Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 27, 2015

CLAIM NO. 201167145

DERBY CITY SIGN & ELECTRIC, INC. PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

ROBIN D. WILSON
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Derby City Sign & Electric, Inc. ("Derby City") appeals from the Opinion, Award and Order rendered October 21, 2014 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") awarding Robin Wilson ("Wilson") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for a left

ankle/foot injury sustained on November 14, 2011. Derby City also seeks review of the November 12, 2014 order denying its petition for reconsideration.

On appeal, Derby City argues substantial evidence does not support the ALJ's determination the November 14, 2011 work accident caused Wilson's left foot and ankle complaints. It asserts Wilson's complaints are the natural progression of symptoms he complained of in August 2011. Because the ALJ's decision is supported by substantial evidence, we affirm.

Wilson filed a Form 101 on October 18, 2013 alleging he injured his left foot/ankle on November 14, 2011 when he stepped off a ladder onto a bush while working for Derby City. Wilson testified by deposition on January 13, 2014 and at the hearing held August 27, 2014. Wilson began working for Derby City in 1999 servicing and installing commercial signs. His job required heavy lifting, climbing, packing, and use of extension ladders. Wilson testified that on November 14, 2011, he stepped off of a six foot ladder onto a root, and rolled his left ankle. Wilson indicated he experienced immediate pain throughout his ankle and crawled to his truck to rest for a period of time. He then retrieved his equipment and drove back to the shop,

where he notified his manager, Paul Ackerman, of the injury. At the time of his injury, he was not taking any medication.

Wilson sought treatment on November 17, 2011 at Podiatric Physicians of Kentucky. Wilson intended to see Dr. William Brown, but could not because he was performing surgery at the time. Wilson had previously treated with Dr. Brown in August 2011. Instead, he saw Dr. Christopher Hubbard, who ordered an MRI of the left foot and ankle. Wilson stated the MRI revealed torn tendons in his foot. Dr. Hubbard performed surgery in early 2012, and Wilson subsequently completed a course of physical therapy. In June 2012, Wilson was discharged from Dr. Hubbard's care with no formal restrictions imposed. Wilson paid for all of his own medical treatment or through his personal health insurance.

Wilson testified that following the November 14, 2011 work injury, he continued working for Derby City until he was restricted from work by Dr. Hubbard on January 25, 2012. He was released to return to work with no restrictions on June 14, 2012. At that time, Wilson was laid off from Derby City. He received a short period of unemployment benefits, and then worked for Glass Sign Company performing the same type of work for approximately five months. He also worked for Louisville Sign for a short

period of time. He currently works at Signarama performing similar but less physically demanding work than his job with Derby City.

Regarding his previous treatment with Dr. Brown, Wilson testified this was for a bone spur in his foot. At his deposition, Wilson explained as follows:

> Q: Had you seen Doctor Brown before November of 2011?
>
> A: Doctor Brown was the one I seen over a bone spur in my foot. I was riding my motorcycle, and I just felt something in my foot. When I would shift gears, I could feel something. It just didn't feel right, and that's when I went and seen Dr. Brown. When I went and seen him, they took x-rays and everything, and he said I had a little bone spur up toward - - about midways in my foot. And with that, just being that, I just let it go at that. As long as I knew what it was, I just let it go at that. I wasn't going to have no surgery done. I wasn't going to have nothing done.
>
> . . . .
>
> Q: Was it a small area?
>
> A: Yeah, just a little bitty spot. And it was more of an aggravation and a feeling that I could feel when I shifted gears on my motorcycle. It didn't bother me until I actually - - I didn't even know it was there until I started riding a motorcycle. I could feel a little something was happening in there. As far as walking and stuff like that, it never bothered me.

At the hearing, Wilson further stated as follows:

> Q: Okay. What was you understanding - - what was the problem you were having in August of 2011, that made you go to the doctor?
>
> A: I felt a little sting, then - - in the side of my foot toward my toes. And, I went to, you know, basically, find out what it was. And, they took an x-ray and said I had a bone spur in the side of my foot.

Wilson indicated the only treatment option offered in August 2011 was to surgically remove the bone spur, which he declined to do. He received no additional treatment until he returned to Dr. Hubbard on November 17, 2011 following the work accident. Wilson testified the pain he experienced in August 2011 was “totally different” than what he experienced after November 14, 2011. He explained the pain he felt in August 2011 was akin to a bee sting. After the November 14, 2011 accident, Wilson testified his left ankle was significantly painful and “I couldn’t even walk.”

