Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 30, 2016

CLAIM NO. 201590314

ED DOERR PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

DAKKOTA INTEGRATED SYSTEM
and HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Ed Doerr ("Doerr") appeals from the March 10, 2016, Opinion, Award, and Order and the May 4, 2016, Order on Petition for Reconsideration of Hon. Stephanie Kinney, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits and medical benefits but dismissed Doerr's claim for permanent partial disability ("PPD") benefits with prejudice.

On appeal, Doerr asserts there is objective medical proof of a harmful work-related change, and his argument is separated into three sub-arguments. First, Doerr asserts the objective proof when coupled with the lack of an active symptomatic condition immediately before the work-related incident compelled a finding of a harmful work-related change in the human organism. Second, Doerr asserts the ALJ did not take into consideration that Doerr had been performing his job duties without interruption since he began working for Dakkota. Third, Doerr asserts that a period of physical therapy prior to the work incident does not support a finding of a chronic condition that has been waxing and waning. We affirm.

Doerr, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including "injury" as defined by the Act. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Doerr was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. 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). The function of the

Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be

disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The Form 101 alleges on April 23, 2014, Doerr injured his low back while in the employ of Dakkota Integrated Services ("Dakkota") in the following manner: "lifting totes filled with approximately 70 pounds of rubber flaps." The Form 104, Work History, attached to the Form 101 indicates Doerr started working for Dakkota on January 15, 2011.

The December 21, 2015, Benefit Review Conference ("BRC") Order and Memorandum lists the following contested issues: benefits per KRS 342.730 [handwritten: "multipliers"]; work-relatedness/causation; notice; average weekly wage; unpaid or contested medical expenses [handwritten: "future"]; injury as defined by the ACT; exclusion for pre-existing disability/impairment; and TTD.

Doerr's FMLA form and medical records generated by Dr. Mandy Franklin were introduced. A record dated September 27, 2013, under the heading "back pain" reads as follows:

> 98 had an operation on his hip with a displacement
>
> 2002 he had a car accident
>
> 2005 [sic] he had another accident with his back

> Pain with squating [sic] and bending
>
> His back will get stiff
>
> Jet bath tub helps some
>
> Ibuprofen help [sic] some

In the October 14, 2013, FMLA form, Dr. Franklin noted Doerr was suffering from "chronic back pain" and needed physical therapy. Under "Approximate date condition commenced" is written "2008."

The June 17, 2014, medical report of Dr. John Johnson was introduced. Under the heading "History of Present Illness" is the following:

> This patient states that on April 23 file [sic] bending and lifting at work at 4 [sic] motor Company [sic] building radiator's [sic] that he heard something pop in his back and since that time he has had moderately severe low back pain [sic] he states he has never had any chronic history of back pain although he has had a couple accidents such as automobile accidents but nothing that is causing any chronic back pain [sic] states that prolonged standing aggravates his pain and discomfort [sic] he does not complain of any numbness or weakness involving the lower extremities [sic] he has been to physical therapy he has not had an MRI.

Attached to the Form 101 is the March 4, 2015, Independent Medical Examination ("IME") report of Dr. Jules Barefoot. Under the heading "History of Present Illness,"

the following is noted: "He denies a history of any prior back problems." After examining Doerr, Dr. Barefoot assessed an 8% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He opined 100% of the impairment rating is attributable to the April 23, 2014, work incident. He further opined as follows:

> Mr. Doerr would have marked difficulty obtaining a job that would require repetitive standing or walking.
>
> He would have difficulty lifting and carrying heavy loads.
>
> He would have difficulty with flexion at his waist on a repetitive basis.
>
> He would have difficulty climbing and descending stairs. He should not work on ladders or scaffolding.
>
> He would have significant difficulty operating machinery with foot controls.
>
> Mr. Doerr had no preexisting or active conditions in his lower back prior to his workplace injury on April 23, 2014.

On August 15, 2015, Dr. Barefoot provided a supplemental report stating he continues to stand by his conclusions contained in his March 4, 2015, IME report.

