OPINION ENTERED: May 8, 2012

CLAIM NO. 201100570

BERNIE WEIGEL PETITIONER

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

FEDERAL MATERIALS
and HON JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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

ALVEY, Chairman. Bernie Weigel ("Weigel") seeks review of the opinion and order rendered December 8, 2011, by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ"), dismissing his claim for benefits against Federal Materials. The ALJ determined Weigel failed to prove he sustained any injuries to his left shoulder, right knee, right elbow, neck

and back in the December 15, 2010 truck accident. Weigel also appeals from the order on his petition for reconsideration entered January 23, 2012. On appeal, Weigel argues the ALJ erred in finding he did not sustain any work-related injuries since objective evidence exists to the contrary, and he is therefore entitled to permanent partial disability ("PPD") benefits, temporary total disability ("TTD") benefits and medical benefits.

Weigel testified by deposition on June 6, 2011 and at the final hearing held October 12, 2011. Weigel was born on April 18, 1955 and resides in Paducah, Kentucky. He completed high school, is certified in automotive repair and has a commercial driver's license. Weigel's work history includes work as a carpenter and truck driver. Weigel began working for Federal Materials in January 2007 as a concrete driver. At the time of the December 15, 2010 accident, he primarily worked as a tanker driver, but occasionally drove a concrete truck. Weigel testified Jeff Brandon ("Brandon") was his supervisor, but he took all his orders from Ronnie Herndon ("Herndon").

Weigel "busted [his] left wrist" in 1984. In 2003, he "blew out [his] left calf muscle and damaged [his] knee," requiring left knee surgery. He had heart attacks in 2003 and 2004. In October 2009, Weigel treated with the

Heart Group for heart problems and advised them he occasionally lost consciousness briefly as if he were falling asleep. Weigel suffered from a heart attack, a mini-stroke and pneumonia in 2010 requiring three separate visits to the hospital.

Weigel testified he was in a prior truck accident on July 28, 2010, when an ACT truck pulled into the right lane occupied by Weigel, forcing him to hit a curb. Weigel experienced some neck pain and injured his right leg and knee when he hit it against the dashboard. He was treated at the emergency room and fully recovered from that accident.

Weigel testified he pulled a muscle in his back and sought medical treatment at Lourdes Hospital a few months prior to the July 28, 2010 truck accident. Weigel admitted diagnostic studies were completed on his low back in 2009. It is unclear whether the pulled back muscle and diagnostic studies stem from the same event.

On December 7, 2010, Weigel testified he sought treatment at Lourdes Hospital for stoke-related symptoms of right leg numbness but denied having low back complaints at that time. Weigel also stated prior to the December 15, 2010 truck accident, he had complaints and problems with

weakness and numbness in his legs which he attributed as possible stroke-related symptoms.

In his deposition, Weigel testified prior to December 15, 2010, he had no problems or treatment for his neck, right shoulder or back. At the hearing, he again testified he had no previous problems with his right knee, hip, left shoulder or neck, but he later admitted to previous knee and neck complaints due to the July 2010 accident. Weigel testified he had no complaints and nothing was bothering him leading up to the December 15, 2010 accident and he had no work restrictions.

On December 15, 2010, Weigel was driving a tractor trailer from Paducah to Missouri. While in Missouri, Weigel testified he attempted to pass another truck located in the left lane at approximately 70 miles per hour. The other truck came into Weigel's lane as he attempted to pass, forcing Weigel into the center grassy median. Weigel's truck ran over a concrete drain located in the median causing the tractor trailer to go airborne. Weigel hit his head on the roof of the cab, left shoulder on the door frame, right knee on the dashboard and right elbow on the steering wheel. The police requested Weigel drive the tractor trailer to a gas station located off the next exit from the highway after they completed their investigation.

Weigel called Brandon, Herndon and Josh Brown ("Brown") of Federal Materials to notify them of the accident. Brown and Brandon came to the scene of the accident and then met with Weigel at the gas station.

