OPINION ENTERED: August 24, 2012

CLAIM NO. 200980341

DEBORAH DENISE JOHNSON PETITIONER

VS. **APPEAL FROM HON. HOWARD FRASIER, ADMINISTRATIVE LAW JUDGE**

TG AUTOMOTIVE SEALING
and HON. HOWARD FRASIER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Deborah Johnson ("Johnson"), *pro se,* appeals the August 31, 2011, opinion and order by Hon. Howard E. Frasier, Administrative Law Judge ("ALJ"), dismissing her claim for failure to prove either a temporary or permanent work-related injury. Johnson failed to file a petition for reconsideration.

Johnson's Form 101 alleges on September 18, 2008, she injured her left wrist, neck, and back while working for TG Automotive Sealing ("TG Automotive"). The injury is alleged to have occurred in the following manner: "Plaintiff was working on a molding machine and it was too high. Plaintiff got [sic] pain in her left shoulder, neck, and lower back."

The April 8, 2011, Benefit Review Conference ("BRC") order lists work-relatedness/causation and injury as defined by the Act as contested issues. Under the heading "other" is the following: "Extent and duration; multipliers, past and future medical expenses."

While it is difficult to understand Johnson's argument on appeal, we will respond as though she has directly addressed the ALJ's August 31, 2011, opinion and order. As Johnson is representing herself, we shall explain the fundamental legal principles that control how this Board must decide her appeal.

Under Kentucky's workers' compensation system, the ALJ functions as both judge and jury. When performing the duties of a jury, the ALJ is commonly referred to as the fact-finder. As fact-finder, the ALJ reviews the evidence submitted by the parties and decides which testimony from the various witnesses is more credible and

best represents the truth of the matter or matters in dispute. The ALJ, as judge, then applies the law to the facts. As a matter of law, the facts as decided by the ALJ cannot be disturbed on appeal by this Board so long as there is substantial evidence of record to support the ALJ's decision. *See* KRS 342.285(1); *See also* Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Furthermore, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, and incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is identifiable evidence in the record that supports the ultimate conclusion. *See* Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); *See also* Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Although we understand Johnson is frustrated at the outcome of her workers' compensation claim, we also recognize the ALJ's job as fact-finder is a difficult responsibility. As a rule, in every workers' compensation claim, both sides resolutely contend they have presented evidence of the "truth" concerning those matters at issue.

It is for this very reason that in cases where the evidence is conflicting regarding an issue, the facts concerning that issue as determined by the ALJ, are afforded vast deference as a matter of law on appellate review.

Authority establishes that Johnson, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of her cause of action before the ALJ, including proof of a work-related injury. *See* Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Johnson was unsuccessful in her burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. *See* Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. *See* REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As fact finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. *See* Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. *See* Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); *See also* Jackson

v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. *See* Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); *See also* Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. *See* Id. In order to reverse the decision of the ALJ, it must be shown there is not substantial evidence of probative value to support his decision. *See* Special Fund v. Francis, supra.

In the August 31, 2011, opinion and order, the ALJ set forth the following findings of fact and conclusions of law:

> (1) The Plaintiff bears the burden of proof and the risk of non-persuasion with respect to every essential element of the claim. Caudill v. Maloney's Discount Store, Ky., 560 S.W.2d 15 (1977). The undersigned finds that the Plaintiff has not supplied any credible testimony of a permanent injury as a result of her work activities of September 18, 2008. Based on her hearing testimony, the only body part for which she continues to have symptoms is her low back. However, the medical evidence does not support the existence of any permanent harmful change to her low back or any other body part as a result of her September 2008 work activities.

(2) The Kentucky Legislature has deemed an “injury” to be "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**.” KRS 342.0011(1) (emphasis added). The term, “objective medical findings,” is further defined in KRS 342.0011(33) as “information gained through direct observation and testing of the patient applying objective or standardized methods.” The Kentucky Supreme Court has explained that a diagnosis based solely on complaints of symptoms, is not an objective medical finding as used in the Act, but indicated that a harmful change could be established, indirectly, through observations and testing applying objective or standardized methods. Gibbs v. Premier Scale Co., 50 S.W.3d 754 (Ky. 2001).

The burden of proving causation and the existence of a permanent injury is on the claimant. Unfortunately, she had not presented any medical proof sufficient to meet her burden of proof. The medical records from the various treating physicians indicate that treatment was primarily provided for her upper extremities and cervical spine, with little or no mention of her lumbar spine. The absence of any mention of lumbar spine symptoms, by itself, is an indicator that such body part was not significantly involved in the alleged work injury.

