Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 24, 2015

CLAIM NO. 201260165

EMMANUEL QUARLES PETITIONER

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

GORDON FOOD SERVICE
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

GORDON FOOD SERVICE CROSS-PETITIONER

VS.

EMMANUEL QUARLES CROSS-RESPONDENT
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENT

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Emmanuel Quarles (“Quarles”) and Gordon Food Service ("Gordon") appeal and cross-appeal, respectively, from the October 21, 2014, Opinion, Award, and Order and the December 1, 2014, Order on Petitions for Reconsideration of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). In the October 21, 2014, Opinion, Award, and Order, the ALJ awarded Quarles temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and past, present, and future medical benefits "for the cure and relief from the effects of the work-related injury to the right knee and for the temporary strain to the low back with the obligation for the low back treatment terminating on April 23, 2013."

On appeal, Quarles contends the ALJ utilized an incorrect standard to determine he suffered from a pre-existing active low back condition. On cross-appeal, Gordon maintains the ALJ erred in relying upon Dr. Warren Bilkey's 7% impairment rating for Quarles’ right knee condition and by not providing essential findings of fact and conclusions of law to support her reliance upon the 7% impairment of Dr. Bilkey.

The Form 101 alleges Quarles sustained injuries to his back, hips, and right knee, while in the employ of Gordon, in the following manner:

> Plaintiff sustained [sic] injury to this Back and Right Knee on 11/28/12 when he lifted [sic] fifty pound bag of sugar and subsequently twisted [sic]. Plaintiff suffered [sic] work-related injury causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides.

The August 12, 2014, Benefit Review Conference Order lists the following contested issues:

> benefits per KRS 342.730; work-relatedness/causation [handwritten: "back"]; unpaid or contested medical expenses; injury as defined by the ACT [handwritten: "back"]; exclusion for pre-existing disability/impairment [handwritten: "back"]; TTD [handwritten: "overpay- duration; underpay- rate"].

The parties stipulated a work-related injury occurred on November 29, 2012. Additionally, the BRC order indicates TTD benefits were paid from December 1, 2012 through September 14, 2013.

Dr. Thomas Loeb’s April 23, 2013, Independent Medical Examination ("IME") report was introduced by Gordon. After examining Quarles and performing a medical records review, Dr. Loeb diagnosed:

> a. He has a medial meniscus tear in the right knee with a central cartilage defect in the medial femoral condyle.

> b. He has multilevel longstanding preexisting degenerative disc disease of the lumbosacral spine, particularly at the L3/L4 level.

Dr. Loeb opined that the incident of November 28, 2012, "could have aggravated an underlying dormant condition in his right knee and low back. He appeared to have dormancy in both sites." Dr. Loeb further opined that Quarles is not yet at maximum medical improvement ("MMI") concerning his right knee condition but is at MMI with respect to his lumbar spine condition. Regarding permanent impairment, Dr. Loeb opined as follows:

> I believe he has permanent impairment to his lumbar spine. As it relates to his work injury of November 28, 2012, I think the only thing he sustained at the time of the work injury was a transient lumbar sprain, a ligamentous sprain, with transient aggravation of his underlying preexisting condition, even though [sic] subjectively was dormant for some time, has been an active, ongoing degenerative process. I think his current symptoms are secondary to that active preexisting process in that the tissues that may have been sprained or injured at the time of his work incident on November 28, 2012, have long since healed. His permanent partial impairment rating for this sprain of his lumbar spine would be 0% to the whole person.

A second IME report of Dr. Loeb dated July 8, 2014, was introduced by Gordon. After examining Quarles

again and performing a medical records review, Dr. Loeb diagnosed:

> He has low back pain with multilevel preexisting degenerative disc disease of the lumbosacral spine with radicular complaints. He also is status post right knee partial medial meniscectomy with mild medial femoral condylar chondromalacia.

