Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 25, 2013

CLAIM NO. 200700182

HAM BROADCASTING COMPANY, INC. PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

ERIC ALEXANDER
ANTHEM HEALTH PLANS OF KENTUCKY, INC.
and HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Ham Broadcasting Company, Inc. ("Ham Broadcasting") seeks review of the March 18, 2013, opinion and award rendered by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ") finding Eric Alexander ("Alexander") sustained a work-related back injury and awarding temporary total disability ("TTD") benefits,

permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. Ham Broadcasting also appeals from the May 14, 2013, order denying its petition for reconsideration.

Alexander alleged a work-related lower back injury occurring on February 11, 2005. At the January 18, 2013, hearing, he testified that on the day in question he and James Owen ("Owen") were setting a steel pole so concrete could be poured around it. The steel pole now "holds up a twenty-one foot satellite dish." Alexander testified when he picked up the pole and put it in the correct position he felt something pull in his back. He testified he provided notice of the injury to D.J. Everett ("Everett"), the president and owner of Ham Broadcasting and Melissa Noel ("Noel"), the executive assistant. Alexander also produced printouts of February 16, 2005, e-mails between he and Everett concerning his back condition. He denied having any prior back problems or using a cane before the February 10, 2005, injury.

The December 13, 2012, benefit review conference ("BRC") order and memorandum reflects the following contested issues: "benefits per KRS 342.730; work-relatedness/causation; notice; average weekly wage; unpaid

or contested medical expenses; injury as defined by the Act; exclusion for pre-existing disability/impairment; TTD."[1]

Concerning the issue of notice and whether he sustained an injury, Alexander deposed his wife, Alicia Alexander, and Owen. Alexander also introduced the records of his treating physicians and the independent medical evaluation ("IME") report of Dr. Frederic T. Huffnagle.

Ham Broadcasting deposed Everett, Noel, and Beth Mann, the general manager, to establish Alexander was not injured on the date in question, did not provide notice of the injury and had pre-existing back and leg problems causing him to occasionally use a cane. Ham Broadcasting also introduced the September 28, 2009, report of Dr. Thomas Loeb and his December 18, 2009, deposition.

Concerning whether Alexander sustained a work-related injury, the ALJ entered the following findings of fact and conclusions of law:

INJURY AS DEFINED BY THE ACT

> The initial determination in this claim is whether plaintiff has suffered an injury as defined by the Kentucky Worker's Compensation Act. While obviously plaintiff contends that he was injured in the course and scope of his employment, the employer has

[1] There is also a BRC order of December 3, 2010.

vehemently denied that plaintiff suffered a work injury and bases their defense on assertions that plaintiff is generally not credible, witnesses from the employer denied being aware of or being advised by the plaintiff of the fact of the injury, he admittedly did not treat for nine months following the injury, he continued to work following the injury, medical records of Dr. McDonald do not reflect a history of the work injury as well as allegations that plaintiff suffered from a prior active back problem.

While there is a significant dispute regarding whether plaintiff suffered a work injury, there is no dispute that plaintiff suffers from a significant low back condition. Plaintiff's expert Dr. Huffnagle diagnosed plaintiff as suffering from sciatica involving the right leg and he assessed a 10% impairment pursuant to the AMA Guides and recommended significant physical restrictions. Dr. McDonald also assessed a 10% impairment pursuant to the AMA Guides based on his diagnosis of a classic L5 radiculopathy. Even the employer’s witness, Dr. Loeb testified that the plaintiff had a very serious low back condition that he described as a L5 nerve root attenuation from posterior subluxation of L5 on S1 and he felt plaintiff needed immediate surgery. As such, the medical evidence is unrebutted the plaintiff suffers from a significant lumbar condition that may require surgery and for which he has been assessed a minimum of a 10% impairment rating.

The difficult question that remains is whether this serious low back condition is related to the alleged work incident. Having reviewed

and considered the entirety of the medical and lay proof, the ALJ is persuaded by the testimony of the claimant, the testimony of James Owen, the e-mail communications between the plaintiff and the employer personnel, the lack of any medical record documentation of a pre-existing active condition, the medical records of Mary James which contain a history of the work injury, and the medical testimony of Dr. Huffnagle and Dr. Loeb, that the plaintiff has met his burden of proving that his low back condition is causally related to his alleged work injury and as such the ALJ concludes the plaintiff has suffered an injury as defined under the Kentucky Workers' Compensation Act.

