Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 13, 2015

CLAIM NO. 200978569

GEOFFREY HAMPTON PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

INTECH CONTRACTING, LLC
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Geoffrey Hampton ("Hampton") appeals from the Opinion, Award and Order rendered October 6, 2014 by Hon. John B. Coleman, Administrative Law Judge ("ALJ"), finding he sustained multiple injuries due to a fall occurring on September 9, 2009 while working for Intech Contracting, LLC ("Intech"). The ALJ awarded Hampton

permanent total disability ("PTD") benefits and medical benefits due to the accident. Hampton also seeks review of the November 10, 2014 Order denying his petition for reconsideration.

On appeal, Hampton argues the ALJ erred in finding Intech responsible for payment of treatment for diabetes for only a limited period from September 9, 2009 through March 9, 2011, a period of eighteen months following his accident. He argues his diabetes is more difficult to control following his work injuries due to inactivity, and therefore Intech should be responsible for payment for all diabetic treatment, not just a period of eighteen months. Because substantial evidence supports the ALJ's determination pertaining to the treatment for diabetes, and a contrary result is not compelled, we affirm.

Hampton filed a Form 101 on January 28, 2010 alleging he sustained severe injuries including lumbar, thoracic and cervical fractures, and eventual amputation of the left leg below the knee, in addition to tetraplegia, when he fell from a bridge on September 9, 2009 when he became disoriented due to low blood sugar while working for Intech. Intech filed a Special Answer denying the allegation the accident and ensuing injuries were work-related. Intech also raised the issue of whether Hampton's

claim should be barred due to intoxication at the time of the accident. Finally, Intech alleged a safety penalty pursuant to KRS 342.165(1) may be applicable to the claim.

The claim was assigned to the Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ Smith"). The parties took numerous depositions, and introduced medical evidence. On December 17, 2010, ALJ Smith rendered an Opinion and Order dismissing the claim. ALJ Smith was convinced Hampton was not attempting suicide when he fell from the bridge. ALJ Smith determined Hampton, an insulin-dependent diabetic patient, frequently had trouble controlling his diabetes. ALJ Smith was convinced that on September 9, 2009, the date of the accident, Hampton failed to take the steps necessary to ward off a hypoglycemic reaction. ALJ Smith determined although the accident occurred at work, it was not caused by the work. He determined Hampton's injuries were not caused by the "position of risk in which he was placed", and he therefore dismissed the claim.

On June 8, 2011, this Board entered an opinion affirming ALJ Smith's dismissal of the claim. On November 18, 2011, the Kentucky Court of Appeals issued a decision which affirmed this Board's opinion. On March 21, 2013, the Kentucky Supreme Court reversed. The Court noted Hampton became disoriented, irritable and angry when he suffered

from a diabetic or hypoglycemic attack, but this did not make him ineligible to receive benefits. The claim was remanded for further proceedings.

The claim was remanded to the Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ Jones"), who had replaced ALJ Smith while the claim was on appeal. On June 20, 2013, ALJ Jones issued a scheduling order which provided time for the parties to introduce evidence, and she scheduled a benefit review conference ("BRC"). On July 19, 2013, an order was issued reassigning the claim to the ALJ after ALJ Jones was appointed to fill a vacancy as Judge of the Kentucky Court of Appeals.

The ALJ allowed the parties to introduce voluminous lay and medical evidence. Numerous lay and medical depositions were taken, including those of Hampton and Dr. Sara S. Salles. Only that evidence pertinent to the issue on appeal will be discussed.

Hampton, a resident of Lexington, Kentucky, testified by deposition on April 26, 2010, August 15, 2013, and at the hearing held August 15, 2014. He has been an insulin dependent diabetic since he was eighteen years old, and continued to treat with insulin prior to the March 9, 2009 accident. He stated the management of his diabetes has always been an issue due to his lack of insurance. He has

had to have ambulance calls to his home in the past, prior to the work accident, for treatment of hypoglycemia. He stated he is able to drive a car, and engages in physical activity including distance swimming, weight lifting and using a treadmill at a local gym.

Dr. James Lynch, an internist in Lexington, Kentucky, testified by deposition on July 3, 2014. He testified lack of activity could potentially worsen diabetes, but he did not know if it had in Mr. Hampton's case. He stated multiple emergency visits to Hampton's home prior to the accident date for hypoglycemic episodes would indicate his diabetes was unstable.

Hampton filed the May 3, 2013 treatment records from the Cardinal Hill Hospital where he was treated by Dr. Salles, a physical medicine and rehabilitation physician. Dr. Salles then testified by deposition on August 20, 2013. Dr. Salles noted Hampton received numerous spinal and extremity injuries when he fell approximately sixty feet while working, which resulted in multiple diagnoses, and included an amputation of the left leg below the knee. Dr. Salles outlined numerous medications and treatments prescribed for Hampton. She stated all were related to the injuries Hampton received from falling from the bridge, except for insulin which, "goes back to his history of

diabetes". Dr. Salles testified Hampton reached maximum medical improvement ("MMI") at some point between twelve and eighteen months after the date of his injury.

