Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 16, 2015

CLAIM NO. 201300911

GOHMANN ASPHALT & CONSTRUCTION PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

DAVE RICH
AND HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Gohmann Asphalt & Construction ("Gohmann") appeals from the Amended Opinion and Order on Remand rendered July 29, 2014, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding David Rich ("Rich") permanent partial disability ("PPD") benefits and medical benefits for work-related injuries sustained on July

23, 2011. Gohmann also appeals from the August 25, 2014 Opinion and Order on Reconsideration overruling its petition for reconsideration. On appeal, Gohmann argues the ALJ failed to comply with the Board's orders pursuant to its Opinion rendered June 20, 2014. Specifically, Gohmann argues the ALJ failed to address the reliability of Dr. Warren Bilkey's opinions in light of contradictory evidence as directed by the Board. We agree, and vacate and remand the claim to the ALJ.

Rich filed a Form 101 on June 13, 2013 alleging he injured his head (face and vision), back, neck, right shoulder, elbow, hip, knee and abdomen when he fell head first six to eight feet on July 23, 2011 while working for Gohmann. Rich received treatment at the emergency department of Clark Memorial Hospital for a laceration to his forehead and abrasions to his nose. Rich followed up with Occupational Medicine Physicians ("OMP") on July 25, 2011, complaining of pain in the back, neck, right shoulder, right ribs, right elbow, right knee and abdomen. Rich was diagnosed with multiple contusions, lacerations, contusions to the right shoulder, right elbow, right ribs, right knee and abdomen, cervical strain/neck pain and lumbar pain/ strain. He was placed on seated duty and prescribed pain medication. On July 27, 2011, Rich reported he was doing

much better and felt like a “new man.” Likewise, on August 1, 2011, Rich reported he was having no problems. It was noted the contusions and cervical strain/neck pain had resolved, and OMP returned Rich to regular duty work.

Rich also treated at the Veterans Affairs Medical Center (“VA”) both prior to and following the work incident for conditions related and unrelated to the July 23, 2011 accident. On April 1, 2005, it was noted Rich had a history of chronic back and knee pain. The records indicate Rich returned in August 2011 for a routine follow-up, and did not mention work-related symptoms other than the forehead laceration. On March 1, 2012, Rich complained of back and right leg pain. On May 17, 2012, Rich complained of headaches and pain in his neck, right shoulder and hip since the July 2011 fall. Similar complaints were made in August and September 2012. Rich was treated conservatively with medication and physical therapy.

Rich testified by deposition on August 8, 2013 and at the final hearing held November 21, 2013. The Board previously summarized his testimony in the June 20, 2014 Opinion Vacating and Remanding. Of relevance, Rich testified the VA diagnosed him with arthritis prior to his work injury, and he admitted receiving treatment for arthritic pain in his back, hand, shoulders, and knees on at

least one occasion in 2005. Rich admitted he was actively taking pain medicine, Tramadol, at the time of his work injury, but was unsure how long he had been taking it and for what condition. Rich denied experiencing pain due to his arthritis at the time of the work accident.

Rich testified OMP released him to regular duty on August 1, 2011. On that date, Rich stated he told OMP he could return to work. Rich stated OMP never prescribed pain medication since he was already taking Tramadol. Rich returned to his regular job after OMP released him and continued to work until November 19, 2011, when he was laid off. Rich did not know whether he sought subsequent treatment for his work injuries from August 2011 until he stopped working for Gohmann in November 2011.

Gohmann filed the "Medical Examination Report For Commercial Driver Fitness Determination" ("DOT physical report") signed by Rich on November 10, 2012, over one year following the July 23, 2011 work incident. "No" is checked by the following in the "Health History" section: "Any illness or injury in last five years?"; "Head/Brain injuries, disorders or illnesses"; "Eye disorders or impaired vision (except corrective lenses)"; "Spinal injury or disease"; and "Chronic low back pain." In the "Physical Examination" section, "no" is checked by the following:

"11. Spine, other musculoskeletal- Previous surgery, deformities, limitation of motion, tenderness." The report also indicates as follows under "Musculoskeletal":

> General no limitation in motion, no muscle or joint pain, no muscle weakness, no neck/backache/shoulder pain, no swelling or redness in joints. Thoracic Lumbar Spine pain none. Injuries none. Arthritis none. Joint pain none. Joint stiffness none. Joint swelling none. Leg cramps none. Muscle aches none. Neck pain none.