The January 28, 2015, report of Dr. Timir Banerjee was introduced. In his report, Dr. Banerjee summarized medical records of Dr. Johnson as follows:

> 2. Dr. Johnson (orthopedics): The doctor saw him on June 17, 2014. He told the Dr. that when he was working at Ford Motor Company building radiators he had heard something pop in his back and since that time he has had moderately severe low back pain. He has never had much of any back pain in the past although he had been in [sic] couple of accidents such as automobile accidents, but nothing that caused chronic back pain. In the past he has had left hip dislocation operation and he had fractured his right arm and he had been in automobile accidents.

After performing an examination, Dr. Banerjee opined:

> 1. I have written down the history clearly.
>
> 2. The present problem is not from a pre-existing condition though he has ligament laxity. He had injured ERECTOR SPINAE the iliocostalis part and also the multifidus- please see the enclosed material to understand the anatomy.
>
> 3. He has had harmful change to the human organism in the muscle but not in the disc or such, the findings are irrelevant and some of the notes regarding leg pain etc. are inappropriate.
>
> 4. He does not need any aggressive medical, surgical or chiropractic treatment for this. He needs to sit in a hot bath and use ICE HOT OR CAPSAICIN

> patches. The narcotic prescriptions should be discontinued by February 15 and are not medically indicated and may cause habituation. There is no evidence of benefit from this type of medication.
>
> 5. Myelogram and CT scan were not medically indicated and not necessary and not related to the injury in question. MRI scan was an adequate study. I have seen all the pictures done in the Norton system. He has facet asymmetry to cause slight difference in the appearance in the nerve root.
>
> 6. He has reached MMI for the injury in question.
>
> 7. FCE may be helpful to determine his capabilities.
>
> 8. According to the 5th edition of AMA guidelines he has 0% impairment using pages 572-575 of chapter 18 that is nonobjective and best decided administratively.

The July 23, 2015, supplemental report of Dr. Banerjee was introduced in which he opined as follows:

> I had indicated in my IME report that he had injury to Erector Spinae and that was not preexisting. I must respectfully submit that I had erred and had given him the benefit of doubt because he had forgotten about his recurrent episodes of back pain prior to the episode in question. As a doctor part of our medical judgment depends on this history. He does have a condition of laxity of ligaments and he has had obviously recurrent episodes of back pain and therefore his condition should be considered as a pre-existing active disabling condition with which he had

> continued to work. He has had episodes of shoulder pain as well as part of his preexisting condition. I had mentioned his hip condition in my notes.

The August 13, 2015, IME report of Dr. Rick Lyon was introduced. Based on his examination, Dr. Lyon diagnosed Doerr with "Myofascial back pain." He opined as follows:

> I am in agreement with Dr. Banjeree that Mr. Doerr has reached MMI. Since he is at MMI an Impairment rating can be determined utilizing the AMA Guides, 5th Edition. Per Table 16-3, Page 384, Mr. Doerr is a DRE Lumbar Category 1 with 0% whole person impairment. It is my opinion that he has returned to his pre-injury condition and that the alleged work event has resulted in no harmful change to the low back. As palliative care, Mr. Doerr would benefit from the use of TENS unit. It is my opinion that he can return to his job duties at the time of injury. Although the work restrictions as determined by Magnum, PT are appropriate, they are a result of the motor vehicle accident and not the alleged work event. Mr. Doerr has likely functioned with in [sic] these restrictions following the motor vehicle accident.

He further opined as follows:

> 4. Review of Dr. Barefoot's evaluation indicates no history of previous back pain. He does chart pain radiating from the left leg to the medial aspect of the thigh down to his knee region. Although Mr. Doerr makes no such complaints today, these particular complaints are consistent with low back

> pain and are not a radicular finding. Dr. Barefoot determined a DRE Lumbar Category II, which requires objective evidence of an injury and nonverifiable radicular complaints. Furthermore, he came to his conclusions without the benefit of an accurate history. Therefore, it is my opinion Dr. Barefoot [sic] estimate of impairment is in error.
>
> 5. Mr. Doerr has had a flare-up of his low back pain. This is a direct result of the motor vehicle accident in 2005 [sic] as confirmed by previous episodes of low back pain. It is also expected that he will have similar events in the future as a result of that motor vehicle accident and unrelated to the alleged work event. Similarly, the alleged event in 2014, was a flare up of his low back pain and not a new injury. He would have benefited from light duty work for approximately 4 to 6 weeks after the alleged work event and likely returned to his baseline condition at that time.