Weigel testified his whole body was sore, but his primary complaints were to his left shoulder, neck, right leg and knee. However, Weigel only advised Brandon and Brown he was sore and his whole body hurt. Weigel did not seek medical treatment because he "thought [he] could work it out." Following the accident, he drove the tractor trailer back to Paducah. On December 16, 2010, Weigel attended a post-accident review meeting with Brown, Brandon and Gary Thompson. Weigel advised he was sore, but did not request medical attention. Weigel testified he worked the following week for Federal Materials and was "laid off" on either December 27 or 28, 2010.

Weigel testified he was fired by Brown when he called him on January 13, 2011 seeking medical treatment for injuries sustained in the truck accident. He assumed he was fired because Brown told him to stay home and take care of this on his own. Weigel did not question what Brown meant by this statement, and Brown never said he was fired or terminated. Weigel later received a letter stating he had self-terminated.

Weigel testified his symptoms worsened and he sought medical treatment on January 15, 201l at Lourdes Hospital emergency room for left arm and shoulder, hip, right leg and right knee pain. X-rays were taken, and he had injections into his hip for pain and inflammation. He was provided a shoulder brace and prescribed pain medication. Weigel indicated he received no treatment for his neck and back because the hospital recommended an MRI be performed.

Weigel testified he treated once with Dr. Kern, who recommended physical therapy, and once with Dr. Hill. Weigel also went to Western Baptist Hospital for an MRI of his shoulder. Weigel did not follow up with Dr. Kern or Dr. Hill and did not complete physical therapy because he could not afford it and he had no health insurance. Weigel testified he treats at the emergency room of Lourdes Hospital when needed. Weigel testified since the December 15, 2010 accident, his symptoms have worsened. He experiences occasional pain in his left shoulder and neck, constant pain in his right leg and hip, and his right hip "keeps going out."

Brown, the safety director at Federal Materials, testified at the final hearing. When he went to the accident site on December 15, 2010, Weigel advised he was

fine and needed no medical attention. Brown confirmed he requested Weigel to drive the tractor trailer to Kentucky since it was safe to operate. At the post-accident review meeting held the following day, Weigel again stated he was fine, did not request medical attention and did not advise them of any injuries.

Brown testified he met with Weigel on January 12 or 13, 2011. At that time, Weigel requested medical treatment for his right shoulder for the December 15, 2010 accident. Brown denied advising Weigel to stay home and take care of this on his own. He also denied advising Weigel he was fired or terminated. Brown sent a letter to Weigel sometime after January 12 or 13, 2011, informing him he had self-terminated because they were unable to contact him for several consecutive days.

Weigel filed the Form 101 claiming injuries to his left shoulder, right knee, right elbow and neck due to the December 15, 2010 truck accident. Weigel attached medical records from Lourdes emergency room dated January 15, 2010. Those records indicate Weigel complained of moderate back and neck pain. The records also noted injuries to the neck, right elbow and left shoulder due to a vehicle accident around Christmas. X-rays of his right elbow and left shoulder appeared normal and a cervical spine x-ray

demonstrated "mild degenerative changes." Weigel was diagnosed with strained left shoulder and sprained right knee, and he was instructed to wear a sling, prescribed pain medication and told to follow-up if he did not improve.

Weigel submitted the May 13, 2011 report of Dr. Charles Epstein, a chiropractor. Dr. Epstein evaluated him on May 5, 2011. Dr. Epstein noted Weigel hit his head, left shoulder and arm, right knee and right elbow when he "hit a concrete road divider doing about 70 miles and (sic) hour." Dr. Epstein noted Weigel currently treats at the emergency room and receives steroid shots in his hip and low back. Upon examination, Weigel complained of right knee, hip, and low back pain. Under the assumption maximum medical improvement ("MMI") had been reached, Dr. Epstein assessed the following impairment ratings pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"): 8% for his cervical spine, 10% for his upper extremity, 7% for his right knee and 8% for his low back for a combined 33% impairment rating. However, Dr. Epstein noted Weigel had not reached MMI since he has had no corrective treatment and his injuries are worsening daily.

Dr. Epstein recommended treatment by an orthopedic physician, chiropractor and physical therapist, and the use

of a cane or motorized wheel chair. Dr. Epstein also opined Weigel is unable to perform any meaningful work.