Regarding an impairment rating for Quarles' low back condition, he opined as follows:

> I think his back condition can be rated using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, from page 384, Table 15-3, under DRE Lumbar Category II. He would be 5% to the whole person for 'asymmetric loss of range of motion, or nonverifiable radicular complaints, defined as complaints of radicular pain without objective findings.' In my opinion, the entire permanent partial impairment rating is due to his preexisting degenerative process as I believe that, in regards to the work injury on November 28, 2012, he had a transient exacerbation of his underlying condition that has completely resolved. Therefore, in regards to the November 28, 2012, work injury, he would have 0% permanent partial impairment. The entirety of his 5% rating would be due to his preexisting disease process.

Dr. Loeb opined Quarles is no longer in need of additional medical treatment for the effects of the November 28, 2012, work incident.

In the October 21, 2014, Opinion, Award, and Order, the ALJ provided the following "Findings of Fact and Conclusions of Law":

> **A. Work relatedness/causation, Injury as Defined by the ACT and Exclusion for preexisting disability/impairment, all as related to the back.**
>
> **1. <u>Principle of law.</u>**
>
> Under the Act, an injury is "any work-related traumatic event or series of traumatic events … 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). The term "objective medical findings" means clinical findings, observations, and other standardized testing performed as part of a physical examination as well as sophisticated diagnostic tests. *Gibbs v. Premier Scale Company/Indiana Scale Company*, 50 S.W.3d 754 (Ky. 2001).
>
> 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. <u>Findings of fact and conclusions of law.</u>

Plaintiff has not met his burden of proving a work related injury to the low back. Instead, any permanent condition to the low back was preexisting. The work injury resulted in only a temporary strain.

3. <u>Evidentiary basis and analysis</u>.

Even though Quarles says he has not suffered prior back problems, the evidence shows he has treated through the years. Additionally, he has suffered additional injury in the MVA after the work injury. While Quarles was found generally to be a credible witness, he did not recall, or at least did not admit to, numerous past documented complaints of back pain. Dr. Raque noted disc disorder and even though several of the physicians found work related back pain, the opinion of

Dr. Loeb is found most persuasive on this issue as it coincides most closely with the medical history of ongoing pain complaints through the years. The work injury of November 28, 2012 resulted in only a temporary strain.

B. Benefits per KRS 342.730.

1. <u>Principle of law.</u>

To qualify for an award of permanent partial benefits under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, he is also required to prove the harmful change resulted in a permanent disability as measured by an AMA impairment. KRS 342.0011(11), (35), and (36). Furthermore, if, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined. KRS 342.730 (1)(c)(1).

2. <u>Findings of fact and conclusions of law.</u>

Quarles retains no work related permanent impairment for his temporary back strain. For his right knee injury, his impairment is 7%. Due to this knee injury he cannot return to the work he performed at the time of the injury and qualifies for the 3 multiplier.

3. <u>Evidentiary basis and analysis</u>.

Pursuant to KRS 342.730(1)(a), Plaintiff is entitled to benefits equal to “sixty-six and two-thirds percent

(66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability."

Based on the FCE, Dr. Nadar did not believe Quarles could return to the same work he performed at the time of the injury. Therefore, his award is multiplied by three.

The parties stipulated that Plaintiff's AWW was $545.46.

Calculation:

$545.46 x .66667 = $363.64 x 7% x .85 x 3 = $64.91

C. TTD benefits.

1. <u>Principle of law</u>.

Kentucky Revised Statute 342.0011(11)(a) states that: "'temporary total disability means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." To qualify for TTD benefits the absence from work must be due to a work-related injury. *See, e.g., Aluminum v. Carkuff*, No. 2009-SC-68-WC, 2009 WL 3526558, at *3 (Ky. Oct. 29, 2009) ("Workers' compensation benefits are paid for the effects of work-related injuries.").

With respect to TTD, a claimant is entitled to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state

average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability.

2. Findings of fact.

Quarles reached MMI for his knee when Dr. Nadar placed him at MMI on September 13, 2013. He was overpaid as to duration by one day and underpaid as to rate. Adjustments are appropriate.