However, while not charged with the burden of proof, the Defendant has presented credible medical evidence from Dr. O’Keefe that the Plaintiff does not have any permanent harmful

> change as a result of her alleged work injury. Thus, based on the failure of the Plaintiff to tip the scales on the existence of an injury, and the credible and affirmative proof from Dr. O'Keefe that no such injury has been shown, the undersigned finds that the Plaintiff has not met her burden of proof on the grounds of either showing a permanent harmful change or continued work-related symptoms from the activities of September 18, 2008.
>
> (3) Having found no injury entitling the Plaintiff income or medical benefits, the undersigned finds that any claim for income or medical benefits should be dismissed. Further, the Plaintiff has not shown the existence of any temporary injury entitling her to TTD benefits, or identified any unpaid past medical benefits which might be due for any temporary symptoms that have now resolved. Again, her only continued complaint is to her low back, and it has been specifically found based on the opinion of Dr. O'Keefe and the treatment records that no low back injury occurred.
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> (4) The undersigned finds the facts as stipulated.

On appeal, we need only to confirm there is evidence in the record in support of the ALJ's conclusions. The March 15, 2011, medical report of Dr. Dennis M. O'Keefe sets forth the following opinions:

> Ms. Deborah Johnson currently has an essentially normal general medical, neurologic, and neuromuscular examination with the exception of

significant arthritic change involving both knees.

With regard to Ms. Johnson's complaints, I would like to discuss them individually.

Ms. Johnson reports problems with low back pain. She indicates that this reportedly developed following a work-related injury of September 2008. Examination by several physicians, including Dr. Sheth and myself, revealed good range of motion at the neck and normal strength and sensation of both lower extremities.

An MRI scan of the lumbar spine requested by Dr. Sheth in December 2008 showed only minimal degenerative changes at the L3/4, L4/5, and L5/S1 levels. No evidence of significant disc herniation, lumbar spinal stenosis, or neuroforaminal stenosis was noted on that study.

At the present time, Ms. Johnson continues to have full range of motion at the low back and normal strength and sensation of both lower extremities.

I do not feel that Ms. Johnson suffered any significant or permanent injury to the low back as a result of her work-related injury of September 2008. I feel that with regard to her low back, she is capable of performing the usual and customary activities of a woman her age and overall general health.

With regard to her complaints of bilateral knee pain, Ms. Johnson has a history of knee pain dating back to 1990. Evaluations by Dr. Vance dating back to April 2007 documents [sic] that Ms. Johnson had complaints of

significant pain, particularly in the left knee, prior to September 2008.

The changes noted in the patient's x-rays are compatible with degenerative disease in both knees, most likely related to the patient's previous physical activities, her knee injury, and her weight.

While Ms. Johnson has significant degenerative changes involving both knees, the problems with her knees do not appear to be in any way related to her work-related injury of 2008.

Ms. Johnson has a history of complaints of numbness and tingling involving both hands. Dr. Sheth diagnosed a mild carpal tunnel syndrome on the basis of minimal changes on nerve conduction studies in November 2009. Nerve conduction studies performed in my office at [sic] current time did not disclose evidence of significant left carpal tunnel syndrome. With regard to the right upper extremity, the findings are compatible with a normal postoperative state without any evidence of active compression of the median nerve at the right wrist.

With regard to her hands, I feel that Ms. Johnson is currently capable of performing the usual and customary activities of a woman her age and overall general health.

At one point in time, Ms. Johnson had complaints of pain involving the neck. She currently indicates that she is not having any significant complaints with regard to her neck or shoulders. Her current examination of the neck and upper extremities was normal. An MRI scan of the cervical spine performed at Southern Regional Open MRI in October

> 2008 was interpreted as a normal study. With regard to her neck, it would be my opinion that Ms. Johnson does not suffer any significant permanent or significant injury to the neck as a result of the work-related events of September 2008.
>
> With regard to her neck, it would be my opinion that Ms. Johnson is capable of performing the usual and customary activities of a woman her age and overall general health.

The March 15, 2011, medical report of Dr. O'Keefe comprises substantial evidence supporting the ALJ's determination to dismiss Johnson's claim for failure to prove work-related injuries to her left wrist, neck, and back as a result of the September 18, 2008, work incident. We need not go any further than this report. However, we also note there is no medical evidence in the record definitively linking any of Johnson's complaints to her employment at AG Automotive. There are records of Dr. Wayne Naimoli, dated July 8, 2009, and October 5, 2009, stating Johnson's carpal tunnel is "most likely" work-related. This is certainly not sufficient to establish Johnson sustained work-related injuries to her left wrist, neck, and back as a result of the September 18, 2008, work incident.

Accordingly, the August 31, 2011, opinion and order dismissing Johnson's claim for failure to prove a work-related injury is **AFFIRMED**.

ALL CONCUR.

PETITIONER/PRO SE:

MS DEBORAH DENISE JOHNSON
1402 GLASS AVENUE
HOPKINSVILLE KY 42240

COUNSEL FOR RESPONDENT:

HON THOMAS C DONKIN
333 W VINE ST STE 1100
LEXINGTON KY 40507

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM RUDLOFF
400 E MAIN ST STE 300
BOWLING GREEN KY 42101