The Board summarized three reports or questionnaires from Dr. Warren Bilkey, all filed by Rich, in the June 20, 2014 Opinion Vacating and Remanding as follows:

> The first is an Independent Medical Examination report dated July 23, 2013, which contains the following statements by Dr. Bilkey which are relevant to the issue on appeal:
>
> - "Mr. Rich had subsequent treatment through OMP which is a work injury clinic. He was placed on light duty. He had subsequent treatment at the VA Medical Center."
>
> - "For Mr. Rich, pain is a daily phenomenon. Pain intensity is 5-10 on a 0 to 10 scale with 10 being the most severe pain imaginable. He feels that he has been symptomatically stable since his work injury. This means that no treatment has been of benefit to him."

- "He does not have a prior history of injury or surgery to the neck, back or head."

- "Following the work injury, he returned to work in a light duty capacity. He has been off work since the past 4 months. He is not employed at present."

Dr. Bilkey also states he reviewed records from Occupational Medicine Physicians and the VA.

An October 25, 2013, questionnaire completed by Dr. Bilkey on November 11, 2013, contains the following:

> You previously evaluated Dave Rich at the request of this office on July 23, 2013. We enclose for your review a copy of Dr. Mark Gladstein's September 9, 2013 report, as well as a copy of a DOT physical performed November 10, 2012. Both medical records have been filed as evidence by the Defendant-Employer in Mr. Rich's workers' compensation claim. By this letter we request you review the enclosed records and respond to the following:
>
> 1. At the time of your evaluation of Mr. Rich, did you review the VA Medical Center records dating back to 2005 regarding Mr. Rich's prior neck and back treatment and were said records considered when issuing your report?
>
> [Dr. Bilkey checked "yes."]
>
> 2. Does the November 10, 2012 DOT physical change your opinions previously expressed in your July 23, 2013 report?

> [Dr. Bilkey checked "yes."]
>
> If yes, please explain: [handwritten by Dr. Bilkey] DOT Health History Contradicts IME Medical History.

A November 14, 2013, questionnaire completed by Dr. Bilkey on November 17, 2013, states, in relevant part, as follows:

> I am in receipt of and thank you for your November 11, 2013 response to our October 25, 2013 correspondence. Mr. Rich testified at the time of his deposition on August 8, 2013 that he continued to experience pain and symptoms as a result of the work-related injury. Assuming Mr. Rich's deposition testimony is accurate, would your opinions previously expressed in your July 23, 2013 report remain unchanged?
>
> [Dr. Bilkey checked "yes."]

In the December 17, 2013 Opinion and Order, the ALJ summarized Rich's testimony, and the reports of Mr. Tiell, Dr. Mark Gladstein and Dr. Luca Conte. The ALJ summarized the July 23, 2012 report of Dr. Bilkey. The ALJ found Rich a convincing witness and the medical evidence from Dr. Bilkey persuasive. After quoting Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ found as follows regarding benefits per 342.730:

> Based upon the evidence in this case and specifically the credible and

convincing testimony of the plaintiff and the persuasive and compelling medical evidence from Dr. Bilkey, which is covered in detail above, I make the factual determination that the plaintiff Mr. Rich cannot return to the type of work which he performed at the time of his work injuries on July 23, 2011. I note that he last worked on November 19, 2011. I note that Mr. Rich has not returned to work at a weekly wage equal to or greater than his average weekly wage at the time of his work injuries. I note that Mr. Rich has a very limited education, having completed the 8th grade. I note that his date of birth was August 3, 1953 and that he is at an advanced age for employment purposes. I further make the factual determination based upon his sworn testimony and the medical evidence from Dr. Bilkey, all of which is covered in detail above, that Mr. Rich cannot continue to earn his former level of wages for the indefinite future. I make the factual determination that Mr. Rich's work injuries on July 23, 2011 will permanently alter his ability to earn an income. In addition to the credible and convincing evidence from Mr. Rich and Dr. Bilkey, I also rely upon *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), and the decision of the Court of Appeals of Kentucky in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky. App. 2004).

I, therefore, make the determination that the plaintiff Mr. Rich is entitled to recover from the defendant and its workers' compensation insurer enhanced permanent partial disability benefits under KRS 343.730(1)(c)1, based upon Dr. Bilkey's permanent impairment rating of 13% to the body as a whole under the AMA

> Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Gohmann filed a petition for reconsideration arguing the opinion did not discuss the November 10, 2012 DOT physical report. It also argued Dr. Bilkey's opinions could not constitute substantial evidence since they are based on an inaccurate history and contrary to the facts. In the January 22, 2014 Opinion and Order on Reconsideration, the ALJ reiterated his reliance upon Rich's testimony and Dr. Bilkey's opinions, as well as the vocational report of Mr. Robert Tiell.

