Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 20, 2014

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.

STIVERS, Member. Gohmann Asphalt & Construction ("Gohmann") appeals from the December 17, 2013, Opinion and Order and the January 22, 2014, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The December 17, 2013, Opinion and Order, awarded Dave Rich ("Rich") permanent partial disability ("PPD") benefits enhanced by the three multiplier and medical

benefits. Gohmann's January 3, 2014, petition for reconsideration was overruled by order dated January 22, 2014. On appeal, Gohmann contends the opinions of Dr. Warren Bilkey do not constitute substantial evidence.

The Form 101, filed June 13, 2013, alleges on July 23, 2011, Rich injured his head (face and vision), back, neck, right shoulder, elbow, hip, knee, and abdomen in the following manner:

> Plaintiff suffered work-related injury to his head (face and vision)/back/ neck/ right shoulder/elbow/hip/knee /abdomen when he fell head first approximately 6-8 feet in the course of his employment causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides.

The undated Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; medical benefits [handwritten: "after 8-1-11"); [handwritten after "other"] credit for unemployment benefits; and permanent total disability.

During his August 8, 2013, deposition, Rich testified regarding the physical symptoms he experienced before the July 23, 2011, injury as follows:

> Q: Then also before this injury it looks like you have been treated for arthritis?
>
> A: Symptoms.

Q: Who treats you for arthritis?

A: Nobody was. They picked it up at the VA.

Q: And it looks like from the arthritis before this you were reporting pain in your back, hands, shoulders, and knees due to arthritis?

A: That I don't know.

Q: Now, in the VA records in 2005 I noted that you had chronic back and knee pain. Have you had back and knee pain for sometime?

A: Just- it was just that one time I think I went there.

Q: Now, following this work injury, the history indicated that you were already taking Tramadol?

A: Yes.

Q: Pain medicine?

A: Yes.

Q: How long had you been taking Tramadol?

A: Oh, I don't know.

Q: Were you taking Tramadol at the time of this injury?

A: Yes.

Q: What would you be taking the pain medication for?

A: That's what the doctor had me on. I'm not- I'm not real sure. I take nine different kinds.

Q: You take nine different kinds of what?

A: Medicine.

Q: But this was for pain. Where were you having pain that you were taking- that you required to take prescription pain meds?
A: I think that was when they asked about my arthritis. I think that's what that was for. I'm not sure.

...

Q: Now, in your medical records following this work injury when they took a history of you, you reported that you were routinely taking Tramadol which you take for arthritis pain in your back, hands, knees, and shoulders?

A: Yeah, that's what- that's what the VA had me on.

Q: Okay.

A: Or they still have me on.

Q: So at the time of this incident you were experiencing pain in your back, hands, knees, and shoulders, and taking pain medication?

A: No, but, I mean- when they- you know, like they send it to you in the mail, like, you know, I don't go see them every week or two. It's only like once every six months you go see them.

Q: But you were taking Tramadol before this injury?

A: I was taking all those medicines.

Q: But are you saying that you weren't having arthritis pain in your back, hand, knees, and shoulders?

A: There at one time I would say yes, but then that was- I only went to them

> one or two times for it and they give [sic] me that medicine and that was- you know, that was it.

Concerning his last treatment by Occupational Physician Medicine in August 2011, and his return to work, Rich testified as follows:

> Q: And then your last visit at Occupational Physician Medicine was August 1st of 2011?
>
> A: August 1st? Might have been.
>
> Q: And their notes indicate that you were not having any problems, that you felt good and wanted to go back to your regular job. Do you recall that you weren't having any more problems?
>
> A: I said I could go back to work.
>
> Q: Did you tell them you were no longer having any pain and not taking any pain medication?
>
> A: I don't think they ever give [sic] me any pain medicine.
>
> Q: Okay.
>
> A: I don't think they give [sic] me any medicine at all over there at Occupational Therapy.
>
> Q: Were you just taking the pain medication you were already taking, the Tramadol?
>
> A: Yeah.
>
> Q: And then they released you from their care and returned you back to work regular duty?
>
> A: Yeah.

Q: And did you go back to work [sic] your regular job?

A: Oh, I think it was a couple weeks after that. Might not have been that long.

Q: Now, in August of 2011 it looks like you did have a visit at the VA and you told them about the laceration on your forehead?

A: Yeah, yes.

Q: And I didn't see any other complaints made to the VA at that time. Was your only complaint as far as the forehead laceration?

A: I went- that's when I was starting to- you know, because I had no insurance. I had to go to them.

Q: But you never went back to Occupational Medicine Physicians?

A: No, that- that was company.

Q: But you went back to work [sic] your regular job after Occupational Physicians released you?

