Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 17, 2014

CLAIM NO. 200985693

H. T. HACKNEY COMPANY, INC. PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

KRISTIE DUNGAN,
DR. AMR O. EL-NAGGAR,
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. H. T. Hackney Company, Inc. ("Hackney") seeks review of the opinion and order on remand rendered August 26, 2013 by Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ"), awarding Kristie Dungan ("Dungan") temporary total disability ("TTD") benefits and medical benefits due to injuries sustained on February 12, 2008 and

March 18, 2009. Hackney also seeks review of the October 8, 2013 order on reconsideration.

On appeal, Hackney argues the ALJ abused his discretion, and was clearly erroneous in concluding Dungan is entitled to future medical benefits. Hackney also argues the ALJ abused his discretion and violated its due process rights in resolving medical fee disputes in Dungan's favor. Because the ALJ failed to set forth a basis or explanation for his decisions, we vacate and remand for additional findings.

A brief history of the claim is necessary. Dungan filed a Form 101 on February 18, 2010, alleging she injured her back and right shoulder on February 12, 2008 when she slipped on ice while unloading groceries from a truck. She also alleged injuries to her neck, both shoulders, back and left leg due to striking a bull while driving a van on March 18, 2009. Hackney subsequently filed medical fee disputes on February 18, 2011, disputing the compensability of a C3-C4 fusion performed by Dr. Amr El-Naggar; on June 29, 2011 disputing compensability of an ulnar nerve condition diagnosed by Dr. El-Naggar; and on August 11, 2011 disputing compensability of the left ulnar surgery performed by Dr. El-Naggar.

In an opinion rendered January 28, 2013, the ALJ noted TTD benefits were paid by Hackney from February 13, 2008 through March 20, 2008, at the rate of $296.45 for the first injury, and again from July 17, 2009 through November 27, 2009 at the rate of $318.01 for the second injury. Relying upon the opinions of Dr. Robert P. Knetsche, the ALJ determined Dungan did not suffer an "injury" as defined by the Act, and dismissed the claim in its entirety. The pending medical disputes were not addressed.

Dungan filed a petition for reconsideration arguing the ALJ failed to render findings of fact sufficient to apprise the parties of the basis for his decision, and to permit meaningful review on appeal. She cited to Arnold v. Toyota Mfg., 375 S.W.3d 56 (Ky. 2002); Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); and, Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985). Dungan also argued the ALJ erred in finding she sustained no injury since Dr. Knetsche actually found she sustained "myofascial injuries". In general, Dungan requested additional findings of fact on all aspects of the ALJ's opinion.

In the order issued March 15, 2013, the ALJ found as follows:

> Upon Petition for Reconsideration by the Plaintiff, with the ALJ having carefully reviewed the Plaintiff's Petition, and carefully reviewed his original Opinion and Order and, being otherwise duly and sufficiently advised, said Petition for Reconsideration is hereby DENIED.

Dungan appealed to this Board which rendered an opinion on June 28, 2013. This Board affirmed the ALJ's decision to not award permanent partial disability ("PPD") benefits stating the evidence supported the determination Dungan did not sustain permanent injuries. We remanded for the ALJ to determine whether Dungan sustained a temporary injury for which she was entitled to temporary income and medical benefits pursuant to Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001). We also remanded for the ALJ to determine whether Dungan would be entitled to future medical benefits pursuant to FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007), despite the lack of a permanent impairment rating, and to provide sufficient reasons for his determination. Finally, the ALJ was directed to resolve the pending medical fee disputes which had not been addressed.

In a three page decision rendered August 26, 2013, the ALJ again stated he relied upon Dr. Knetsche's opinions. He found Dungan did not suffer a permanent work-related

injury as contemplated in Robertson v. United Parcel Service, supra, and further stated, "and as such is entitled to be compensated for **temporary** medical expenses associated therewith." (Emphasis added). The ALJ awarded TTD benefits from February 9, 2008 through March 21, 2008, at the rate of $295.09 per week, and again from March 19, 2009 through November 5, 2009 at the rate of $351.04 per week. The ALJ then specifically addressed entitlement to medical benefits as follows:

> Plaintiff shall recover of Defendant-employer and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances as may be reasonably required for the cure and relief from the effects of the work-related injury. Defendant's obligation shall commensurate with the limits set by the Kentucky Medical Fee Schedule.

The ALJ failed to address the medical fee disputes, and failed to provide his reasons for his determinations as directed by this Board.

On September 5, 2013, Hackney filed a "Request for Clarification" of the August 26, 2013 decision. Hackney stated the ALJ did not specify which medical treatment was necessary for the cure and relief of the work injuries and therefore compensable.