The Board vacated and remanded the claim to the ALJ in the opinion rendered June 20, 2014, stating as follows:

> In light of Rich's representations as documented in the November 10, 2012, DOT physical report, the disparity between these representations and the history Dr. Bilkey received and documented at the July 23, 2013, examination, and the fact that on October 25, 2013, Dr. Bilkey indicated that the DOT physical report changes his opinions as expressed in the July 23, 2013, report, the ALJ should have directly addressed Gohmann's arguments in its petition for reconsideration and made additional findings of fact resolving the contradictions in the record. While the ALJ is not required to engage in a detailed explanation of the minutia of his reasoning in reaching a particular result, his decision must effectively provide

adequate findings of fact based on the evidence upon which his ultimate conclusions are drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburg and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Medical evidence predating the work injury indicates Rich had chronic back, hand, shoulder, and bilateral knee pain. Further, other medical records generated after the injury reveal Rich's physical symptoms were no longer present. Given this medical evidence, we believe the matter must be remanded for the ALJ to directly address this evidence and make findings of fact as to whether this evidence causes Dr. Bilkey's opinions to be less than reliable.

While we acknowledge the reliability of Dr. Bilkey's opinions was not made a contested issue at the BRC, we believe the reliability of witnesses does not have to be made a separate issue. Also, Gohmann presented this argument to the ALJ in its November 25, 2013, Position Paper.

Since the ALJ has not sufficiently addressed the reliability of Dr. Bilkey's opinions in light of the contradictions identified in the record, the award of income and medical benefits must be vacated and the claim remanded for additional findings of fact regarding the contradictory medical evidence discussed herein and its direct bearing on the reliability of Dr. Bilkey's opinions. Stated another way, the ALJ must provide the basis for his rejection of the medical evidence which casts doubt about the

> **reliability and credibility of Dr. Bilkey's opinions.**
> (emphasis added)

The June 20, 2014 Opinion by the Board was not appealed by either party. The ALJ rendered an Amended Opinion and Order on Remand on July 29, 2014. The ALJ provided the same summaries of Rich's testimony, and the reports of Mr. Tiell, Dr. Gladstein, and Dr. Conte contained in the original opinion. The ALJ again summarized the July 23, 2013 report of Dr. Bilkey. In addition, the ALJ provided summaries of Dr. Bilkey's November 11 and 17, 2013 reports, stating as follows:

> Dr. Bilkey completed a second medical report dated November 11, 2013, in which he noted that he had read Dr. Gladstein's September 9, 2013 report and the copy of a DOT physical record performed on November 10, 2012. Dr. Bilkey stated that he had reviewed Mr. Rich's VA Medical Center records dating back to 2005 and the November 10, 2012 DOT physical examination report and Dr. Bilkey stated that he had taken into consideration all of the above medical records in reaching his opinions.
>
> In addition, Dr. Bilkey completed a third medical report on November 17, 2013, in which he stated that he had read Mr. Rich's August 8, 2013 deposition and that he had taken said sworn testimony into consideration in reaching his opinions contained in his July 23, 2013 medical report.
>
> The bottom line is that Dr. Bilkey took into consideration the pertinent

> medical records dealing with Mr. Rich in arriving at his medical opinions in this case.

Under the "Findings of Fact and Conclusions of Law" section, the ALJ reiterated his reliance upon Rich's testimony. After citing to Fawbush, supra, the ALJ stated the following in finding Rich entitled to PPD benefits based upon a 13% impairment rating enhanced by the three multiplier, stating as follows:

> Based upon the plaintiff's sworn testimony, as covered above, and the comprehensive, persuasive and compelling medical evidence from Dr. Bilkey, which is summarized in detail above, I make the factual determination that Mr. Rich cannot return to the type of work which he performed at the time of his work injuries in accordance with KRS 342.730(1)(c)1.

