Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 16, 2013

CLAIM NO. 200874483

BIG LOTS, INC. PETITIONER

VS. **APPEAL FROM HON. JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE**

LORITTA WHITWORTH
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Big Lots, Inc. ("Big Lots") appeals from the February 11, 2013, opinion and award resolving Loritta Whitworth's ("Whitworth") Motion to Reopen in her favor and the order denying its petition for reconsideration dated April 2, 2013, of Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ Weatherby"). In the February 11, 2013, opinion and award, the ALJ awarded temporary total

disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits.

The Form 101 alleges on April 25, 2008, while working for Big Lots, Whitworth injured her "left upper extremity" when a box containing a recliner fell on her. Medical records attached to the Form 101 indicate Dr. Marcis Craig performed a left shoulder arthroscopy, an arthroscopic subacromial decompression, and an open distal clavicle resection on October 7, 2008. The claim was originally assigned to Hon. Douglas W. Gott, Administrative Law Judge (“ALJ Gott”).

Whitworth's March 23, 2010, brief alleges only a left shoulder injury and contains the following language:

> This case concerns a claim for permanent partial disability benefits stemming from a work-related injury that occurred on or about April 25, 2008, when a recliner fell from a storage unit, striking Plaintiff on her left shoulder as it fell.
>
> . . .
>
> Many times shoulder injury cases are complex and difficult because the mechanism of injury is not readily apparent. In the present case, the means by which Plaintiff's shoulder injury occurred is obvious.

In a March 26, 2010, opinion, award, and order, ALJ Gott awarded TTD benefits, permanent partial disability

("PPD") benefits, and medical benefits. ALJ Gott made the following findings of fact and conclusions of law:

> The ALJ was impressed that the impairment rating from Dr. Bilkey was consistent with the rating from the treating surgeon, Dr. Craig. Dr. Craig assigned an 8% whole person rating for loss of range of motion; Dr. Bilkey assigned 9%. (The range of motion measurements by Dr. Moskol [sic] were more severe than what was reported by Drs. Craig and Bilkey several months earlier; p. 37 of his report.) The additional 2% impairment assigned by Dr. Bilkey was for the distal clavicle resection that Dr. Craig did not account for in his rating. But Dr. Moskol [sic] confirmed that the distal clavicle resection merited 2% impairment in his report.
>
> The ALJ finds that the 11% rating assigned by Dr. Bilkey is the most reliable evidence of Whitworth's impairment for loss of range of motion and accompanying distal clavicle resection in her shoulder. In stating his opinion of nonwork [sic] relatedness [sic], Dr. Moskol [sic] provided no rating for the ALJ to consider if that opinion was rejected, except for the 2% applicable to the distal clavicle resection. As stated above, the ALJ agrees with that rating from Dr. Moskol [sic], and it is a part of the rating assigned by Dr. Bilkey.
>
> Based on the restrictions assigned by Dr. Bilkey and Dr. Nazar, together with Whitworth's credible description of her present limitations and her uncontradicted description of her 'before and after' job positions, the ALJ finds that she does not retain the physical capacity to return to the job

> as a furniture sales manager and is therefore entitled to the 3x multiplier of KRS 342.730(1)(c)1. The Defendant attempts to characterize Whitworth's current job as a 'promotion' from her preinjury work, but she makes less money and does not have the same physical requirements in the new job; she clearly lacks the physical capacity to move furniture as she did previously.

In the "award" section of the March 26, 2010, opinion, award, and order, ALJ Gott, in awarding medical benefits, stated as follows:

> The Plaintiff shall recover from the Defendant/Employer, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing, supplies, appliances, prescriptions and mileage reimbursements as may be reasonably required for the care and relief from the effects of the **left shoulder injury**.

(emphasis added).