3. Evidentiary basis and analysis.

TTD was paid from December 1, 2012 through September 14, 2013. Although arguable, benefits could have begun one day late and ended one day late, it is possible Defendant Employer is entitled to a one day adjustment in payment based on the last day of work and the date of MMI, September 13, 2013, according to Dr. Nadar. However, as the rate paid was $355.29 and should have been $363.36 based on the average weekly wage of $545.46, there is no question he was underpaid as to rate and is entitled to reimbursement.

D. Unpaid or contested medical expenses.

1. Principle of law.

KRS 342.020 mandates that the employer pay for the cure and relief from the effects of the injury as may reasonably be required at the time of the injury and thereafter during disability. Unlike KRS 342.0011(11) and KRS 342.730(1), KRS 342.020(1) does not state eligibility for medical benefits requires proof of a permanent impairment rating, of a permanent disability rating, or of eligibility for permanent income benefits.

Moreover, it states clearly liability for medical benefits exists "for so long as the employee is disabled regardless of the duration of the employee's income benefits." See *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). To be compensable, however, medical treatment must be reasonable and necessary.

2. <u>Findings of fact and conclusions of law.</u>

Quarles is entitled to payment of medical benefits related to the cure and/or relief of the effects of the work related right knee injury and for the temporary back strain. For the temporary back strain, Quarles reached MMI per Dr. Loeb on April 23, 2013.

3. <u>Evidentiary basis and analysis</u>.

Quarles knee injury is found by all evaluators and treating physicians to be related, at least in part, to the November 28, 2012 work injury and thus, all medical benefits for related treatment are the responsibility of the carrier. The back claim is much more difficult. Quarles had back complaints through the years but did not admit to having recollection of these complaints. He has ongoing litigation related to back pain from the subsequent MVA. Furthermore, the convincing opinion is that of Dr. Loeb who found any pathology with Quarles' back to be due to preexisting degenerative conditions and not due to the work injury. For the temporary strain he may have suffered on November 28, 2012, his treatment is found appropriate and work related through April 23, 2012 when Dr. Loeb placed him at MMI for his back.

Both Quarles and Gordon filed petitions for reconsideration. In the December 1, 2014, Order on Petitions for Reconsideration, the ALJ clarified that Quarles' hip claim has been dismissed. The remainder of Quarles' and Gordon's petitions for reconsideration was dismissed.

Quarles argues the ALJ misconstrued the applicable law in determining he has a pre-existing active low back condition as there are no medical records indicating he had a symptomatic or impairment ratable low back condition immediately preceding the alleged work-related injury.

Despite Quarles' arguments on appeal, we are unable to determine from the language in the October 21, 2014, Opinion, Award, and Order whether the ALJ believed Quarles suffered from a pre-existing *active* or a pre-existing *dormant* low back condition at the time of the November 28, 2012, incident. Even though the ALJ cited the applicable law to be utilized in determining whether a pre-existing active condition is present, specifically the standard articulated in Finley v. DBM Technologies, 217 S.W. 3d 261 (Ky. App. 2007), she did not directly conclude Quarles was suffering from a pre-existing *active* low back condition at the time of the November 28, 2012, incident.

The ALJ's final conclusion was "any permanent condition to the Quarles' low back was preexisting. The work injury resulted in only a temporary strain." She reinforced this finding on the subsequent page of her opinion stating: "Quarles retains no work related permanent impairment for his temporary back strain." This finding is supported by Dr. Loeb who opined, in the July 8, 2014, IME, that Quarles "had a transient exacerbation of his underlying condition that has completely resolved." Since the ALJ determined Quarles sustained a temporary low back injury, Finley, supra, is inapplicable.

