OPINION ENTERED: December 21, 2012

CLAIM NO. 201173836

DONALD R. WOODS PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

TODD COUNTY STANDARD
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Donald R. Woods ("Woods") appeals from the July 27, 2012, opinion and order of Hon. R. Scott Borders, Administrative Law Judge ("ALJ") dismissing Woods' claim for benefits against Todd County Standard ("Todd County") arising out of an alleged thoracic spine injury. Woods also appeals from the August 27, 2012, order overruling his petition for reconsideration.

The Form 101 alleges on August 12, 2011, Woods injured his thoracic spine in the following manner: "I stepped in a shallow hole and fell onto the side of van." Woods described the medical treatment he received as follows: "MRI of Thoracic Spine on August 29, 2011. Was discharged from Saint Thomas Hospital on August 30, 2011 and was discharged on October 21, 2011."

In its Form 111, Todd County denied the claim for the following reason:

> The alleged injury did not arise out of and in the course of employment. Explain: The plaintiff treated for thoracic and low back pain months before the date of the alleged injury. As such, the plaintiff's condition is not related to the alleged injury of August 12, 2011.

In the opinion and order, the ALJ determined as follows:

> KRS 342.0011 (1) defines injury as meaning, "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."
>
> The Plaintiff bears the burden of proof and risk of non-persuasion in each and every element of his case. *Colwell v Dresser Instrument Division,* 217 SW3d 213 (KY 2006). *Snawder vs. Stice*, 576 SW

2d 276 (KY App. 1979) *Jones vs. Newberg*, 890 SW 2d 284 (KY 1994).

There is no question that Mr. Woods suffered from Propionibacterium discitis/osteomyelitis which caused the T5 – T6 disc space to collapse. This has been diagnosed by Dr. Martel, Dr. Grabenstein, and Dr. Sheridan.

Mr. Woods argues this infectious disease had a precipitating traumatic event consisting of a T4-T5 fracture that preceded and caused his infection. In support of his position he submitted medical proof from Dr. Grabenstein who opined that Mr. Woods suffered compression fractures of T4-T5 most likely caused by his fall at work which increased his risk for osteomyelitis/discitis which he was diagnosed at St. Thomas Hospital. Dr. Grabenstein felt that his diagnosis and treatment for this infection was a result of his work-related fall.

The Defendant Employer argues that Mr. Woods has not met his burden of proving that his fall at work caused the development of a T4-T5 fracture and the infection which led to the disk space collapse and his need for hospitalization and resultant impairment. They [sic] argue that the infection which was pre-existing caused the T5 – T6 disc to collapse not the incident at work of August 12, 2011. They [sic] support this position with testimony from Dr. Sheridan who opined that the infection caused the disk to collapse not the incident at work of August 12, 2011. Dr. Sheridan was of the opinion that the admission to St. Thomas Hospital on August 31, 2011, was not related to the injury three weeks earlier but was for some unrelated infection. Dr. Sheridan did not believe

this mechanism of injury at work is consistent with the infectious process and noted he had complaints of thoracic pain prior to the work event and also noted [sic] to have a boil some time before his admission to the hospital.

In addition, Dr. Martel, the physician who treated Mr. Woods at St. Thomas Hospital could not say with certainty if the T4-T5 fracture of the thoracic spine or the infection came first. He notes that his symptoms began in March or April of 2011 and it is very possible that a fall and subsequent fracture could have been what seeded the Propionibacterium which led to further destruction that he could not rule out that there was an idiopathic seeding of bacteria which then led to destruction and pathologic fracture with this fall.

In this specific instance, after careful review of the lay and the medical testimony, the Administrative Law Judge finds persuasive and relies upon the opinion of Dr. Richard Sheridan in finding that the Plaintiff has not met his burden of proving that he suffered an injury as defined by the Act to his thoracic spine as alleged by him on August 12, 2011.

The administrative law judge finds, based on the opinion of Dr. Sheridan, that the infection caused the T5–T6 disc to collapse not the incident at work of August 12, 2011. The Administrative Law Judge further finds that the Plaintiff has not proven the work incident caused the T4-T5 fractures and that the admission to St. Thomas Hospital on August 31, 2011, was not related to the August 12, 2011, incident three weeks prior but to an unrelated infection and that the

> mechanism of injury at work on August 12, 2011 is not consistent with the infectious process. In addition, Mr. Woods complained of thoracic pain prior to the work event of August 2011.
>
> The Administrative Law Judge further notes that the Plaintiff's treating doctor, Dr. Martel, could not, within reasonable medical probability make a connection to Mr. Woods's thoracic spine infection and the August 12, 2011, incident at work. While Dr. Grabenstein felt that the development of osteomyelitis/discitis was causally related to the August 12, 2011, work-related incident, the Administrative Law Judge did not find his testimony to be persuasive.