Dr. Lyon concluded as follows:

> It is my opinion that Mr. Doerr's low back condition was preexisting and active at the time of [sic] alleged work event, as confirmed by recurrent episodes of low back pain. Although Mr. Doerr states the pain only occurred in 2013, the records indicate he has had recurrent issues with his low back since the 2005 [sic] motor vehicle accident.

In a supplemental report dated September 20, 2015, Dr. Lyon stated:

> I am in receipt of your letter dated 09/02/2015. With that letter, you

> provided images of the lumbar spine dated 06/17/2014. I have reviewed the images which include standing AP and Lateral views. They reveal no obvious acute abnormalities. As a result, my opinions expressed in the August 13, 2015 report are unchanged.

In a second supplemental report dated January 24, 2016, Dr. Lyon set forth the following additional opinions:

> I am in receipt of your correspondence requesting an impairment rating. I am in agreement with Dr. Banjeree that Mr. Doerr has reached MMI. Since he is at MMI an Impairment rating can be determined utilizing the AMA Guides, 5th Edition. Per Table 16-3, Page 384, Mr. Doerr is a DRE Lumbar Category 1 with 0% whole person impairment. It is my opinion that he has returned to his pre-injury condition and that the alleged work event has resulted in no harmful change to the low back.
>
> This rating is in contrast to the 8% estimated by Dr. Barefoot as a DRE Lumbar Category II. Review of Dr. Barefoot's evaluation indicates no history of previous back pain which is not consistent with the medical records. He does chart pain radiating from the left leg to the medial aspect of the thigh down to his knee region. Although Mr. Doerr made no such complaints on my evaluation, these particular complaints are consistent with low back pain and are not a radicular finding. Therefore, Mr. Doerr does not meet the criterial [sic] for a Lumbar Category II rating.

Doerr was deposed on May 15, 2015. He testified he filed a lawsuit in 2004 after sustaining a lower back

strain in a car accident. He underwent physical therapy and chiropractic treatment following the accident. His back pain at that time bothered him in the morning. Doerr took Somas for three months for his pain.

Doerr testified that he had a motorcycle accident in 1990, in which he fractured his hip and was required to undergo surgery.

Doerr also testified concerning when his back pain returned in 2013:

> Do I have any issues? No. I went to- what was the year I got hurt, 2014. So, 2013 I went for- I was having a problem of the same pain came back in the morning, and I told my doctor, so she had [sic] got [sic] me FMLA. I went to therapy on my own and I came back to work. That was 2013, I believe, September or something [sic] was over with.

Doerr's job responsibility when he was first hired at Dakkota was assembling radiators. At the time of his injury, he was working as a backup material handler. He testified regarding his job duties as follows:

> A: You service the line, you just keep the line going. You bring all the materials or whatever it is that keeps the line going.
>
> Q: So, you're on your feet?
>
> A: Yes.
>
> Q: And are you lifting items?

A: Yes.

Q: And are you lifting- how are you lifting them?

A: Squat down, bending down, pick it up, stand back up, take it to wherever it goes.

Q: Are you using any equipment?

A: Depending on the item.

Doerr testified concerning the April 23, 2014, work incident:

A: I was doing the backup forklift driving, I was about to- the line needed some materials, but the shift before us left empty pallets in front of materials. So, I was like, I have to move that out to get to the materials for the line.

Q: Is that something you've had to do before?

A: No. Every shift is supposed to clean up behind theirself [sic].

Q: So the shift before you hadn't cleaned up?

A: No, they just left the empties in front of the material that I needed to get to. When I was picking up the pallet, the forks, they tilt, like, you tilt the forks towards you. I could see- like, there's three rows- there's two rows of three, but the middle was like empty.

So, when I tilted, I was looking, but the pallets- the material- the empty pallets, the totes wouldn't move. So

I'm like, I wonder, is it something in the middle.

So, I set it back down, I pulled the forks out, I went around there, and that's when I heard my back pop.

...

Q: Okay. Once you heard your back pop, what happened?

A: I thought it was just from- I thought it was just like something that just happened. I didn't think it was as serious as it came out to be. I struggled getting the tote up, I didn't have it all the way up, but I went ahead and picked it up, I put it on the line, and I just tried to move my back a little. Even though it was hurting I just kept trying to move it. I figured I'll stretch it out.