The ALJ also found Rich returned to work earning the same average weekly wage he earned at the time of his work injuries per KRS 342.730(1)(c)2. The ALJ stated as follows pursuant to the third prong of the Fawbush analysis:

> Mr. Rich is now 60 years of age, meaning that he is at an advanced age for employment in the highly competitive job market. I further make the factual determination based upon Mr. Rich's sworn testimony, as covered above, and the comprehensive, persuasive and compelling medical evidence from Dr. Bilkey, which is covered in detail above, that Mr. Rich

cannot continue to earn his former level of wages for the indefinite future. I make the factual determination that Mr. Rich's work injuries on July 23, 2011 will permanently alter his ability to earn an income.

. . . .

Based upon the plaintiff's sworn testimony, as covered above, and the comprehensive, persuasive and compelling medical evidence from Dr. Bilkey, as covered in detail above, I make the factual determination that it is unlikely that Mr. Rich will be able to continue for the indefinite future to do work from which to earn such a wage. Based upon the above-cited evidence from the plaintiff and Dr. Bilkey, I make the factual determination that the third prong of the Fawbush analysis applies here and that the plaintiff's July 23, 2011 work injuries have permanently altered his ability to earn an income and that he is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage, and that he is, therefore, entitled to the 3 multiplier under KRS 342.730(1)(c)1. . . .

In addition, I make the factual determination that the three medical reports from Dr. Bilkey are comprehensive, persuasive, compelling and reliable expert medical evidence. I make the determination that the plaintiff's enhanced permanent partial disability benefits shall be based upon Dr. Bilkey's 13% permanent partial impairment rating under the AMA Guides, Fifth Edition.

Gohmann filed a petition for reconsideration arguing the ALJ failed to comply with the Board's orders entered June 20, 2014. It argued the ALJ failed to address Rich's prior treatment for chronic pain, the November 10, 2012 DOT physical report, and several inaccuracies contained in the reports of Dr. Bilkey. Gohmann argues Rich misrepresented his prior health history, his treatment and resolution of symptoms, his work following the work injury, and the results of the DOT physical to Dr. Bilkey. Therefore, Dr. Bilkey's report cannot be considered substantial evidence pursuant to Cepero v. Fabricated Metals Corp., 32 S.W.3d 839 (Ky. 2004). Gohmann stated the ALJ's amended opinion on remand is essentially the same as his original opinion.

In the August 25, 2014 Opinion and Order on Reconsideration, the ALJ essentially provided the same analysis found in the July 29, 2014 opinion on remand. He reiterated his reliance upon the testimony of Rich, and the reports of Dr. Bilkey without specifically addressing Gohmann's arguments in its petition for reconsideration.

On appeal, Gohmann argues the ALJ, on remand, failed to comply with the Board's directions by not addressing three pieces of evidence contradicting the opinions of Dr. Bilkey. First, the ALJ made no additional

findings of fact discussing the November 10, 2012 DOT physical report. Gohmann argues the only statement regarding the DOT physical report by the ALJ on remand, that Dr. Bilkey had reviewed it and took it into consideration in reaching his opinion, is inaccurate. Rather, Dr. Bilkey indicated his review of the DOT physical report changed his opinion since the DOT health history contradicts the history Rich provided at the time of his July 23, 2013 evaluation. Second, Gohmann argues the ALJ's statement on remand that Dr. Bilkey had reviewed the VA records dating back to 2005 and took them into consideration when issuing his opinion is inadequate. Gohmann argues there is no discussion by either Dr. Bilkey or the ALJ in his opinion on remand how Rich's prior medical history factored into their ultimate determinations of work-relatedness. Third, Gohmann argues the ALJ on remand failed to address the treatment records from OPS following the work injury indicating his symptoms had resolved and was returned to regular duty on August 1, 2011. In sum, Gohmann argues the ALJ failed to make additional findings concerning contradictory evidence and its impact on the credibility of Dr. Bilkey's opinions as directed by the Board on remand.

Gohmann also argues the opinion of Dr. Bilkey cannot constitute substantial evidence since the history provided by Rich is substantially inaccurate and incomplete, citing to Cepero v. Fabricated Metals Corp., supra. Gohmann points out the history provided by Rich in the DOT physical form is in sharp contrast to the history he provided to Dr. Bilkey during his July 23, 2013 evaluation. It states Dr. Bilkey reviewed the DOT physical report and indicated his opinions expressed in the July 23, 2013 report would change. Gohmann also argues Dr. Bilkey failed to discuss the prior medical records and their impact on his determination Rich's chronic back and shoulder pain are due to the July 23, 2011 work injury. Gohmann argues Dr. Bilkey's statement Rich has had symptoms since the July 23, 2011 injury and has not responded to conservative treatment is inaccurate in light of the OPS records and lack of complaints at the VA until May 17, 2012. In light of the misrepresentations made by Rich to Dr. Bilkey, Gohmann argues the ALJ erroneously relied upon Dr. Bilkey's opinions. Gohmann requests the ALJ's opinion on remand be reversed and Rich's claim for PPD benefits and medical benefits be dismissed.