A review of Dr. Loeb's two IME reports, the physician upon which the ALJ relied to resolve Quarles' low back claim, reveals equivocal opinions on the issue of Quarles' low back condition being a pre-existing dormant or a pre-existing active condition. However, in this particular case, this is a distinction without a difference, as the ALJ ultimately concluded Quarles sustained a temporary strain to his low back and entered an appropriate award of past, present, and future medical benefits terminating on April 23, 2013, the date upon which Dr. Loeb deemed Quarles had reached MMI for his low back

strain.[1] It is clear from both of Dr. Loeb's IME reports that he believes Quarles sustained a temporary low back strain; thus, the ALJ’s determination will not be disturbed.

On cross-appeal, Gordon argues the ALJ failed to provide adequate findings of fact and conclusions of law regarding her reliance upon Dr. Bilkey's 7% impairment rating for Quarles' right knee injury. Gordon also asserts Dr. Bilkey's opinions do not constitute substantial evidence as Table 17-5 in the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) pertains to gait-derangements of persons who are dependent upon assistive devices.

A review of the ALJ's "Summary of the Evidence" reveals she carefully examined and weighed the medical evidence, including Dr. Bilkey's June 11, 2014, IME report. However, in her "Findings of Fact and Conclusions of Law," the ALJ failed to identify the physician upon whom she relied in determining Quarles sustained a 7% impairment rating for the injury to his right knee. While we are cognizant of the fact the ALJ is not required to engage in a detailed discussion of the facts or set forth the minute

[1] Quarles was awarded TTD benefits from November 28, 2012, through September 13, 2013, the date upon which Dr. Anbu Nadar placed Quarles at MMI for his right knee.

details of her reasoning in reaching a particular result, the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). Here, the ALJ has not given the parties or the Board sufficient findings of fact in support of her conclusion Quarles has a 7% impairment rating for the right knee injury. The ALJ merely stated, "For his right knee injury, his impairment is 7%." At a minimum, the ALJ must identify the physician upon whose impairment rating she has relied. While this Board can surmise from the record that Dr. Bilkey assessed a 7% impairment rating for Quarles' right knee injury, we are not required to do this. In contrast, the ALJ *is required* to set forth the basic facts upon which she relied to derive her ultimate conclusions. We vacate the ALJ's determination Quarles has a 7% impairment due to his right knee condition, and remand for additional findings regarding Quarles' knee injury which includes but is not limited to identifying the physicians' impairment rating for Quarles' right knee injury upon which the ALJ relied.

We reject Gordon's argument that Dr. Bilkey's opinions do not comprise substantial evidence because they are not consistent with the AMA Guides. A review of Chapter

17.2c which contains Table 17-5 states as follows: "**Except as otherwise noted**, the percentages given in Table 17-5 are for full-time gait derangements of person who are dependent on **assistive devices**." (first emphasis added; second emphasis in original). Dr. Bilkey assessed a 7% impairment rating pursuant to Table 17-5. According to this table, no assistive device is required for a 7% impairment rating as it reads as follows: "Antalgic limp with shortened stance phase and documented moderate to advanced arthritic changes of hip, knee, or ankle." We note the record establishes Quarles had difficulty walking due to pain. Dr. Bilkey's opinions and impairment rating are consistent with the AMA Guides and comprise substantial evidence upon which the ALJ can rely.

Accordingly, the ALJ's determination Quarles has a 7% impairment rating due to the right knee injury and the award of PPD benefits based upon this finding are **VACATED.** Concerning all other issues raised on appeal, the October 21, 2014, Opinion, Award, and Order and the December 1, 2014, Order on Petitions for Reconsideration are **AFFIRMED**. This claim is **REMANDED** for additional findings of fact and entry of an amended opinion consistent with the views set forth herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON KELLEY GRAY
303 N HURSTBOURNE PKWY STE 110
LOUISVILLE KY 40222

COUNSEL FOR RESPONDENT:

HON STEPHANIE N WOLFINBARGER
429 W MUHAMMAD ALI BLVD STE 1102
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON JANE RICE WILLIAMS
217 S MAIN ST STE 10
LONDON KY 40741