A: Yes.

Q: It looks like you continued working your regular job until November 19th?

A: November something.

Q: And did you have any additional treatment for your injuries during that time?

A: No.

Q: Did you make any complaints as far as being in any type of pain at that time?

A: Just to myself.

Q: You didn't complain to anybody else or seek any type of treatment?

A: Just I did at the VA.

Q: Okay. Now, I don't see any VA treatment until March of 2012. Did you go to the VA when you were working full duty for Gohmann?

A: Yes.

Q: Did you go more than that one time where you were seen for your laceration on your forehead?

A: I can't tell you how many times I've been.

Q: But I am talking about from the time after your injury, August of 2011, until you stopped working on November 19th of 2011. Did you have any treatment for your injuries during that period?

A: No, I don't think so. I'm not- I'm not real sure.

Rich's November 10, 2012, "Medical Examination Report For Commercial Driver Fitness Determination" ("DOT physical report") was introduced which has "no" 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." In addition, the report 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.

Several sets of medical records from the Veterans Administration Medical Center ("VA") were introduced which includes records dating back to 2005 indicating, in part, as follows: "51 y/o male with h/o back and knee pain who presents for initial visit to the va. was followed by private pcp, now wishes to follow here. chronic bil knee and back pain. does not take anything for this."

The September 9, 2013, report of Dr. Mark O. Gladstein provides the following history:

- "On careful review of his previous VA records, this patient was seen by Dr. Bruno on April 1, 2005 complaining of chronic back and bilateral knee discomfort."
- "The patient reported to Occupational Physician Services that he felt like a new man on July 27, 2011. The patient was cleared for a return to regular duty on August 1, 2011."

Three reports or completed questionnaires from Dr. Bilkey were introduced by Rich. 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 set forth the following Findings of Fact and Conclusions of Law:

Preface

> As the Supreme Court of the United States stated in *Watts v. Indiana*, 338 U.S.49 (1949), there comes a point where a court should not be ignorant as judges of which we know as men. That principle certainly applies in the case at bar.
>
> Workers' compensation is a very important field of law. If not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of business, and the pocketbooks of consumers are affected daily by it." --- comment by Judge E. R. Mills in *Singletary v. Mangham Construction*, 418 So.2d 1138 (Fla.1st DCA, 1982).
>
> **A. Benefits per KRS 342.730; permanent total disability.**
>
> I saw and heard the plaintiff testify at the Hearing and make the factual determination that he was a credible and convincing lay witness. I also found very persuasive and compelling the medical evidence from Dr. Bilkey.
>
> *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky.2003) and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the Administrative Law Judge must determine whether a claimant can return to the type of work performed at the time of

injury. Second, the Administrative Law Judge must determine whether the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury wage and then ceases that employment. Third, the Administrative Law Judge must determine whether the claimant can continue to earn that level of wages for the indefinite future.

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.

B. Medical benefits after August 1, 2011.

KRS 342.020 requires the employer to pay for the cure and relief from the effects of an injury or occupational disease, the medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.

Based upon the medical evidence filed in the case and specifically the plaintiff's testimony and the medical evidence from Dr. Bilkey, I make the factual determination that the plaintiff is entitled to recover from the defendant-employer and its workers' compensation insurer for appropriate medical treatment as ordered by his treating physicians. Of course, the defendant has the right to raise a medical dispute regarding any recommended medical treatment.

C. Credit for unemployment benefits.

> KRS 342.730(5) provides that all income benefits for temporary total disability or permanent total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total disability or permanent total disability. Since there has been no award in this case for either temporary total disability or permanent total disability, I make the determination that the provisions of the aforesaid statute are not applicable in this factual situation.

In its petition for reconsideration, Gohmann asserted, in relevant part, as follows:

> 3. The Opinion and Order has no discussion of the November 10, 2012 DOT physical at Sahetya Medical Group. At this examination, Plaintiff denied having any spinal injury or disease or any chronic low back pain. Plaintiff certified that this information was true. He had a normal back and musculoskeletal exam. He reported being able to do his usual activities and being in a good state of health. Dr. Bilkey even stated that this evidence would change his opinions expressed in his report previously. (Bilkey letter signed November 11, 2013.)
>
> 4. Dr. Bilkey's opinions for [sic] which the ALJ relied cannot be considered substantive evidence as it is based on a completely inaccurate history and contrary to the actual facts as discussed above. The treating doctor indicated his symptoms from the injury had resolved as of August 1, 2011 with no work restrictions. The DOT physical of November 10, 2012 indicated Plaintiff was asymptomatic and could work his usual activities. Dr.