Wilson denied telling Ken Ackerman (“Ackerman”) he needed foot surgery before the November 14, 2011 work accident for which he would need time off when he was hired at Derby City.

Ackerman, the owner of Derby City, testified by deposition on April 25, 2014. He hired Wilson in 2008 to service and maintain electrical signs. Ackerman testified

that prior to November 2011, Wilson on multiple occasions mentioned he had a foot problem which would require surgery, and would need to be off work for a period of time after the procedure was performed. Ackerman also testified Wilson missed at least two days of work in 2009 stating he needed to see a doctor about his foot. At the deposition, video surveillance from November 14, 2011 was introduced which depicted Wilson entering and leaving the work premises at the time of the work accident.

The records from Drs. Brown and Hubbard from Podiatric Physicians of Kentucky were introduced. Three months prior to the work injury, Wilson was treated by Dr. Brown on August 11, 2011. The treatment note contained the following:

> **Chief Complaint (1/1)**: This 49 year old female[1] presents today for hindfoot pain assessment bilateral
>
> **Location**: She indicates the problem location is the lateral aspect of left foot and lateral aspect of right foot.
>
> **Duration**: Condition has existed for one month.
>
> **Timing (onset/frequency)**: Onset was gradual.

[1] It is noted Wilson is male, and this appears to be a typographical error in the physician's records.

> **Associated signs and symptoms**: Associated signs and symptoms include morning pain and pain.
>
> **Modifying factors**: Patient indicates irritation from direct pressure and prolonged walking and standing aggravate the condition.
>
> **Quality**: Quality of the pain is described by the patient as localized, sharp and shooting. Patient relates pain on a scale from 0 to 10 as 8/10.
>
> **Severity:** Severity of condition is progressively worsening.
>
> **Context:** Patient denies a previous history of trauma. Prior history of this condition exists. The patient has had no previous treatment for this condition.

An examination revealed no evidence of vascular insufficiency, numbness or neurologic pain. The note indicates x-rays were taken, but did not discuss the results. Likewise, the "impression" section is left blank. Wilson was told to return in three weeks for follow-up and was prescribed Dexpak dexamethsasone tablets.

Brown returned approximately three months later on November 17, 2011, and was treated by Dr. Hubbard. The treatment note indicates as follows:

> **Chief Complaint (1/1):** This 49 year old female[2] presents today for follow up on hindfoot pain assessment left.

[2] Again, this appears to be a typographical error in the physician's records.

> **Location:** She indicates the problem location is the lateral aspect of left foot.
>
> **Duration:** Condition has existed for one month.
>
> **Timing (onset/frequency):** Onset was gradual.
>
> **Associated signs and symptoms**: Associated signs and symptoms include pain.
>
> **Modifying factors**: Patient indicates irritation from direct pressure and prolonged walking and standing aggravate the condition.
>
> **Quality**: Quality of the pain is described by the patient as localized, sharp and shooting. Patient relates pain on a scale from 9 to 10, (10 being the worse).
>
> **Severity:** Severity of condition is progressively worsening.
>
> **Context:** Patient denies a previous history of trauma. Prior history of this condition exists. The patient has had no previous treatment for this condition.

An examination again revealed no evidence of vascular insufficiency, numbness or neurologic pain. However, pain was noted with "actively testing the peroneal tendons on the left. The left foot is edematous." Dr. Hubbard ordered an MRI of the left foot and ankle, and prescribed a pneumatic boot and medication. An "addendum" from Dr. Hubbard was

added February 1, 2012, which stated “Patient states that this is a work related injury and that his employer is aware of this.”

The MRI demonstrated an intact distal insertion of the peroneus longus, and borderline small effusion of the first MTP joint, a finding of questionable significance. Subsequently, Dr. Hubbard diagnosed peroneus longus tendon tear and painful “Os Peroneum L foot” and recommended surgical repair. The records indicate surgery was performed in March 2012. Following a course of recovery and physical therapy, Wilson was released to return to work with no restrictions on June 14, 2012.