Weigel submitted the medical notes of Dr. Brian Kern, an orthopedic surgeon, dated June 8, 2011 and October 11, 2011. Dr. Kern noted Weigel complained of constant right hip, right knee and left shoulder pain and his knee and neck occasionally locked up. Dr. Kern also noted "the patient is fairly hard to pin down today on his complaints." Dr. Kern examined Weigel and reviewed medical records and diagnostics studies performed since the December 15, 2010 accident. Dr. Kern diagnosed right hip, thigh, knee and left shoulder pain. Dr. Kern noted no obvious pathology on his shoulder x-ray or MRI. He also noted a possible small medial meniscus tear on his right knee, though his symptoms in the lower right extremity were not caused by a medial meniscus tear. Dr. Kern recommended physical therapy and a re-evaluation in six weeks.

Weigel also submitted the report of Dr. Kern dated October 11, 2011. Dr. Kern noted complaints of low back pain, right lower extremity pain and bilateral shoulder dysfunction since the December 15, 2010 accident. Dr. Kern recommended a functional capacity evaluation to be performed. Dr. Kern assessed a 10% impairment rating pursuant to the AMA Guides.

Weigel submitted the medical note of Dr. Clint Hill dated June 20, 2011. Dr. Hill noted complaints of low back, right leg, knee, neck, bilateral shoulder, right hip and thigh pain. Weigel conveyed he had not undergone any treatment, except physical therapy recommended by Dr. Kern, which provided no relief. After examining Weigel and reviewing his medical records, Dr. Hill diagnosed neck pain with possible left arm radiculopathy, low back pain with right leg radiculopathy and right knee pain. Dr. Hill prescribed a steroid dose pack and recommended lumbar and cervical MRIs.

Federal Materials submitted medical records from Rachel Crowley, PA-C, of the Heart Group dated October 13, 2009. Weigel presented to Ms. Crowley for a follow-up of cardiac complaints. Weigel stated he drives a truck, gets extremely fatigued and "will occasionally lose consciousness for a second, like falling asleep."

Federal Materials submitted the medical records of Dr. William Hogancamp dated December 7, 2009. Weigel was referred to Dr. Hogancamp for the onset of headaches "after a TIA occurring one month ago." It was noted Weigel had an episode of vision change, facial numbness, weakness and right upper extremity numbness and weakness lasting less than twenty-four hours, one month previously. Dr. Hogancamp

diagnosed CVA/TIA, intractable common migraine, transient alteration of awareness, mild OSA, PLMD and RLS, prescribed medication, and advised Weigel to follow-up in two weeks.

Federal Materials submitted the medical records of Lourdes Hospital dated July 28, 2010 and December 7, 2010. On July 28, 2010, Weigel sought medical treatment following a truck accident occurring that day. Weigel complained of pain in his right leg and knee, right upper extremity, neck and back. A right knee CT revealed tricompartmental chondrosis with possible superimposed focal chondral defects, small suprapatellar effusion and suspected chondocalcinosis. Weigel was prescribed pain medication and discharged. He again sought medical treatment at Lourdes Hospital on December 7, 2010, complaining of low back pain and weakness in his legs. A lumbar x-ray showed no recent abnormality and “chronic degenerative changes.”

Federal Materials submitted the report of Dr. John L. Stanton, an orthopedic surgeon, dated August 25, 2011. Dr. Stanton noted Weigel’s history of prior injuries and reviewed his medical records following the December 15, 2010 truck accident. He noted Weigel complained of being sore all over following the December 15, 2010 accident, but did not seek medical care and was able to drive the vehicle another one hundred miles. Weigel complained of neck,

bilateral shoulder, low back and neck pain, as well as sciatica. He denied experiencing previous low back problems. Dr. Stanton noted Weigel exaggerated his responses during the exam and upon exiting the building. Dr. Stanton noted Weigel appeared to have ongoing problems with his right shoulder, neck and back and at least one other injury to the right knee from a previous vehicle accident, all preceding his December 15, 2010 work injury. He also noted no complaints were made until at least a month after the accident, and at that time, the complaints did not include the lower back or the right knee. Dr. Stanton stated:

> It is difficult therefore to relate the patient's current complaints of right shoulder pain, right knee and leg pain, low back pain and neck pain to a motor vehicle accident as being the primary cause of his discomfort. It is more likely that his discomfort is due to ongoing preexisting degenerative changes in his neck, back, shoulder, and knee and nothing more.