> Gladstein also opined that his symptoms from the work injury had resolved with no impairment and no permanent work restrictions. It was patent error for the ALJ to rely on the opinion of Dr. Bilkey.

Presumably, because Gohmann did not request additional findings on this issue, the ALJ failed to address this specific argument in the January 22, 2014, Order on Reconsideration.

On appeal, Gohmann asserts Dr. Bilkey's opinions concerning causation are "corrupt" because he received an inaccurate history. Gohmann argues pursuant to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), that "the inaccuracies in this case rise to such a level that no reasonable fact-finder could find any probative value in the medical opinion of Dr. Bilkey." Gohmann cites the following as support for the rejection of Dr. Bilkey's opinions:

- "First, Rich denied any prior history of injury or surgery to the neck, back, head or any other significant illness history to Dr. Bilkey. (Bilkey report, p.2). This is completely false. At the time of the July 23, 2011, injury, Rich admits that he has been treating for chronic back, shoulder and bilateral knee pain at the VA Medical Center for the last 10-12 years for which he has been taking Tramadol two times a day to control his pain. (7/13/11 DOT physical; Rich dep. pgs. 22-29; records

from VA Medical Center; OMP records 7/28/11)."

- "Second, Dr. Bilkey's history indicates that following the injury, Rich had subsequent treatment through OMP followed by subsequent treatment at the VA Medical Center. While technically correct, it is inaccurate as he was released from Occupational Medicine Physicians on August 1, 2012 with a complete resolution of symptoms and did not seek additional treatment which he alleges is related to the work injury until nearly 10 months later on May 17, 2012 at the VA Medical Center. The history provided to Dr. Bilkey that Rich has had continuous symptoms since his date of injury and failed to improve with conservative care is false."

- "Third, the history provided to Dr. Bilkey regarding Rich's return to work is not accurate. The history obtained by Dr. Bilkey at the time of his July 23, 2013 examination was that following the work injury he returned to work in a light duty capacity but was off work the past four months. Dr. Bilkey notes that Rich has not been able to resume his usual work activities that he successfully performed prior to July 23, 2011. This is completely inaccurate. It is undisputed that Rich lost no time from work and while he did work light duty for a short period of time, as of August 1, 2011 he returned to work regular duty, unrestricted including extensive amounts of overtime routinely working 60 hours per week and continued doing so until laid off November 19, 2012 due to seasonal layoffs at which point he applied for and started collecting unemployment."

- "Fourth and finally, Rich underwent a DOT physical on November 10, 2012, eight months prior to the evaluation with Dr. Bilkey and nearly a year after being laid [sic] at Gohmann. Rich completed the health history and certified the history he provided was complete and true. He signed and dated the history. He denied any illness or injury in the last five years. He denied any head/brain injuries, disorders or illnesses. He denied any eye disorder or impaired vision. He denied any spinal injury or disease. He denied chronic low back pain. On physical exam he denied any previous problems with his spine or other musculoskeletal areas as well as any impairment regarding any extremities. He had a normal back exam and normal musculoskeletal exam. He was found generally able to do usual activities, had a good exercise tolerance, good general state of health and no fatigue. There were no headaches, no dizziness, no lightheadedness noted and vision was normal. There was no thoracic lumbar neck or joint pain. This is in stark contrast to the history he provided to Dr. Bilkey the time of the July 23, 2013 examination as well as Rich's testimony in his workers' compensation claim. Rich's counsel had Dr. Bilkey review the records from Seheta Medical Group and Dr. Bilkey opined that upon review of these records his opinions expressed in his July 23, 2013 report would change. Dr. Bilkey stated that the history Rich gave for the DOT exam contradicted the history he received. Thus, based on this fact alone, it was in error for the ALJ to rely on the opinion of Dr. Bilkey. Dr. Bilkey opined that his opinions originally provided would change. Thus the opinion for which the ALJ relied was no longer a valid opinion. Rich's counsel then

> followed up with Dr. Bilkey asking him to assume that Rich's deposition testimony is accurate and if that were the case then Dr. Bilkey opined his opinions previously expressed would remain unchanged."

We acknowledge Gohmann did not ask for additional findings in its January 3, 2014, petition for reconsideration. Additionally, Gohmann did not put forth a Cepero v. Fabricated Metals Corp., supra, argument in its petition for reconsideration. However, Gohmann did set forth an argument contending it was error for the ALJ to rely on Dr. Bilkey's opinions, and that argument was ignored by the ALJ in the January 22, 2014, Opinion and Order on Reconsideration.

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.

Accordingly, that portion of the December 17, 2013, Opinion and Order awarding income and medical benefits is **VACATED** and this claim is **REMANDED** to the ALJ for entry of an amended opinion consistent with the views expressed herein.

ALL CONCUR.

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