In reaching this conclusion the ALJ notes that there is no question that plaintiff and James Owen did in fact set the pole for the satellite in concrete on the alleged injury date based upon the testimony of the plaintiff and the employer's witnesses. This part of the claim is not disputed. While certainly whether plaintiff suffered an acute injury during the performance of that job activity is the essence of the dispute in this claim, based upon the e-mail communications between plaintiff and D.J. Everett, there can be no dispute but that plaintiff suffered from some type of a comparatively acute back problem immediately following the performance of that job. While there is no reference in the e-mails to an injury occurring to the plaintiff at any time, D.J. Everett asks the plaintiff how his back is doing in the 11:15 AM e-mail, plaintiff responds in the 12:31 PM e-mail that "it started out really good – but in a short while it was worse", Everett responded at 1:36 PM "Glad you felt better and sorry you are feeling

worse. Maybe a couple of days rest for the old back are in order." The e-mail sent at 5:27 PM on February 16, 2005 merely documents that plaintiff was involved in pouring the concrete for the setting of the satellite post.

The inference the ALJ draws from these communications is that soon after the performance of the satellite post job, the plaintiff developed an acute back problem that he told D.J. Everett about. While this is not proof the plaintiff actually hurt his back in setting the satellite post, the ALJ believes it is consistent with his testimony regarding the occurrence of the injury and is inconsistent with the testimony of D.J. Everett that he was not aware that plaintiff was having any back problems and it stands to reason that other company personnel were aware of this as well despite their denials. D.J. Everett was not questioned about the e-mails at his deposition. However, Melissa Noel testified on behalf of the employer and she stated as follows:

> I don't recall Eric ever saying I hurt my back on February doing this. I know after he had some problems, I knew I shouldn't have been doing that that day. I hurt my back then. Yes, I can remember him referring to it, but it's hard to tell when Eric actually hurt his back or how he hurt his back because we had so many times that he came in on canes and could have hurt his back at work or anywhere as far as I knew. I know he referred to hurting his back there yes I remember him saying that. But he never reported it, he

> never filled out a claim form. I have absolutely no paperwork at all.
>
> Question: But my question is, if he said he had that discussion with you, can you dispute that, if he specifically recalls?
>
> Answer: We had several discussions about his back being hurt or, you know, and being hurt. He usually called me if he could not work. (Noel deposition pages 13 – 14).

The ALJ believes Ms. Noel's testimony is an admission that plaintiff did tell her that he hurt his back setting the satellite post in February, 2005 and provides significant support for plaintiff’s testimony regarding the occurrence of the injury, especially in light of D.J. Everett's acknowledgment that plaintiff was having back problems immediately following the post setting job. The ALJ believes the Ms. Noel's testimony could be sufficient, in and of itself to, support a finding of work-relatedness even in the absence of any other corroborating testimony.

However, there is further evidence to support plaintiff's allegation of the work injury. While the fact the plaintiff did not initially treat for his injury, and delayed treating for it at all until December 13, 2005 when he was seen at Trigg County Primary Care with right hip pain which he did not attribute to any specific incident and was attributed to by the physician to OA (osteoarthritis), when he sought treatment from Mary James, the nurse practitioner, on September 12, 2006 he

gave her a history of pain in the right hip radiating into the right leg that he attributed as follows: “he did have an injury to his back about three years ago when he lifted a 300 pound pipe." While certainly the time frame is inconsistent the mechanism of injury as described by plaintiff to Mary James is consistent with his testimony. Plaintiff was eventually referred to Dr. McDonald and his medical records were attached regarding the work incident. They did not reflect any history of injury at all which certainly does not support the plaintiff’s claim but neither does it support an alternative, non–work related mechanism of injury. Dr. McDonald also authored a letter dated January 17, 2008 to plaintiff's counsel in which he acknowledged there was “no specific reference to a work-related injury" in his medical records. But plaintiff was also seen by Dr. Frederick Huffnagle at the request of his counsel and, not surprisingly, Dr. Huffnagle received a thorough history of the work injury. Given that he was plaintiff’s witness this is not terribly convincing. However, Dr. Huffnagle’s theory regarding the insidious onset of plaintiff’s injury as being typical of what occurs with an annular tear seems credible.