Because the ALJ's analysis on remand is not in accordance with the directive we provided in the June 20,

2014 opinion, we must vacate the award of indemnity and medical benefits. In our previous opinion, in light of Gohmann's petition for reconsideration, we clearly stated the ALJ should have specifically addressed and resolved the contradictions found in the histories provided by Rich in the DOT physical report and Dr. Bilkey's report, and the fact Dr. Bilkey indicated the DOT physical report changes his opinions as expressed in the July 23, 2013, report. We also noted other contradicting evidence submitted by Gohmannm, including medical evidence indicating prior chronic pain complaints and medical records indicating Rich's symptoms from the work injury had resolved in August 2011. The Board found the ALJ did not sufficiently address the reliability of Dr. Bilkey's opinions in light of contradictions identified in the record. The claim was remanded for "additional findings of fact regarding the contradictory medical evidence discussed herein and its direct bearing on the reliability of Dr. Bilkey's opinions. Stated another way, the ALJ must provide the basis for his rejection of the medical evidence which casts doubt about the reliability and credibility of Dr. Bilkey's opinions." Since the opinion was not appealed, it is the law of the case.

On remand, the ALJ merely provided an inaccurate summary of the November 11, 2013 report and November 17, 2013 report by Dr. Bilkey. The ALJ summarized the November 11, 2013 report by stating Dr. Bilkey had reviewed the VA records dating back to 2005 and the November 10, 2012 DOT physical report and "Dr. Bilkey stated that he had taken into consideration all of the above medical records in reaching his opinions." This summary is simply inaccurate. After acknowledging he reviewed and considered the VA records dating back to 2005 in issuing his July 23, 2013 report, Dr. Bilkey indicated the November 10, 2012 DOT physical report changed his opinions since the "DOT Health History Contradicts IME Medical History."

In summarizing the third medical report by Dr. Bilkey dated November 17, 2013, the ALJ stated Dr. Bilkey had read Rich's deposition testimony, and had taken said sworn testimony into consideration in reaching his July 23, 2013 opinions. This summary is again inaccurate. Rather, Dr. Bilkey simply indicated his opinions contained in the July 23, 2013 report remained unchanged in light of the fact Rich testified he continued to experience pain and symptoms as a result of the work-related injury. There is no indication Dr. Bilkey reviewed the entirety of Rich's deposition testimony.

Once again, the ALJ failed to address Gohmann's arguments in its petition for reconsideration and failed to make additional findings of fact resolving the contradictions in the record. In the findings of fact and conclusions of law section, the ALJ merely repeated he found the testimony of Rich credible and the opinions of Dr. Bilkey persuasive without addressing the contradictory evidence submitted by Gohmann. In the June 20, 2014 Opinion Vacating and Remanding, the Board remanded the claim for:

> additional findings of fact regarding the contradictory medical evidence discussed herein and its direct bearing on the reliability of Dr. Bilkey's opinions. Stated another way, the ALJ must provide the basis for his rejection of the medical evidence which casts doubt about the reliability and credibility of Dr. Bilkey's opinions.

The ALJ failed to comply with this directive.

Because the ALJ provided inaccurate summaries of the November 11 and November 17, 2013 reports by Dr. Bilkey, and failed to discuss in any fashion the impact of the contradictory medical evidence in his assessment of the reliability of Dr. Bilkey's opinions, the opinion on remand and the order on petition for reconsideration awarding PPD benefits and medical benefits must be vacated and the claim remanded for an analysis consistent with the Board's opinion of June 20, 2014.

We decline Gohmann's request to remand the claim to the ALJ with directions to reverse and dismiss Rich's claim for PPD benefits and medical benefits. As the ALJ is the fact-finder, he must determine the extent of Rich's occupational disability.

Accordingly, the July 29, 2014 Amended Opinion and Order on Remand and the August 25, 2014 Opinion and Order on Reconsideration by Hon. William J. Rudloff, Administrative Law Judge are **VACATED.** This matter is **REMANDED** to the ALJ for entry of an opinion consistent with the views expressed in the Board's June 20, 2014 opinion as outlined herein.

ALL CONCUR.

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