On July 14, 2011, Whitworth filed a Motion to Reopen alleging a worsening of condition. In the attached Affidavit, Whitworth stated as follows:

> 1. That on or about April 25, 2008, this affiant suffered a **work-related injury to her neck, left arm and low back.**
>
> 2. That on or about March 24, 2010, by way of an Opinion, Award & Order ALJ Douglas Gott found that the 11% rating assigned by Dr. Bilkey was the most

reliable evidence of the Claimant's impairment. The ALJ rejected Dr. Moskal's 2% rating and the assertion that the Claimant's problems were not work-related, and further, based upon the restrictions assigned by Dr. Bilkey and Dr. Nazar together with the Claimant's credible testimony, awarded her an 11% impairment with a 3 factor. The calculation was $715.63 x 2/3 = $477.09 x 11% x 1 x 3 - $157.44 per week for 425 weeks beginning March 8, 2009. In addition, the ALJ awarded reasonable and necessary medical expenses pursuant to KRS 342.

3. That this affiant initially treated by Dr. William Nash and Dr. Marcus [sic] Craig, orthopedic surgeons in Elizabethtown, Kentucky and also saw Dr. Gregory Nazar, a neurosurgeon. Post award [sic], she continued under the care of Dr. Craig and was sent to Dr. John Harpring. Dr. Harpring sent her for a myelogram and Claimant also had an EMG performed by Dr. Ballard. Claimant was also seen by Dr. Mitchell Campbell. She then had her myelogram reviewed by Dr. Block who referred her to Dr. Michael Doyle and Dr. Doyle has scheduled her for surgery.

4. That this affiant states that her condition has gradually grown worse since her claim was decided by the ALJ and this affiant now feels that she is again temporarily totally disabled and her treating physician has her off from work or in the alternative will take her off from work at the time of her surgery. In addition, she may be permanently totally disabled or may have additional impairment under the AMA Guidelines after the surgery is performed. This affiant states that she wishes to proceed with the surgery but does not know if the Defendant/employer

> will authorize the surgery. This affiant feels that this situation warrants a reopening under KRS 342.125 for multiple reasons.

(emphasis added).

On July 22, 2011, Big Lots filed a response to Whitworth's motion to reopen, asserting the Form 101 alleges only an injury to the left upper extremity. It asserted "if the Plaintiff has a neck problem, then it is some event that arose after the earlier left upper extremity injury." It further asserted that any claim for a neck injury had to be filed by April 24, 2010, two years after the date of the original injury. Because it was not, Big Lot’s argued Whitworth's neck claim is "barred by the statute of limitations, as well as by the statute providing that all claims in litigation must be filed and resolved contemporaneously." On July 25, 2011, Big Lots filed a "Special Answer and Motion to Dismiss" pleading the statute of limitations as a special answer.

By order dated August 4, 2011, the Chief Administrative Law Judge, Hon. J. Landon Overfield (CALJ Overfield) noted Whitworth failed to attach medical records to her motion to reopen. CALJ Overfield passed Whitworth's motion to reopen, granting her thirty days to supplement her motion to reopen with the appropriate medical records.

On August 19, 2011, Whitworth filed an Amended Motion to Reopen to which she attached several medical records. By order dated August 31, 2011, CALJ Overfield sustained Whitworth's motion to reopen and assigned the claim to an ALJ.

On September 7, 2011, Big Lots filed a petition for reconsideration, arguing Whitworth's motion to reopen is for an injury not identified in the original litigation.

On September 20, 2011, the claim was assigned to Hon. James L. Kerr, Administrative Law Judge ("ALJ Kerr"). By order dated October 10, 2011, the claim was reassigned to Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman").[1]

By order dated October 10, 2011, Big Lots' petition for reconsideration was denied.

On October 27, 2011, Big Lots appealed from the August 31, 2011, order sustaining Big Lots' motion to reopen and the October 10, 2011, order denying its petition for reconsideration. By opinion entered November 2, 2011, this Board dismissed Big Lots' appeal holding both contested orders to be interlocutory in nature. The Board's

[1] Following the claim being reassigned to ALJ Coleman, apparently the claim was once again reassigned to ALJ Weatherby. However, the Board has been unable to locate this particular order of reassignment.

opinion was affirmed by the Court of Appeals on May 11, 2012.