In his petition for reconsideration, Woods asserted the ALJ erred by relying on Dr. Richard Sheridan's opinions. As previously noted, the ALJ overruled Woods' petition for reconsideration.

On appeal, Woods asserts he suffered a work-related injury as defined by the Workers' Compensation Act and the injury caused the resulting thoracic spine infection.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion regarding every element of his or her claim, including injury under the Act and causation. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial

evidence, evidence sufficient to convince reasonable people, in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id. Kentucky law holds when the party with the burden of proof before the ALJ was unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is 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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Here, as Woods was unsuccessful in proving he sustained an "injury" under the Act and in proving causation, our task is to determine if the record compels a different result. Since the record does not compel a different result, we affirm.

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951

S.W.2d 329, 330 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88, 98 (Ky. 2000). Additionally, if “the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe.” Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

KRS 342.0011 (1) defines "injury" as "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." Relying upon Dr. Sheridan’s opinions, the ALJ determined Woods had not met his burden of proving an injury as defined by the Act. Additionally, the ALJ determined Woods had not met his burden of proof on the issue of causation.

In his March 21, 2012, independent medical examination ("IME") report, Dr. Sheridan provided the following opinions:

> In my opinion this patient's diagnosis is fractures of T4 and 5 with resultant discitis at T4-5 with partial vertebral body collapse at T4 and 5 resulting in a 40˚ gibbus or a localized kyphosis. I believe he has reached maximum medical improvement. In my opinion he merits a 15% whole-person impairment, DRE III Thoracic on Page 389 of the AMA Guides Fifth Edition. He requires the following permanent restrictions:
>
> 1. Lift/push/pull 10 lbs. to 20 lbs. frequently and 20 lbs. to 50 lbs. infrequently.
>
> 2. No frequent bend, stoop, rotate at the waist, or reach from floor to waist.
>
> All of my opinions are within reasonable medical probability. I hope this has been of some assistance to you.

In a supplemental report dated April 2, 2012, Dr. Sheridan explained further:

> I believe the infection caused the T5-T6 disc to collapse, not the incident at work of 8/12/11. The admission to St. Thomas Hospital on 8/31/11 was not related to the injury three weeks earlier, but to some unrelated infection. I do not think his mechanism of injury at work is consistent with the infectious process. Also, he had complaints of thoracic pain prior to the work event of 8/31/11. He was also noted to have a boil sometime before his admission to the hospital.
>
> All my opinions are within reasonable medical probability. I hope this has been of some assistance to you.

Dr. Sheridan’s opinions comprise substantial evidence in support of the ALJ's determination Woods has neither suffered an injury as defined by the Act nor proved his thoracic condition was caused by an event at work. Dr. Sheridan, in his supplemental report, opined the August 12, 2011, incident at work is not "consistent with the infectious process." Additionally, Dr. Sheridan opined Woods' infection caused the T6-T6 disc to collapse, and not the August 12, 2011, incident at work. We disagree with Woods' interpretation of Dr. Sheridan's opinions set forth in the March 21, 2012, IME report as being consistent with Dr. Grabenstein's opinions. Specifically, Woods asserts as follows:

> In fact, Dr. Sheridan's original opinion specifically stated:
>
> > 'In my opinion this patient's diagnosis is fractures of T4 and 5, with resultant discitis at T4-5 with partial vertebral body collapse at T4 and 5 resulting in a 40 degree gibbus or a localized kyphosis.'[footnote omitted]
>
> Specifically, a review of Dr. Sheridan's opinion states that Mr. Woods has fractures at T4 and 5. This was Dr. Gravenstein's assessment as well.

We do not believe Dr. Sheridan’s opinions can be stretched to the point they support Woods’ claim. Dr. Sheridan's supplemental report clarifies any possible confusion regarding his opinions as to what came first- the fractures or the infection. It is clear from Dr. Sheridan's supplemental report he believes "the infection caused the T5-T6 disc to collapse, not the incident at work of 8/12/11." Thus, Dr. Sheridan’s opinions constitute substantial evidence supporting the ALJ's decision to dismiss Woods' claim for failure to prove an "injury" as defined by the Act and his condition is causally related to an event at work. While this Board acknowledges contrary evidence in the record by Dr. Grabenstein, this evidence does not compel a contrary result. The ALJ did not find Dr. Grabenstein's testimony to be "persuasive," and this Board cannot disturb the ALJ’s decision. Within the discretion afforded to him under the law, the ALJ is permitted to disregard such contrary evidence and rely instead on Dr. Sheridan's opinions.

Accordingly, the July 27, 2012, opinion and order and the August 27, 2012, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON W GREG HARVEY
P O BOX 1270
BOWLING GREEN KY 42102

COUNSEL FOR RESPONDENT:

HON TERRANCE J JANES
P O BOX 52
HOPKINSVILLE KY 42241

ADMINISTRATIVE LAW JUDGE:

HON R SCOTT BORDERS
8120 DREAM STREET
FLORENCE KY 41042