Dr. Stanton opined Weigel did not qualify for an impairment rating since he has nothing more than mild degenerative changes which preceded the date of his accident. Dr. Stanton recommended physical therapy, anti-inflammatory medication, intermittent muscle relaxers, and possible

steroid injections to the right knee, none of which are related to the December 15, 2010 incident.

Federal Materials submitted the medical report of Dr. Richard Berkman, a neurosurgeon, dated September 6, 2011. Dr. Berkman reviewed Weigel's medical records and performed an examination. He noted Weigel complained of low back pain radiating into his right hip and leg and bilateral shoulder pain. Dr. Berkman noted several instances when Weigel demonstrated symptomatology out of proportion to the maneuvers he was performing, suggesting symptom magnification. He also noted difficulty in performing an examination of the low extremity due to Weigel's pain complaints. Dr. Berkman concluded Weigel did not have a lumbar spine injury due to the truck accident since 1) there were no objective findings of nerve root compression, 2) his limping was non-physiologic, and 3) he had pre-existing back problems and did not complain of low back and right leg radiation pain until three months following the truck accident. Dr. Berkman concluded Weigel did not sustain an injury to his neck due to the truck accident because he did not complain of cervical radicular symptoms, and he did not have neck complaints on the examination date. Dr. Berkman opined Weigel did not have a permanent impairment for his neck or low back condition, and he did not aggravate a pre-

existing condition. Dr. Berkman declined to address Weigel's orthopedic claims to his left shoulder, right knee and right hip since it was outside of his expertise. However, Dr. Berkman recommended an orthopedic surgeon examine Weigel's right hip. Dr. Berkman disagreed with Dr. Charles Epstein's report.

In the opinion and order rendered December 8, 2011, the ALJ dismissed Weigel's claim for benefits finding he failed to prove he sustained injuries to his left shoulder, right knee, right elbow, neck and back in the truck accident occurring December 15, 2010. The ALJ stated as follows:

> **ANALYSIS, FINDINGS OF FACT AND CONCLUSIONS OF LAW**
>
> The ALJ has had to approach this claim from many aspects to arrive at his decision. There are many discrepancies herein in history and testimony. First, Plaintiff had two accidents approximately 6 months apart in which he described both accidents happening basically in the same manner. In July 2010 he was forced into a curb and off the road by an ACT truck in which he sustained about the same injuries. He was treated at Lourdes ER complaining of right knee and leg, neck, pain in right upper back and neck between shoulders and back pain.
>
> The ALJ found the testimony of John Brown, the Safety Director of Defendant, credible.

Then on December 15, 2010, he was again forced off the highway when an ACT truck came into his lane, forcing him into the median during which he was thrown around in the vehicle. He denied being injured at the time, drove his vehicle many miles back to Paducah, and did not seek any medical treatment until the middle of January 2011. A week before the incident, on December 7, 2010, he had x-rays and complained of low back pain and weakness of the legs, more prominently in the right leg with some numbness. He was diagnosed with chronic degenerative changes. Then on January 15, 2011, at Lourdes ER he presented with neck, right elbow and left shoulder pain and gave a completely different history of how the injury came about in his pickup truck "around Christmas." He did not mention any hip pain. At the hearing his main complaints were of his hip and right leg.

In October 2009 at the Heart Group in Paducah, he gave a history of driving a truck and occasionally losing consciousness for a second, "like falling asleep." He had a stroke in 2010 and was hospitalized at Western Baptist Hospital for three days.

The ALJ has reviewed the medical [sic] as well as the examining physicians' reports. Dr. Kern made two reports. In his June 8, 2011 report, he said the patient was "fairly hard to pin down today on his complaints." He did not have objective medical evidence accounting for his complaints. The doctor said some of his pain may be just simply from deconditioning. Then on October 11, 2011, in listing ROM of the hip and shoulder, he noted that Plaintiff's ROM was "actually greater during conversation than during normal

observation." He then recommended an FCE to determine consistency of effort.