By order dated September 25, 2012, ALJ Weatherby ordered the benefit review conference ("BRC") cancelled and a BRC/final hearing was scheduled for December 11, 2012. At the hearing, the ALJ listed the stipulations and contested issues stating as follows:

> ALJ: I note that just prior to going on the record here today a benefit review conference was held in this matter. It was concluded that the stipulations will be- well, the issues stipulated to will be the opinion and award of March 24th of 2010, and that the contested issues are as follows: worsening of condition temporary or permanent that is attributable to the work injury as filed, statute of limitations, joinder as required by KRS 342.270 Sub 1, extent and duration and work-relatedness, proper use of the AMA Guides and notice. Does that adequately summarize the stipulations and issues, Gentlemen?
>
> Hon. Mr. Harding: Judge, can I just add one more? Whether or not the claim was properly re-opened.
>
> ALJ: Okay. So added.

In the February 11, 2013, opinion and award, ALJ Weatherby made the following findings of fact and conclusions of law regarding joinder as required by KRS 270(1), whether reopening was proper, and notice:

13. KRS 342.270(1) states in relevant part:

> When the application is filed by the employee or during the pendency of that claim, he or she shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him or her. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

15. [sic] The Plaintiff in this matter began treating for the injury to her shoulder in June of 2008 with Elizabethtown Orthopedics and as early as July 2008, the notes from her treatment reference complaints of neck pain. The Plaintiff's Form 101 was filed in July of 2009 and referenced the left upper extremity.

15. The Plaintiff is not a physician and the evidence demonstrates that early on she voiced complaints regarding neck pain. It is understandable that the Plaintiff intended that the left upper extremity encompass the neck pain that she had clearly been experiencing for at least a year prior to the filing of the Form 101. It is certainly clear that she had communicated that pain to her treating physician. The ALJ finds that the term left upper extremity in this context is sufficient to encompass a cervical spine injury.

16. The Defendant has had access to the Plaintiff's medical treatment

> records and in the judgment of the ALJ has not been prejudiced by any confusion that may have resulted in referencing the left upper extremity to the exclusion of a specific reference to the neck or cervical spine. Likewise, the Defendant has not been prejudiced by the failure of the Plaintiff to specifically name the cervical injury until the reopening. The Plaintiff clearly gave notice of an injury as noted by the ALJ in the original Opinion and Award.
>
> 17. Finally, the Plaintiff is not bringing a new cause of action that is now waived because it was not brought along with the initial filing. This claim has been reopened because of an alleged worsening of the same injury and thus the reopening refers to the same cause of action. The timing of the filing is therefore governed by KRS 342.125(3) and as such the Motion to Reopen was timely filed.
>
> 18. The ALJ therefore finds that notice is proper and that the Motion to Reopen was properly and timely filed.

Big Lots filed a six-page petition for reconsideration in which it requested additional findings of fact regarding the following issues:

> 1. "This Defendant respectfully requests further findings of fact and references to the specific medical records relied upon by the Administrative Law Judge in determining that the Plaintiff had ongoing symptoms of neck complaints prior to the filing of the Form 101."

2. "This Defendant also requests further findings of fact and conclusions of law with regard to the Administrative Law Judge's opinions of work-relatedness and causation and benefits pursuant to KRS 342.730. In particular, the initial examining physicians found no cervical problems."

3. "This Defendant requests further findings with regard to work-relatedness/causation/and impairment, specifically requesting that the Administrative Law Judge set forth why Dr. Doyle's opinions are more credible than Dr. Best's and the other treating physicians involved in both the cervical claim and the shoulder claim."

4. "For the reasons as set out above, this Defendant respectfully requests that the Administrative Law Judge reconsider his legal conclusion in finding total disability and substitute the award for benefits based upon a three (3) multiplier, if this claim is decided to be work-related and appropriate for reopening."

5. "Moreover, this Defendant also requests further findings of fact as to the finding of total disability as opposed to a finding of permanent partial disability, and requests that the Administrative Law Judge cite to evidence which would support a finding that Plaintiff is unable to perform any type of work with the moderate restrictions of now lifting over twenty-five (25 lbs.) and no excessive or prolonged sitting and standing and no repetitive bending and twisting."

6. "This Defendant respectfully requests further findings of fact and conclusions of law as to why Dr. Doyle's opinion as to the date of

> maximum medical improvement of December 24, 2011 is most credible, especially in light of the Defendant's position that Dr. Doyle's surgery was unreasonable, unnecessary and not work-related."
>
> 7. "We would also ask that further findings of fact be entered to show that the Plaintiff provided due and timely notice of her neck problem."