I walked over and got three empty totes for another job that I was going to have to do. When I picked them up, they hurted (sic). So I walked them to the three empty totes where I was going to use them at, and I was like, I can't take it. I went to the supervisor, Kevin McNally (phonetic), and I told him what happened.

Q: How long do you think it was before you went to the supervisor?

A: Less than three minutes, four minutes.

Q: From when you heard your back pop?

A: Yes.

...

Q: Did you drive home?

> A: No, I laid in the back seat. My wife drove me.
>
> Q: Your wife took you home?
>
> A: Yeah. Tina Lewis was there, she helped me get in the car.

Doerr recounted his treatment the next day at OPS:

> A: They took a [sic] x-ray, they checked my bending mobility, and they gave me therapy and they told me that they believed that I had a sprained muscle or- I don't know, he has the report what they wrote in there, and they put me on light duty.
>
> Q: So when did you go back to work?
>
> A: Three days later.

At the time of his deposition, Doerr was taking Hydrocodone 7.5 and a muscle relaxer.

Doerr was deposed again on September 10, 2015. He testified when he saw Dr. Franklin on September 27, 2013, he was experiencing back "discomfort," not pain. Doerr acknowledged he underwent physical therapy after seeing Dr. Franklin on September 27, 2013. Doerr testified that after his 2004 motor vehicle accident, he experienced "discomfort," not pain. He was given Somas, and underwent chiropractic treatment after the accident.

Doerr also testified at the January 25, 2016, hearing. When asked about the time he saw Dr. Franklin in 2013, he responded as follows:

> Q: Tell us about why you saw her?
>
> A: I went to her because I had like a stiffness and discomfort in my back.
>
> Q: How long did you see her?
>
> A: I went to see her once and she recommended physical therapy?
>
> Q: Did you complete the physical therapy?
>
> A: Yes.
>
> Q: Do you remember when?
>
> A: Somewhere around early December.

Doerr testified that between December and date of his alleged injury, he did not miss any work and was not working under any restrictions. The last day he worked for Dakkota was November 25, 2014. He testified he has not worked since because "their job description of light duty wasn't what the doctor considered light duty."

Doerr testified about his previous back problems:

> Q: ...Regarding the visit with Dr. Franklin in 2013, you said that was for a discomfort in your back; is that correct?
>
> A: Yes.
>
> Q: How long did you treat for that?

A: She sent me to therapy roughly to somewhere [sic] the end of December.

Q: And was that an injury that you had had previously that was aggravated?

A: I wouldn't say- I couldn't answer that question.

Q: You had had a back injury before that. Right?

A: Yes.

Q: Was that in 2008?

A: No.

Q: When was it?

A: 2004, 2003, somewhere around there.

Q: Was that a result of a car accident?

A: Yes.

Q: And did you have- you had therapy for that?

A: Yes.

Q: And how long- did you have symptoms for that?

A: Right after therapy it [sic] was [sic] no more symptoms.

Q: And, then, did you re-aggravate your back in 2008?

A: No.

Q: So you had testified a few minutes ago on direct that you applied for FMLA leave.

A: Yes.

Q: And you filled out an application when you applied for that FMLA leave. Right?

A: Yes.

Q: You signed that application saying that everything that was in it was true; is that right?

A: I signed it before it was filled out.

Q: So you didn't fill out the application; you just signed your name?

A: I signed my name and turned it into my doctor so they could send it back to Dakota [sic].

Q: On that FMLA application, you wrote that you had back pain since 2008. So is that incorrect?

A: It could be on there, but I meant to put down 2004, if it says 2008.

...

Q: This is your FMLA application. See here- is that your signature?

A: That's not my name.

Q: Whose name is it then?

A: I don't know.

Q: Is that your doctor's name, Mandy Franklin?

A: It could be.

Q: And this information that Mandy Franklin had came [sic] from you; is that right?