On September 9, 2013, Dungan filed a petition for reconsideration arguing the ALJ failed to address the pending medical fee disputes. She also requested the ALJ make additional findings of fact regarding the injuries sustained as previously directed by this Board. She also requested the ALJ determine her psychological conditions be included as part of her work injuries. Finally, she argued she is entitled to future medical benefits pursuant to FEI Installation v. Williams, supra, despite the lack of a permanent impairment rating.

On September 16, 2013, Hackney responded to Dungan's petition for reconsideration and agreed the ALJ needed to address the medical fee disputes. It argued the psychological conditions are not compensable. Hackney also stated Dungan was merely re-arguing the merits of the claim in asking for the award of future medical benefits.

In a two-page order on reconsideration dated October 8, 2013, the ALJ granted Dungan's petition for reconsideration stating as follows:

> Petition for Reconsideration having been filed by the Plaintiff, the Defendant having filed its Response, and the Administrative Law Judge being sufficiently advised,
>
> **IT IS HEREBY ORDERED AS FOLLOWS**:

1. That the Plaintiff's Petition for Reconsideration is Granted.

2. That the Findings and Fact and Conclusions of Law are **AMENDED** as follows:

1. The Plaintiff suffered a work-related injury on February 12, 2008 to her low back with pain radiating down into the left leg, pain the right shoulder and right upper extremity. The injury occurred when Plaintiff slipped on ice while unloading grocery [sic] from her delivery truck. The Plaintiff is entitled to additional treatment to the right shoulder recommended by Dr. Latterman.

2. The Plaintiff suffered work-related injuries as the result of the traumatic collision between the van and a bull on March 18, 2009. Plaintiff suffered injuries to her neck, low back, left elbow, legs, and psychological conditions of anxiety and depression.

3. The Plaintiff is entitled to future medical expenses for the injuries sustained including her psychological condition pursuant to KRS 342.020 and *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007).

4. The medical fee disputes are resolved in favor of the Plaintiff.

5. The Opinion and Award is **AMENDED** to reflect the corrections set forth above. Any provision of the Opinion and Order of January 28, 2013 inconsistent with the Order on Petition for Reconsideration is hereby modified.

On appeal, Hackney argues the ALJ's determinations are clearly erroneous, and he abused his discretion both in awarding future medical benefits, and in resolving the medical disputes in Dungan's favor.

As the claimant in a workers' compensation proceeding, Dungan had the burden of proving each of the essential elements of her cause of action, including entitlement to future medical benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Dungan was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

That said, the ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., supra. This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is 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). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the claim was remanded to the ALJ "for further consideration, for an exercise of

discretion, and for an explanation that will permit a meaningful review."

We find the ALJ failed to set forth adequate findings of fact and explanation which would allow meaningful review regarding his determinations. Likewise his determinations appear to be somewhat inconsistent. As Hackney points out, it is somewhat incongruous to find only a temporary injury, and also determine the cervical fusion surgery is compensable.

We previously remanded this claim to the ALJ to determine whether Dungan sustained a temporary injury, and if so, to what medical benefits she may be entitled. We also directed the ALJ to resolve any outstanding medical disputes, and to "provide sufficient reasons for the award". The August 26, 2013 opinion and the October 8, 2013 order on reconsideration merely recite his conclusions, and are bereft of any analysis or reasons for the determinations set forth therein. Therefore, the Board and the parties are left to guess what evidence the ALJ relied upon in reaching his decision.

Mere conclusory determinations are insufficient, especially in light of the previous direction of this Board. On remand, the ALJ is directed to conduct an analysis in accordance with both statutory and case law

referenced above and to provide with more specificity the rationale supporting his determination of entitlement to future medical benefits, finding compensable the shoulder treatment by Dr. Latterman, compensability of depression, and in resolving the medical disputes in Dungan's favor. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Accordingly, those portions of the August 26, 2013 opinion and order and the October 8, 2013 order on reconsideration by Hon. Jonathan Weatherby, Administrative Law Judge, are **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

COUNSELS FOR PETITIONER:

HON WALTER A WARD
HON DONALD J NEIHAUS
333 WEST VINE ST, STE 1100
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON MARK D KNIGHT
PO BOX 49
SOMERSET, KY 42502

OTHER RESPONDENT:

DR AMR O EL-NAGGAR
LAKE CUMBERLAND NEUROSURGICAL CLINIC
75 HAIL KNOB ROAD
SOMERSET, KY 42503

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511