Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 6, 2013

CLAIM NO. 200997680 & 200573546

BIG RIVERS ELECTRIC CORP. PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, III, ADMINISTRATIVE LAW JUDGE**

LARRY JOHNSON
and HON. OTTO DANIEL WOLFF, IV
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Big Rivers Electric Corp. ("Big Rivers") as insured by Liberty Mutual ("Liberty") appeals from the January 11, 2013 Opinion and Award rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"), and from the March 15, 2013 Order on Reconsideration. The sole question on appeal is whether the ALJ erred in determining Larry Johnson ("Johnson") had a pre-existing impairment

rating. Because the ALJ's determination is supported by substantial evidence, we affirm.

Johnson sustained two injuries while employed by Big Rivers. The first injury, involving Johnson's right knee, occurred on August 31, 2005 when he was a passenger on an all terrain vehicle which flipped, pinning his knee to the ground. Big Rivers was insured by Kentucky Employers Safety Association at the time of this injury. Johnson sustained the second injury on February 4, 2009 when he slipped on ice and fell, striking his right hip on a large rock. Big Rivers was insured by Liberty at the time of this injury. Johnson's claims were consolidated for litigation purposes.

Dr. James Goris assigned a 10% impairment rating secondary to arthritis for the knee pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") in a June 6, 2006 Form 107. In assigning the impairment, Dr. Goris used Table 17-31, "Arthritis Impairments Based on Roentgenographically Determined Cartilege Intervals." The chart indicates a 1mm cartilage interval in the knee warrants a 10% whole person impairment rating. He indicated Johnson had advanced arthritis for which he had an active impairment prior to the

work injury. Dr. Goris attributed “most all” of the impairment to the pre-existing arthritis.

On April 7, 2006, Dr. Goris noted Johnson had a permanent partial impairment “based to [sic] his osteoarthritis, a great deal of which was pre-existing.” Dr. Goris stated the impairment for 1mm of joint space was 10%. He stated “Again, I feel that the arthritis is pre-existing, although his symptoms have been aggravated by his work-related accident. I do not have a ratable impairment strictly from the work injury.”

In an April 20, 2007 report to Johnson’s counsel, Dr. Goris stated Johnson had treated with Dr. Alan Johnson, an associate of Dr. Goris, since 1994. Johnson received corticosteroid injections and Synvisc injections in April 2004.

In a November 8, 2011 report, Dr. Goris assigned a 20% impairment rating for the right knee pursuant to the AMA Guides. Dr. Goris stated 50% of the impairment is due to a pre-existing osteoarthritic condition and 50% was caused by the work injury. Therefore, he assigned a 10% impairment to the work injury.

Dr. Johnson treated Johnson for osteoarthritis of the knees from 1994 through 2004. On April 1, 2004, Dr. Johnson administered injections and predicted Johnson may

eventually need knee replacements. As early as 1994, x-rays showed some medial joint space narrowing in the knee.

Dr. Daniel Wolens assigned a 10% impairment for pre-existing pathology of the knee. Dr. Wolens noted Johnson had 1mm of joint space in his knee prior to the work injury which would qualify him for the 10% impairment. However, Dr. Wolens stated Johnson experienced pain as a result of the accident, and this increased pain was the only change in Johnson's condition following the work injury. Accordingly, Dr. Wolens assessed a 1% to 3% impairment for pain as a result of the 2005 injury, depending on how Johnson's knee pain affects his daily living activities.

Dr. Bart Goldman assigned a 20% impairment pursuant to the AMA Guides, but attributed the entire impairment to pre-existing degenerative disease.

Upon consideration of each doctor's evaluation, the ALJ found the 2005 injury to Johnson's knee produced a permanent partial disability. The ALJ's findings relevant to this appeal are as follows:

> The most persuasive expert medical proof regarding Plaintiff's right knee injury comes from Dr. Goris. His input is most persuasive because he has had repeated opportunities to see and monitor Plaintiff's status post injury, and his practice group treated Plaintiff for right knee problems years before Plaintiff's MVA.

> KESA argues a portion, if not all, of Plaintiff's right knee impairment is attributable to a preexisting condition and having provided evidence on that issue, coupled with the input of Drs. Goris and Wolens, makes it doubt. [sic] Plaintiff had a pre-MVA active condition in his right knee. Dr. Goris wrote, "Up until the date of the accident, Mr. Johnson had symptomatic arthritis…50% of this (Plaintiff's 20% WPI rating) would be due to the pre-existing osteoarthritic condition and 50% caused by the effects of the injury. Therefore, I would assign a 10% impairment rating as work-related to the right knee." For the reasons above noted, the input of Dr. Goris is most persuasive on most all issues, particularly the issue of Plaintiff's pre-existing condition. Using Dr. Goris' input, it is determined Plaintiff's WPI rating, as a result of his 2005 work-related MVA, is 10%.