> A: Yeah, but if it says 2008, that's stuff that me [sic] and her [sic] went over that she has wrong in her system.
>
> Q: So you're saying that this date of [sic] 2008 back injury is not correct?
>
> A: No, it's not.
>
> Q: What should the date be?
>
> A: 2004.
>
> Q: So you had a back injury in 2004?
>
> A: Yes.
>
> Q: Did you have any other motor vehicle accidents?
>
> A: Before or after?
>
> Q: Before your injury at Dakota [sic].
>
> A: I had a motorcycle accident in '91, and another accident in 1998, somewhere around there, '98, '97.
>
> Q: Did you have a motor vehicle accident in 2002?
>
> A: That is the one that is in 2004- 2004, 2003, somewhere around there.
>
> Q: That's when you hurt your back?
>
> A: Yes.

Regarding the medical histories he provided various doctors, Doerr testified:

> Q: When you went to see your physicians after you suffered your injury from Dakota [sic], did you- for example, Dr. Johnson when you went to the Norton

Heath Clinic- did you tell him anything about having a prior back injury?

A: Whatever he asked me, I answered. I don't remember everything me [sic] and him [sic] talked about.

Q: If his records, which are tendered here, say no back injury, that would be incorrect?

A: It would- like I say, I can't remember exactly what we talked about. When you asked me that the last time I told you, he probably didn't ask me that way. He could have asked me have I ever hurt my back the way it was hurting, and I would have told him no.

Q: But the answer to my question is- Dr. Johnson's records said nothing about a prior back injury; is that correct?

A: I didn't read his records. All my medical files is [sic] in Norton Healthcare. So anything that Mandy Franklin got in there, he could see, too. So all my back injuries or any accidents I ever had, he has access to them when he looks at my file. My FMLA papers are there and everything.

Q: You don't remember telling him that you had prior back injuries when you went to treat?

A: No, I don't remember.

Q: And when you went to do your IME with Dr. Barefoot, do you ever remember telling him about prior back injuries?

A: No.

> Q: How about when you did your IME with Dr. Banerjee, did you tell him about prior back injuries?
>
> ...
>
> A: Yes, I told him about my FMLA.
>
> Q: Did you tell him about the 2004 injury?
>
> A: I can't remember exactly what we all talked about. I do remember telling him about the FMLA.

In the March 10, 2016, Opinion, Award, and Order, the ALJ set forth the following Findings of Fact and Conclusions of Law regarding the existence of an injury as defined by the Workers' Compensation Act:

> It has long been held in Kentucky courts that a worker is entitled to be compensated for all the harmful changes that flow from a work-related injury that are not attributable to an independent, intervening cause. Elizabeth Sportswear v. Stice, 720 S.W. 2d (Ky. App. 1986).
>
> "Injury is statutorily defined in KRS 342.0011 (1):
>
> "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of an in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.
>
> "Objective medical findings" is defined by KRS 342.0011 (33) as information gained through direct observation and

testing of the patient, applying objective or standardized methods. In Gibbs v. Premier Scale Co., 50 S.W. 3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011 (1) and (33) if it is based upon symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001), in which the Court held that while objective medical evidence must support a harmful change diagnosis, it is unnecessary to prove causation of any injury through objective medical findings.

Medical causation must be proved to a reasonable medical probability with expert 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).

In Derr Construction, the Kentucky Supreme Court explained:

KRS 342.120(4) [now KRS 342.120(6)] specifically exempts the employer from paying income benefits for prior, active disability or for disability resulting from the arousal of a previously dormant condition. However, KRS 342.020 contains no such exemption regarding medical benefits. Liability for medical expenses requires only that an injury was caused by work and that medical treatment was necessitated by the injury.

An arousal of a previously dormant condition is compensable and is not to be considered "natural aging" to be excluded from compensability. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). It is the Defendant's burden to prove the existence of pre-existing, active disability. In order for a condition to be deemed pre-existing and active, it must be symptomatic, and impairment ratable immediately prior to the occurrence of the work event. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007).

Plaintiff had a work event wherein he felt his back pop with an onset of back pain. This work accident was reported to Plaintiff's supervisor, and Plaintiff was referred to OPS for treatment. However, approximately 6 months before the work, Plaintiff had back symptoms which he minimized during his testimony and characterized as stiffness and discomfort. Regardless, these symptoms were severe enough to prompt Plaintiff to seek treatment with Dr. Franklin. Plaintiff claims these symptoms and his back condition was not chronic in nature, but this does not correlate with his FMLA application and Dr. Franklin's treatment for what she deemed as chronic back pain since 2008. Furthermore, Dr. Franklin's treatment records note complaints of back pain and not mere tightness and discomfort, which contradict Plaintiff's testimony.