Dr. Hubbard also prepared a letter on February 7, 2012, stating he first saw Wilson in November 2011, and “at that time he stated that he had slipped off a ladder at work and hurt his left foot.” Wilson also reported he had previously complained of pain in both feet and was treated by Dr. Brown. Dr. Hubbard outlined Wilson’s course of treatment, indicating surgery was necessary to repair tendons in his left foot, and requested approval.

Dr. Hubbard testified by deposition on May 29, 2014, and confirmed he began treating Wilson on November 17, 2011. Dr. Hubbard performed surgery to repair a “peroneus longus tendon tear, a longitudinal split tear,” and stated,

"Once again, as a general rule, a progressively degenerative type of condition. It could have been precipitated from an injury, but my first visit with the patient there was no mention of a specific injury."

After reviewing the medical records, Dr. Hubbard stated he was aware of no objective changes in Wilson's condition between August 2011 and November 2011. Dr. Hubbard testified as follows:

> Q: Would the surgery be consistent with the symptoms that are listed in August of 2011?
>
> A: It could be. I would have to look at the exam. And once again, we hadn't had the MRI at that point, so the MRI would have confirmed what would have needed to be done surgically.
>
> Q: Are there any particular mechanisms of injury that you could associate with the type of surgery you completed on Mr. Wilson?
>
> A: Once again, as a general rule, I believe that it's not one specific incident, but it could be precipitated by an inversion type of ankle sprain, or a lateral ankle sprain, which could injure the tendon, and then usually kind of degenerates over time.
>
> It's usually not kind of like a fracture, a broken bone, where you had the surgery and you need to go in to repair it. Usually with tendon injuries, usually, you will still sometimes try physical therapy and conservative treatment . . . before you talk about surgical intervention.

> When I got the patient in my hands, so to speak, he was saying he had discomfort since August - - well, of course, before then, based upon the note.
>
> Q: And then again, did you consider this just to be the natural progression of the symptoms that he complained of back in August?
>
> A: In my mind, that's what I felt I was dealing with, yes.
>
> Q: Doctor, have all your opinions been stated within a reasonable degree of medical probability?
>
> A: That's correct.

On cross-examination, Dr. Hubbard stated as follows:

> Q: Mr. Wilson testified that on November 14th of 2011 he was stepping off of a ladder and - - I don't know - - rolled his foot, I guess. Could that type of injury have caused the problems that he has that led to the surgery?
>
> A: It could have. It could have. It's possible.

Wilson attached the January 8, 2014 report of Dr. James Farrage who diagnosed status post left peroneal tendon repair with ongoing issues of pain, swelling, decreased range of motion, impaired strength with muscle atrophy and reduction in functional capacity. Dr. Farrage stated Wilson's clinical presentation and historical account are consistent with the proposed mechanism of injury, and he has

undergone appropriate medical treatment. Dr. Farrage opined Wilson is at maximum medical improvement ("MMI"). Pursuant to the 5th Edition of the American Medical Association, Guides the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Farrage assessed a 2% impairment rating, "which is wholly attributable to the reported work injury on 11/14/11. There is no apparent apportionment for preexisting condition." Dr. Farrage assigned permanent restrictions and stated Wilson does not retain the physical capacity to return to his previous job.

Derby City filed the February 28, 2012 physician review report of Dr. Keith Myrick who opined Wilson's tendon tear is unrelated to the November 14, 2011 work injury based upon the November 17, 2011 treatment note. Dr. Myrick stated it indicated Wilson had a prior history of this condition, he denied any trauma, and the condition had existed for a month prior to the visit. Dr. Myrick concluded the peroneal tendon tear is a pre-existing condition and is unrelated to the November 14, 2011 injury.

Derby City also filed the February 18, 2014 report of Dr. Thomas Loeb. Dr. Loeb diagnosed "peroneal tendon tear, etiology unknown, status post surgical repair with residual sensory changes in the distal peroneal nerve distribution." Dr. Loeb concluded Wilson's left ankle

condition is not related to the November 14, 2011 injury based upon his review of Dr. Hubbard's medical notes. Dr. Loeb opined Wilson reached MMI within six to eight months after his surgery. He assessed a 6% impairment rating pursuant to the AMA Guides, wholly unrelated to the November 14, 2011 work injury. He likewise declined to assign any work-related permanent restrictions.