Dr. Salles stated Hampton had diabetes prior to his fall. Because he was fairly immobile, she determined the fall "complicated" his diabetes. When she saw Hampton on May 3, 2013, she noted his objective findings were within normal limits, except for his gait problem.

Dr. Gregory T. Snider evaluated Hampton at Intech's request on October 18, 2013. Dr. Snider noted Hampton's history of being an insulin-dependent diabetic since he was eighteen. He recommended Hampton continue to follow up with this family physician for management of his diabetes.

A BRC was held on September 10, 2013. The issues listed in the BRC Order and Memorandum were benefits per KRS 342.730; average weekly wage; unpaid or contested medical expenses; and exclusion for pre-existing active disability. A second BRC was held on May 13, 2014. The contested issues included the same as those previously listed, and additionally included a medical dispute and unpaid medical bills, including those for a mental health condition. The BRC order was subsequently amended to include an issue of

whether Intech was required to produce copies of Hampton's payroll checks which had been requested.

On October 16, 2014, the ALJ rendered a decision awarding PTD and medical benefits to Hampton. However, the ALJ determined Intech was not responsible for providing Hampton a handicap accessible van which had been requested. Additionally, relying upon the testimony of Dr. Salles, the ALJ found Intech was only responsible for payment for Hampton's treatment for diabetes for a period of eighteen months after the injury.

The ALJ also specifically stated as follows:

> Additionally, an employer may be responsible for reasonable and necessary medical expenses when a subsequent work related event causes a worsening or progression of a pre-existing active condition. *Derr Construction Company v. Bennett, 873 S.W.2d 824 (Ky. 1994)*. However, in a situation where the subsequent injury does not result in any structural change nor additional impairment an award of medical benefits during the period of temporary aggravation until an individual returns to his baseline condition may be appropriate. *Sears Roebuck and Co. v. Dennis, 131 S. W. 3d 351 (Ky. App. 2004)*.

The ALJ further stated as follows:

> The medical record makes it clear the plaintiff has had poor control of his diabetic condition prior to the work related injury. However, the testimony of Dr. Salles makes it clear the

> diabetic condition was complicated by the effects of the work injury and vice versa for a period of time. In other words, it was necessary to treat both conditions in order to improve the plaintiff's work related conditions. She testified that typically an individual would be at maximum medical improvement between twelve and eighteen months following the type of injury the plaintiff received. As Dr. Salles noted the diabetic condition to be a pre-existing condition that was temporarily complicated, it is appropriate for the defendant to be responsible for treatment of that condition during the temporary exacerbation or in this instance from September 9, 2009 through March 9, 2011 which is eighteen months from the work injury. Thereafter the defendant is relieved of continued treatment for the plaintiff's diabetic condition.

Hampton filed a petition for reconsideration arguing the ALJ erred in not finding Intech responsible for treatment of his diabetes after March 9, 2011. The ALJ entered an order on November 10, 2014 denying the petition for reconsideration.

As the claimant in a workers' compensation proceeding, Hampton had the burden of proving each of the essential elements of his cause of action, including compensability of his treatment for diabetes after March 9, 2011. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Hampton was unsuccessful in his 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 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 sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's

decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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 could otherwise have been drawn from the record. Whittaker v. Rowland, supra. 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, supra.

On review, we find Hampton's appeal regarding the ALJ's finding Intech is only responsible for payment for treatment of his diabetes for a period of eighteen months to be nothing more than a re-argument of the evidence. Hampton impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence for that of the ALJ. This is not the Board's function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Dr. Salles noted Hampton reached MMI twelve to eighteen months post-injury. Dr. Lynch could not state

Hampton's inactivity had worsened his diabetes. Hampton testified regarding his regimen of working out four times a week which included swimming at least five hundred yards, weight lifting and walking on the treadmill. It is further noted Hampton actively treated for diabetes for years prior to the accident. Based upon the evidence of record, it was not unreasonable for the ALJ to find Intech responsible for payment for treatment of diabetes for a period of eighteen months.

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and

resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

> Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Id. at 286

Here, as in Robertson, the ALJ determined Hampton had reached MMI for the condition he actively treated prior to the work injury. Dr. Salles opined Hampton reached MMI one year to eighteen months post-injury. There is no evidence Hampton's diabetes was permanently worsened from its pre-injury state. Giving Hampton the benefit of the doubt, the ALJ determined eighteen months was appropriate. No other result is compelled.

Therefore, the October 6, 2014 Opinion, Award and Order and the November 10, 2014 Order denying the petition for reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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