Plaintiff's low back symptoms, for which he sought treatment on April 24, 2014 at OPS, are very similar to Plaintiff's previous low back complaints. On April 24, 2014, Plaintiff made complaints of non-radicular back pain and was diagnosed with a lumbar strain. Plaintiff's prior

history is positive for lumbar strains. What the ALJ finds most troubling is Plaintiff's history regarding his prior low back symptoms to multiple treating and evaluating physicians. He denied chronic back pain during treatment with Dr. Johnson, which contradicts Dr. Franklin's records. It seems highly unlikely OPS, Dr. Johnson, and Dr. Barefoot all, on their own accord, failed to note Plaintiff's prior back history. It is much more likely that Plaintiff simply did not provide a history of his prior back complaints. Physical therapist Magnum noted self-limited behaviors. This coupled with Plaintiff's tenuous reports of prior symptoms casts dispersion [sic] on this element of Plaintiff's testimony.

It is very interesting that Plaintiff provided Dr. Franklin with a more detailed and accurate history of prior low back symptoms when he sought treatment in late 2013. This is presumably why Dr. Franklin diagnosed chronic low back pain. Plaintiff claims his condition dramatically improved following physical therapy in late 2013. However, on December 30, 2013, Plaintiff indicated he planned to continue exercises he was taught during physical therapy.

Dr. Barefoot has indicated Plaintiff had an underlying osteoarthritis /degenerative disc disease that was asymptomatic, dormant and nondisabling prior to the work accident. Initially, Plaintiff denied prior low back injuries or symptoms. However, Dr. Barefoot was afforded an opportunity to review Dr. Franklin's prior treatment records. Plaintiff claims he was able to perform any and all jobs prior to this work accident. He underwent a pre-employment physical in 2012, but it is

clear he had low back symptoms after this physical that required treatment.

Plaintiff now claims he has radicular symptoms, but he did not report radiating symptoms to OPS. Dr. Banerjee, a neurosurgeon, felt Plaintiff's problem has a muscle origin, not disc. There is a neurosurgeon and orthopedic indicating Plaintiff had a pre-existing, active condition. This is in contradiction to Dr. Barefoot's, an emergency room physician, opinions.

The Defendant argues Plaintiff's back symptoms are the result of a pre-existing, active condition and therefore is not compensable. However, there is no evidence Plaintiff had an impairment ratable condition, immediately prior to the April 23, 2014 work accident. However, this ALJ does not conclude Plaintiff's current symptoms are related to the April 23, 2014 work accident. The ALJ finds Plaintiff's current lumbar condition is the result of a pre-existing lumbar condition that has waxed and waned over the years and continues to do so.

The ALJ notes physicians at OPS noted muscle spasms following the work accident, but these spasms resolved. Dr. Johnson did not note any spasms during his treatment of Plaintiff in June, 2014. The ALJ notes Plaintiff's lumbar MRI which showed a protrusion, but concludes this is consistent with normal aging and genetic influences, not an acute injury, relying on Dr. Lyons. The ALJ finds Plaintiff sustained, at most, a temporary exacerbation, which has returned to baseline. In making these conclusions, the ALJ relies on Drs. Lyon and Banerjee.

In his Petition for Reconsideration, Doerr requested the ALJ reconsider her decision and find he sustained an 8% whole person impairment due to the work injury. Doerr's petition for reconsideration was denied by Order dated May 4, 2016.

Substantial evidence in the record supports the ALJ's dismissal of Doerr's claim for PPD benefits. In her March 10, 2016, decision, the ALJ stated she relied upon both Drs. Lyon and Banerjee in finding Doerr sustained, at most, a temporary exacerbation which has returned to baseline. The ALJ clearly stated that Dakkota failed to prove Doerr had an impairment ratable pre-existing condition at the time of the April 23, 2014, work incident; therefore, Doerr's pre-existing condition was not active.

In his January 28, 2015, report, Dr. Banerjee originally opined Doerr's back condition was not pre-existing, and he assigned a 0% impairment rating pursuant to the AMA Guides. In his July 23, 2015, supplemental report, after reviewing the medical records of Dr. Franklin, Dr. Banerjee opined Doerr's back condition should be considered a "pre-existing active disabling condition."