In a supplemental letter dated March 29, 2014, Dr. Loeb stated, according to the March 22, 2012 operative note, Wilson "incurred his injury four months prior which would be consistent with the prior history of injury in November 2011." Dr. Loeb also indicated his assessment of impairment remains unchanged.

In the October 21, 2014 opinion, the ALJ stated as follows under "Work relatedness/causation and preexisting active impairment:"

> **1. Principle of law.**
>
> Medical causation must be proved to a reasonable medical probability with expert medical testimony . . . [however], [i]t is the quality and substance of a physician's testimony, not the use of particular 'magic words,' that determines whether it rises to the level of reasonable medical probability, *i.e.*, to the level necessary to prove a particular medical fact." *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004). The

claimant bears the burden of proving causation.

When work-related trauma arouses or exacerbates a preexisting condition, it has caused a harmful change in the human organism, *i.e.*, an injury as defined by KRS 342.0011(1). Although impairment that results is compensable, the type and duration of benefits depends on whether the impairment is permanent or temporary. To the extent that the condition is active immediately before the trauma occurs, it cannot have been aroused by the trauma and, thus, to that extent cannot be compensable. "[T]o be characterized as active, an underlying preexisting condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." *Finley v. DBM Technologies*, 217 S.W. 3d 261 (Ky. App. 2007). The employer bears the burden of proving the existence of a preexisting, active disability.

2. Findings of fact and conclusions of law.

Wilson sustained his burden of proving a work related left ankle/foot injury on November 14, 2011 with no preexisting active impairment.

3. Evidentiary basis and analysis.

Wilson is a believable witness. He had seen Dr. Brown, Dr. Hubbard's partner, for a foot condition prior to the work injury but worked unrestricted with no significant complaints until he twisted the ankle on November 14, 2011. The surveillance video, though mostly inconclusive, appears to show Wilson

> having difficulty walking, if anything. The initial treatment record from Dr. Hubbard on December 17, 2011 notes a gradual onset but also refers to Wilson as female all through the record. For this reason, the initial record from Dr. Hubbard is not found to be conclusive on this issue. In his deposition, Dr. Hubbard stated the injury as related by Wilson could have been the cause:
>
> > Q: …Could that type of injury have caused the problems that he has that led to the surgery?
> >
> > A: It could have, It could have. It's possible.
>
> Additionally, Dr. Hubbard's later office notes state the condition is work related. Dr. Loeb's report has been reviewed but his opinion on causation is not adopted herein. The opinion of Dr. Farrage on work relatedness/causation is not found to be any more helpful than that of Dr. Loeb on the issue. It is the review of the records of Dr. Hubbard along with the testimony of Wilson which have been persuasive on the issue of causation.

The ALJ awarded Wilson PPD benefits based upon a 2% impairment rating and found the three multiplier applicable. The ALJ also awarded TTD benefits from January 25, 2012, the date of surgery, until Dr. Hubbard found Wilson reached MMI on June 14, 2012. She also awarded medical benefits.

Derby City filed a petition for reconsideration raising essentially the same arguments it now makes on appeal. The ALJ denied the petition on November 12, 2014, stating as follows:

> Defendant Employer asks for reconsideration of the finding of work related causation, based on the mention in the opinion by the ALJ of Dr. Hubbard's first office note stating Robin Wilson was a woman, thereby rendering the note inconclusive on the issue of causation. After review of the opinion, there are numerous other records from Dr. Hibbard (sic), including the deposition transcript, supporting the finding of work related causation.

On appeal, Derby City argues the ALJ's finding on causation/work-relatedness/prior active condition is not supported by substantial evidence. Derby City contends it is undisputed Wilson was actively treating for problems in the lateral aspect of his left foot prior to November 14, 2011. Derby City argues the records from Podiatric Physicians of Kentucky, coupled with Dr. Hubbard's testimony, clearly demonstrate the November 14, 2011 work incident did not cause Wilson's complaints. Rather, his condition is due to the natural progression of his prior symptoms which had been progressively worsening. Derby City argues the ALJ placed improper weight on the fact the records repeatedly referred to Wilson as a female, and

erred in disregarding the medical history contained within the November 17, 2011 medical note of Dr. Hubbard. Derby City argues Dr. Hubbard's testimony indicating "it's possible" Wilson's injury could have been caused by the November 14, 2011 event does not rise to reasonable medical probability required to establish causation. Derby City argues Dr. Hubbard does not offer an opinion on causation in the medical records, but simply refers to Wilson's account of the injury. Derby City argues Wilson's testimony is insufficient and does not constitute substantial evidence regarding the issue of medical causation.