The ALJ applied the three multiplier to the knee injury. The ALJ further determined Johnson was permanently totally disabled as a result of the 2009 hip injury.

Liberty filed a petition for reconsideration, arguing in pertinent part that the ALJ erred in determining Johnson had a 10% pre-existing active impairment. In his March 15, 2013 order ruling on the petition for reconsideration, the ALJ stated Liberty's request for reconsideration of the impairment apportionment was an

improper attempt to re-argue and re-weigh the evidence. Thus, the ALJ overruled the petition on this basis.

On appeal, Liberty argues the ALJ erred by adopting an incorrect apportionment of impairment by Dr. Goris. Citing the unpublished decision in Leaseway Motor Co. Transp. V. Cline, 2006 WL 1791573, Ky. App., June 30, 2006 (No. 2005-CA-002591-WC) and Audi of Lexington v. Elam, 367 S.W.3d 598 (Ky. 2012), Liberty argues a percentage apportionment of impairment cannot be relied upon to support a permanent partial disability award. Here, Liberty notes the ALJ relied upon Dr. Goris' impairment rating of 20%, which included a 50/50 apportionment, to arrive at a 10% rating attributable to the work injury. Liberty contends there was no ratable impairment specifically present before the accident pursuant to the AMA Guides.

Further, Liberty contends the requirement that the condition be active was not met. Liberty observes Dr. Goris "waivered on this issue," alternately noting Johnson's condition was active and dormant in his multiple reports. Liberty asks the Board to reverse the ALJ's decision and direct the ALJ to award permanent partial disability benefits based upon a 20% impairment rating. In the alterative, Liberty requests the matter be remanded for

further findings of fact and conclusions of law regarding prior active impairment.

Contrary to Liberty's assertions, substantial evidence in the record indicates Johnson had an active pre-existing osteoarthritic condition in his knee which was symptomatic and impairment ratable prior to the work injury. Most significantly, the evidence establishes Johnson's joint space in his knee was reduced to 1mm prior to the work injury. Dr. Goris and Dr. Wolens agree, a reduction of joint space to 1mm as a result of osteoarthritis warrants a 10% impairment rating. Further, Dr. Goris stated in his April 7, 2006 note Johnson had a 10% impairment rating and added "I do not have a ratable impairment strictly from his work injury." Johnson ultimately underwent knee replacement due to increased pain as a result of the work injury, resulting in a 20% impairment rating. Given the totality of the evidence, the ALJ could reasonably find a 10% impairment rating as a result of the work injury because that injury hastened the need for knee replacement.

Although Dr. Goris expressed his impairment rating as an apportionment in his April 20, 2007 report, based upon the entirety of the evidence, it is evident Dr. Goris believed Johnson had a 10% prior active impairment as a result of the pre-existing osteoarthritis and had an

additional 10% impairment as a result of the surgery necessitated by the increased pain following the work injury.

Audi of Lexington v. Elam, *supra*, is easily distinguished. There, the Supreme Court held an ALJ could not apply an apportionment assigned in 2008 to a non-work-related cause, to an impairment rating following fusion surgery in 2009. No doctor testified that a progression of the pre-existing degenerative condition contributed in the same proportion to the impairment rating present after the 2009 fusion surgery, which the ALJ found to be work-related. In that case, the ALJ erred by failing to subtract the 5% impairment rating physicians had assigned for the back condition as it existed immediately before the claimant's accident from the 21% impairment rating that existed when he reached MMI after the work-related lumbar fusion.

Leaseway Motor Co. Transport v. Cline, 2007 WL 858834 (Ky.) rendered March 22, 2007 is also easily distinguishable from the present case. In Leaseway, the Supreme Court held the claimant's impairment rating did not have to be reduced for any pre-injury impairment from prior injuries. However, the employer presented no medical evidence related to the claimant's prior injuries, and no physician calculated the amount of impairment that existed

immediately before the work-related injury pursuant to the AMA Guides. In the claim *sub judice*, Drs. Goris, Wolens and Goodman all indicated there was an impairment ratable condition prior to the work injury.

Accordingly, the January 11, 2013 Opinion and Award rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge and the March 15, 2013 Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JOHN SPIES
333 GUTHRIE GREEN
SUITE 203
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON THOMAS RHOADS
9 EAST CENTER STREET
MADISONVILLE, KY 42431

COUNSEL FOR RESPONDENT:

HON SAMUAL BACH
PO BOX 881
HENDERSON, KY 42419

ADMINISTRATIVE LAW JUDGE:

HON OTTO DANIEL WOLFF, IV
8120 DREAM STREET
FLORENCE, KY 41042