Dr. Lyon, in his August 13, 2015, IME report, stated unequivocally Doerr's back condition was a pre-existing active condition at the time of the April 23,

2014, work incident, and the work incident "was a flare up of his low back pain and not a new injury." In his second supplemental report dated January 24, 2016, Dr. Lyon assigned a 0% whole person impairment rating.

The above-cited medical evidence from Drs. Banerjee and Lyon comprises substantial evidence in support of the ALJ's conclusion Doerr sustained a temporary exacerbation which has returned to baseline. In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, supra. Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, supra. 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). Where evidence is conflicting, the ALJ, as fact-finder, has the discretion to

pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). The ALJ's dismissal of Doerr's claim for permanent income benefits will not be disturbed.

In Doerr's first sub-argument, he asserts that in order for a pre-existing condition to be active, it must be manifesting symptoms and be impairment ratable immediately before the work incident. This argument is irrelevant due to the fact the ALJ determined the condition, prior to the April 23, 2014, work incident, was a pre-existing *dormant* condition and not a pre-existing *active* condition. Indeed, the ALJ conclusively rejects Dakkota's argument regarding a pre-existing *active* condition by stating as follows in the March 10, 2016, Opinion, Award, and Order:

> The Defendant argues Plaintiff's back symptoms are the result of a pre-existing, active condition and therefore not compensable. However, there is no evidence Plaintiff had an impairment ratable condition, immediately prior to the April 23, 2014, work accident.

While we acknowledge both Drs. Banerjee and Lyons, the physicians upon whom the ALJ relied, opined Doerr was suffering from a pre-existing active condition at the time of the April 23, 2014, work incident, the ALJ noted that his condition was not impairment ratable; thus,

the ALJ did not find Doerr was suffering from a pre-existing *active* condition.

In his second sub-argument, Doerr asserts the ALJ failed to consider that he had been performing his job duties without interruption since he began working for Dakkota. This argument lacks merit. The March 10, 2016, Opinion, Award, and Order reveals a five-page detailed discussion of Doerr's testimony set forth in his two depositions and hearing testimony, including his start date at Dakkota, his original job duties, and the duties he was performing at the time of the April 23, 2014, incident. Clearly, the ALJ was well-versed in Doerr's work history at Dakkota. Further, it should be emphasized that the ALJ is only required to provide a factual basis for her ultimate conclusions sufficient to afford meaningful appellate review. Kentland Elkhorn Coal Co. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). The ALJ need not provide a detailed summary of the evidence she considered or include the minute details of her reasoning in reaching her final conclusions. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

Finally, in his third and final sub-argument, Doerr asserts that a single period of physical therapy

prior to the April 23, 2014, work incident does not support a finding of a chronic condition that has been waxing and waning. We note, too, that Doerr also makes reference to the standard set forth in Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004) without explaining how it is applicable to his argument. As this Board has no meaningful way of addressing the Cepero, supra, reference, we will not attempt to do so.

The ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence, including the lay and medical evidence, and make her findings accordingly. Miller v. East Kentucky Beverage/Pepsico, Inc., supra; Jackson v. General Refractories Co., supra. While both Drs. Banerjee and Lyons opined Doerr's condition was pre-existing and active at the time of the April 23, 2014, work incident, the ALJ clearly rejected these opinions. This is well within her discretion. As previously noted 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. Magic Coal Co. v. Fox, supra. However, in his July 23, 2015, supplemental report, Dr. Banerjee states Doerr "had forgotten about his ***recurrent episodes of back pain*** prior

to the episode in question." (emphasis added). In Dr. Lyon’s August 13, 2015, IME report, he opined Doerr experienced a "flare-up" of his low back pain and that "the records indicate he has had ***recurrent issues with his low back*** since the 2005 [sic] motor vehicle accident." This language from both physicians comprises substantial evidence in support of the ALJ's determination Doerr's back pain waxed and waned before the April 23, 2014, work incident, and that the incident caused a temporary exacerbation or, as Dr. Lyon articulated, a "flare-up," which has returned to baseline. Further, the evidence does not compel a different outcome.

Accordingly, the March 10, 2016, Opinion, Award, and Order and the May 4, 2016, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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