Since Wilson was successful before the ALJ regarding the causation of his left ankle condition, the question on appeal is whether her determination is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

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). An 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, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

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 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

While medical causation usually requires proof from a medical expert, the ALJ may properly infer causation, or a lack of causation, from the totality of the circumstances as evidenced by the lay and expert testimony of record. *See* Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., Ky. App., 618 S.W.2d 184 (1981); Cf. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Causation is a factual issue to be determined within the sound discretion of the ALJ as fact finder. Union Underwear Co. v. Scearce, supra; Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969).

In this instance, it was not so unreasonable for the ALJ to infer from the totality of the circumstances evidenced by the lay and medical testimony that Wilson's left ankle condition was caused by his work accident. The ALJ relied upon Wilson's testimony and the records of Dr. Hubbard in finding the left foot condition, including the surgery, was due to the November 14, 2011 work accident. Clearly, Wilson believed his current left foot condition resulted from the November 14, 2011 work accident. Wilson acknowledged he had previously seen Dr. Brown on one occasion in August 2011. However, he testified it was for a

bone spur, which caused a stinging pain in a small area of his foot. He indicated he received no further treatment for this and continued to work without restrictions. Wilson testified his pain was much worse and "totally different" following the November 14, 2011 work accident and eventually required surgery to repair torn tendons in his left foot.

Treatment records from Podiatric Physicians of Kentucky are equivocal regarding causation. Three months prior to the work accident, Wilson reported pain in the lateral aspect of both feet in August 2011 gradually occurring for the past month. The treatment note from August 11, 2011 provides neither the results of x-rays taken that day nor a diagnosis or impression. Wilson did not return until three months later after the November 14, 2011 work accident. The history section of the treatment note is the same as the August 2011 note, with exception of Wilson reporting pain only in his left foot. Upon examination, Dr. Hubbard noted pain with "actively testing the peroneal tendons on the left. The left foot is edematous." Dr. Hubbard ordered an MRI of the left foot and ankle, and prescribed a pneumatic boot and medication. An "addendum" from Dr. Hubbard was added to the note on February 1, 2012, which stated "Patient states that this is a work related injury and that his employer is aware of this." In the

February 7, 2012 letter, Dr. Hubbard stated Wilson reported in November 2011 he slipped off a ladder at work injuring his left foot, and indicated surgery was necessary to repair tendons in his left foot.

Dr. Hubbard's testimony is likewise equivocal regarding the issue of causation. On direct examination, Dr. Hubbard emphasized peroneus longus tendon tears are generally a progressive degenerative condition, which could be precipitated from an injury. In Wilson's case, Dr. Hubbard agreed he felt Wilson's condition in November 2011 was the progression of symptoms complained of in August 2011. However, on cross-examination, he indicated it was also possible for the November 14, 2011 work accident to have caused the injuries eventually requiring surgical repair.

Taken together, Wilson's testimony and the records from Podiatric Physicians of Kentucky constitute substantial evidence upon which the ALJ could rely in support of her determination on causation. The ALJ acted within her authority in reviewing and weighing the evidence presented on the issue of causation, including her finding the initial record from Dr. Hubbard was not conclusive on the issue. She ultimately found the reports of Drs. Farrage and Loeb unpersuasive, and instead relied upon the treating physician

and testimony of Wilson. Derby City's appeal essentially is a request for the Board to re-weigh the evidence and draw conclusions in its favor, a task which we cannot do. Whittaker v. Rowland, supra. While the ALJ certainly could have interpreted the records from Dr. Hubbard as advocated by Derby City, she was not required to do so.

Accordingly, the October 21, 2014 opinion and the November 12, 2014 order on petition for reconsideration by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON DOUGLAS A U'SELLIS
600 EAST MAIN ST, STE 100
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON JOY L BUCHENBERGER
455 SOUTH FOURTH STREET
1450 STARKS BUILDING
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON JANE RICE WILLIAMS
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601