On April 2, 2013, ALJ Weatherby signed the prepared order attached to Whitworth's response.

On appeal, Big Lots sets forth three arguments. First, it argues the ALJ erred in reopening and finding compensability. Secondly, it argues the ALJ's determinations regarding due and timely notice and the statute of limitations are not based upon substantial evidence. Lastly, Big Lots asserts the ALJ's determination regarding permanent total disability is not based on substantial evidence.

We vacate ALJ Weatherby's determination Whitworth's cervical spine condition comprises a worsening of the original April 25, 2008, injury and remand.

The March 24, 2010, opinion, award, and order of ALJ Gott clearly defined Whitworth's original injury as a "left shoulder injury." This is consistent with Whitworth’s assertion in her brief to ALJ Gott regarding the April 25,

2008, injury. We acknowledge Whitworth, in the Form 101, characterized her injury as a "left upper extremity." However, the scope of the work-related injury is not defined by what Whitworth pled in the Form 101. Additionally, the scope of the work injury, as stated by ALJ Weatherby in the March 24, 2010, opinion, award, and order, is not defined by the fact that Whitworth "early on...voiced complaints regarding neck pain." The scope of the work-related injury is governed exclusively by ALJ Gott’s determination in the March 24, 2010, opinion, award, and order, that Whitworth sustained only a left shoulder injury. This determination was not contested by Whitworth in a petition for reconsideration or on appeal to this Board; therefore, it is the law of the case. Consequently, the sole body part injured on April 25, 2008, is Whitworth's left shoulder.

Additionally, the medical records firmly establish Whitworth’s cervical condition was symptomatic at the time of the filing of the Form 101 and prior to ALJ Gott’s decision. This is consistent with ALJ Weatherby’s findings of fact and conclusions of law wherein he noted as early as July 2008, Whitworth was being treated, along with her shoulder, for complaints of neck pain. He also noted that “early on” Whitworth voiced complaints regarding neck

pain. Consequently, ALJ Weatherby interpreted the left upper extremity injury pled in the Form 101 to encompass the neck pain which he noted “she clearly had been experiencing at least a year prior to filing a 101.” He also noted she had communicated her neck pain to her treating physician.

Because ALJ Gott determined Whitworth sustained only a left shoulder injury, ALJ Weatherby could not expand ALJ Gott’s definition of the work injury to include a cervical condition. The medical evidence and ALJ Weatherby’s findings of fact and conclusions of law establish this is not a case where the cervical condition manifested and became symptomatic after ALJ Gott’s decision. Rather, the contrary is true. Whitworth was suffering from a cervical condition prior to the entry of ALJ Gott’s decision. This is entirely consistent with paragraph one of Whitworth’s affidavit in which she states she suffered a “work-related injury to her neck…” on April 25, 2008. As ALJ Gott defined the April 25, 2008, work injury to be a left shoulder injury, Whitworth cannot seek to redefine the injury on reopening. Similarly, ALJ Weatherby was prohibited from redefining the work injury of April 25, 2008, on reopening. Consequently, it was error for ALJ Weatherby to determine Whitworth's cervical spine

condition comprises a "worsening of the same injury." Therefore, we vacate ALJ Weatherby’s decision and remand for entry of an order denying the July 14, 2011, Motion to Reopen and the August 19, 2011, Amended Motion to Reopen, because in the Motion to Reopen Whitworth alleged a separate injury, not a worsening of the original April 25, 2008, left shoulder injury.

All remaining issues on appeal are rendered moot by our decision.

Finally, ALJ Weatherby should have addressed in much greater detail Big Lots' February 25, 2013, petition for reconsideration. While it is sometimes appropriate to utilize a prepared order, it is not appropriate in all cases, particularly when a party has clearly asked for numerous additional findings of fact.

Accordingly, the February 11, 2013, opinion and award and the April 2, 2013, order denying Big Lots' petition for reconsideration are **VACATED**. This claim is **REMANDED** for entry of an order consistent with the views set forth herein.

ALL CONCUR.

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