. Heart Pounding, Chest Pain or Discomfort, Sweating, Trembling, Shortness of Breath or Smothering Feeling, Fears of losing control or going crazy.

Dr. Patton diagnosed the following:

> Axis I- 296.23 Major Depression, single episode, 300.01 Panic Disorder, 309.81 PTSD
> Axis II- none
> Axis III- sleep apnea, hypertension
> Axis IV- severe, occupational issues
> Axis V GAF- Current: 65 Past: 80

Panic Disorder was also noted in records dated October 4, 2010.

Dr. Patton's December 6, 2010, record contains his opinion McCray is "totally and permanently disabled from any form of work due to the severity of his symptoms."

The medical records indicate the man McCray shot was, in actuality, wielding a BB gun.

Numerous records of the psychologist Michele Amburgey, M.A. were introduced. On December 28, 2009, she indicated "PTSD traits present."

On August 27, 2010, Dr. James Daum found "substantial evidence of post traumatic [sic] stress disorder" and opined McCray is "psychologically unfit to perform the duties of a trooper for the Kentucky State Police."

In the November 19, 2012, opinion and order, the ALJ determined as follows:

> This claim has been bifurcated to first decide whether plaintiff's

occupationally disabling psychological injury which resulted from plaintiff's fatal shooting of a suspect on September 25, 2009 qualifies as a compensable "injury" in accordance with the statutory definition of a compensable workers compensation injury found in KRS 342.0011(1). That statute requires that a compensable "injury," by statutory definition, "shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury." In Lexington-Fayette Urban County Government v. West, Ky., 52 S.W.3d 564 (2001), the Court explained:

> It is apparent from the foregoing that since December 12, 1996, the term "injury" refers to the traumatic event or series of events that causes a harmful change rather than to the harmful change, itself. **We conclude, therefore, that for the purposes of the 1996 version of KRS 342.0011(1), a "physical injury" is an event that involves physical trauma and proximately causes a harmful change in the human organism that is evidenced by objective medical findings. An event that involves physical trauma may be viewed as a "physical injury" without regard to whether the harmful change that directly and proximately results is physical, psychological, psychiatric, or stress-related.** But in instances where the harmful change is psychological, psychiatric, or stress-related, it must

> directly result from the physically traumatic event.
>
> Id., at 566-567 (emphasis added).

Therefore, the relevant question in this claim is whether plaintiff's psychological impairment directly results from a physically traumatic event.

In considering this question, the Administrative Law Judge first notes that plaintiff presented at his final hearing as an exceptionally credible witness. In psychological claims such as this, it is often too easy for a claimant to fabricate a story in order to make his claim compensable. However, Mr. McCray testified quite credibly and with complete candor about the events of September 25, 2009, even knowing that his testimony may not establish the elements necessary to allow a finding that his condition meets the statutory definition of a compensable psychological injury. In this regard, Mr. McCray is to be commended for his impeccable honesty.

However, just as Mr. McCray worked as a Kentucky State Trooper to enforce the laws of the Commonwealth and was bound to act within those laws, this Administrative Law Judge is similarly constrained by the body of law handed down by our legislature and by the appellate courts. As stated above, in order for even a very serious and legitimate psychological condition to be compensable as a workers compensation injury, it must be the direct result of a physically traumatic event. As applied to this case, there is no evidence that plaintiff suffered any kind of physical injury or physical

trauma on the night of the shooting. Indeed, the Administrative Law Judge personally questioned plaintiff on this point at the hearing and plaintiff could not offer any physical trauma or even physical exertion beyond the firing of his weapon at the suspect.

Because there is no evidence that plaintiff endured any kind of physical trauma on September 25, 2009 or that his PTSD is due to any physically traumatic event (physically traumatic to him, not the suspect), KRS 342.0011(1) requires, as a matter of law, that plaintiff's claim must be dismissed. It may be that an appellate court would consider the facts presented here and specifically allow plaintiff's psychological condition to be compensable. However, based on Kentucky law as it currently stands, the Administrative Law Judge, as a matter of law, is, regrettably, forced to conclude plaintiff's psychological injury did not arise from a physically traumatic event and, as such, is not compensable. Plaintiff's claim must therefore be dismissed.

KRS 342.0011(1) defines "injury" as follows:

'Injury' means 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. 'Injury' does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. 'Injury' when used generally, unless the context indicates otherwise, shall include an

> occupational disease and damage to a prosthetic appliance, but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.

Significantly, the above-cited statutory definition of an "injury" *does not require physical contact.*

Further, we believe the events of September 25, 2009, *as a matter of law*, comprise a "work-related traumatic event...arising out of and in the course of [McCray's] employment." McCray was called to respond to a domestic dispute where his life was threatened by a suspect wielding, McCray thought, a gun. McCray testified the suspect raised the gun above his head and said he was going to kill anybody "that came up on that hill where he lived." The suspect brought his gun down and McCray was forced to fire his pistol. The first couple of rounds missed the suspect, but then the next rounds McCray fired struck him. At that point, the suspect fell to his knees and continued to threaten McCray verbally and physically by pointing his gun at him. McCray fired at the suspect again and "dropped him." Since there were more people in the house, McCray called for backup, got his M-16 rifle out of the trunk of

his cruiser, and ran into the woods for cover until backup arrived.

Based on the uncontroverted facts, the events of September 25, 2009, comprise a prima facie "work-related traumatic event...arising out of and in the course of employment," as McCray, after his life was repeatedly threatened, was forced to shoot and kill a man and protect himself from the potential additional threat from those inside the house. KRS 342.0011(1).

That said, the "work-related traumatic event...arising out of and in the course of employment" must also be the proximate cause of a "harmful change in the human organism as evidenced by objective medical findings." KRS 342.0011(1). Dr. Patton's medical records reflect he noted McCray suffered a host of distinct physical symptoms shortly after the September 25, 2009, incident, including heart pounding, chest pain or discomfort, sweating, trembling, and shortness of breath or a smothering feeling. The ALJ could most certainly determine these symptoms comprise "a harmful change in the human organism evidenced by objective medical findings" and were proximately caused by the work-related traumatic event of September 25, 2009. Additionally, as McCray testified in his deposition, his blood pressure was high when they

checked it in the ambulance immediately after the September 25, 2009, work-related traumatic event. The ALJ may rely upon McCray's testimony regarding his high blood pressure *in conjunction with* Dr. Patton's medical records to find the work-related traumatic event on September 25, 2009, proximately caused a "harmful change in the human organism as evidenced by objective medical findings."

On remand, the ALJ must consider whether McCray sustained a physical "injury" as defined by KRS 342.0011(1) in light of the fact that McCray experienced a "work-related traumatic event...arising out of and in the course of employment" on September 25, 2009, in having to shoot and kill a man in defense of his own life and in light of the high blood pressure he sustained immediately afterwards and the subsequent physical symptoms he experienced as noted in Dr. Patton's medical records. Should the ALJ determine McCray sustained a physical injury as defined by the statute, the ALJ must then determine if McCray's PTSD is a "direct result" of that physical injury. KRS 342.0011(1). If the ALJ determines McCray’s PTSD is a “direct result” of the physical injury, McCray’s PTSD is also an “injury” as defined by KRS 342.0011(1).

Accordingly, the November 19, 2012, opinion and order and the January 3, 2013, order overruling McCray's

petition for reconsideration are **VACATED** and the claim is **REMANDED** for additional findings consistent with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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