The ALJ found the reports of Drs. Berkman and Stanton more persuasive. Dr. Berkman did not agree with the report of Dr. Epstein, in that the "report lacks a studied evaluation of the patient's symptoms, the onset of symptoms in relationship to the MVA and as a result is of no credibility with regard to causation. Furthermore, the fact that the patient limps and appears to be getting worse is not necessarily [sic] reflection of the patient's disease progressing. [sic] But more of a reflection of the patient's symptom magnification which has always been well out of proportion to what the imaging studies have shown in particular if one looks back at the orthopedic notes that this issue has been commented on previously." [sic]

The ALJ was particularly persuaded by the lengthy and detailed report of Dr. Berkman, in which he systematically refuted Plaintiff's claims of injury arising out of the incident of December 15, 2010. He did think that Plaintiff may have a hip problem, but this was not one of his complaints when he sought medical treatment in January. He concluded that Plaintiff did not sustain an injury in the truck incident on December 15, 2010.

The ALJ finds that Plaintiff has failed to prove that he sustained any injury to his left shoulder, right knee, right elbow and neck and back in the truck incident of December 15, 2010.

ORDER AND AWARD

Based upon the foregoing findings of fact and conclusions of law, **IT IS**

> **HEREBY ORDERED AND ADJUDGED** that Plaintiff, Bernie Weigel's, Claim Number 2011-00570, for claims for injuries to the left shoulder, right knee, right elbow, neck and back are hereby **DISMISSED**.

On reconsideration, Weigel argued the ALJ's decision was clearly erroneous since the evidence indicated he suffered work-related injuries to his back, neck, shoulders, right knee and hips on December 15, 2010. In the order denying the petition for reconsideration dated January 23, 2012, the ALJ stated:

> Upon consideration of plaintiff's "Motion for Reconsideration;" and upon consideration of defendant's response and objection; and the Administrative Law Judge being otherwise sufficiently advised; IT IS HEREBY ORDERED plaintiff's "Motion (petition) for Reconsideration" is **DENIED.**

As the claimant in a workers' compensation proceeding, Weigel had the burden of proving each of the essential elements of his cause of action including causation/work-relatedness of the alleged injuries. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Weigel was unsuccessful before the ALJ regarding work-relatedness/causation, the question on appeal is whether the evidence compels a finding in his 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 Weigel sustained injuries to his back, neck, shoulders, right knee and hips as a result of the truck accident on December 15, 2010. The ALJ found Brown's testimony to be credible and relied upon the opinions of Dr. Berkman and Dr. Stanton. Dr. Berkman concluded Weigel did not sustain a lumbar spine or neck injury in the truck accident. He noted no objective findings of nerve root compression, and he opined Weigel's limp was non-physiologic. He also noted Weigel had pre-existing back problems, and he did not complain of low back and right leg radiation pain until three months following the accident and he had not complained of neck or cervical radicular symptoms. Dr. Berkman opined Weigel demonstrated symptom magnification but also noted he possibly had a hip problem which should be examined by an orthopedist.

Dr. Stanton also noted Weigel provided responses and concluded he could not relate the complaints of right shoulder, right knee, right leg, low back and neck pain to the December 15, 2010 accident. Dr. Stanton noted Weigel had ongoing problems with his right shoulder, neck and back

and a right knee prior to the December 15, 2010 accident. He also noted Weigel reported no complaints until at least a month after the accident, at which time he had no complaints of the lower back or right knee. Dr. Stanton concluded Weigel's complaints are due to pre-existing degenerative changes in his neck, back, shoulder, and knee and nothing more. Dr. Stanton explained in detail why he did not agree with the medical report prepared by Dr. Epstein.

We believe the ALJ's decision finding a lack of causation between Weigel's conditions and the December 15, 2010 work-related truck accident is supported by substantial evidence, and no contrary result is compelled. Accordingly, the ALJ's decision rendered December 8, 2011, and order on reconsideration entered January 22, 2012 are hereby **AFFIRMED**.

ALL CONCUR.

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