Lastly, medical testimony in the claim comes from Dr. Loeb who evaluated the plaintiff at the request of the employer. In his report Dr. Loeb states “However, in lieu of the fact that he absolutely denies any other intervening injury, it is hard to rationalize at least some contributing aspect of his work injury to cause a slow progressive laxity of his lower lumbar ligamentous structures which is the only thing that could allow for this extremely rare posterior subluxation of L5 on S1…I

would have to opine there is at least some contribution of work injury to bring his dormant condition into a disabling reality albeit it has taken place over time. I would have to relate this to the work injury if no other credible history can be brought forth to show he had some severe intervening mechanical accident that could have possibly caused this incredibly rare anatomic situation that has developed." (Loeb report p.7-8) While Dr. Loeb retreated considerably in his deposition from his testimony that there was a causative relationship between the plaintiff's condition and the work injury, he did so on the basis of the testimony of the employer's lay witnesses and the alleged history that the plaintiff utilized a cane prior to his work injury as well as the statements plaintiff made to the Tennessee correctional institution regarding "crushed discs", and that this testimony was proof the plaintiff's current condition was entirely due to a pre-existing, non-work-related cause. Having considered Dr. Loeb's testimony in his report and his deposition the ALJ is more persuaded by the opinions expressed in his report and those opinions support a causal relationship with the work injury.

In summary, the ALJ is persuaded by the testimony of the claimant regarding the occurrence of his injury and his testimony is corroborated by the testimony of James Owen which the ALJ finds credible. Further, the employer's lay witnesses acknowledged that plaintiff developed an acute back condition and Melissa Noel was advised at the time of the alleged work injury. Further, the medical testimony from Mary James is consistent with plaintiff's testimony [sic] regard to the mechanism

> of injury and the testimony of Dr. Huffnagle and Dr. Loeb support a finding of a causative relationship. All these factors viewed together are sufficient to convince the ALJ that plaintiff's injury occurred as he testified and as such, the ALJ finds that plaintiff suffered an injury as defined by the Kentucky Workers' Compensation Act.

Based on the testimony of Everett and Noel, the ALJ concluded due and timely notice was given. The ALJ also concluded there was no exclusion for a pre-existing disability. Relying upon the opinions of Drs. Huffnagle and Sean McDonald, the ALJ determined the injury produced a 10% impairment and Alexander did not retain the physical capacity to return to the job he performed at the time of the injury. Concerning entitlement to TTD benefits, the ALJ concluded as follows:

> Entitlement to temporary total disability is determined by reference to KRS 342.0011(11) which defines temporary total disability as the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement which would permit a return to employment. As applied in this claim, plaintiff testified that he missed three weeks following the injury but returned to his regular job at regular pay thereafter until December 2005 at which time he was terminated due to a non-work-related injury. The medical records of Neurological Surgeons of Western Kentucky were submitted by the plaintiff and reflect the plaintiff was treated by Dr. Robert

> Meriwether on January 15, 2007 and Dr. Meriwether stated "I have placed him off work until Dr. Keck has had a chance to go over his records and make recommendations." Plaintiff treated with Dr. McDonald the remainder of the year 2007 and underwent various diagnostic tests. He was last treated on December 3, 2007 and Dr. McDonald assessed a 10% impairment rating pursuant to the AMA Guides by letter dated January 17, 2008. Dr. Huffnagle placed plaintiff at MMI as of the date of his evaluation, February 23, 2009. Dr. Loeb stated that the plaintiff had not achieved MMI as of date of his evaluation, September 28, 2009. Having considered the entirety of the medical and lay evidence on this issue, the ALJ concludes that plaintiff is entitled to temporary total disability benefits from the date he was taken off work by Dr. Meriwether, January 15, 2007 until January 17, 2008, the date Dr. McDonald assessed an impairment rating pursuant to the AMA Guides. The AMA Guides indicate that a rating cannot be assessed until such time as the examinee has reached MMI, and the ALJ therefore infers that Dr. McDonald felt plaintiff was at MMI on the day he assessed his rating. Further, the record does not contain any documentation of further treatment. As such, the ALJ concludes that plaintiff was at MMI as of January 17, 2008 and is therefore entitled to TTD from January 15, 2007 until January 17, 2008.

Ham Broadcasting filed a petition for reconsideration objecting to the award of PPD benefits and, alternatively, to the ALJ's calculation of the PPD benefits. It also asserted the ALJ erred in awarding TTD

benefits and in resolving the issue of causation and notice.

In the May 14, 2013, order the ALJ sustained in part Ham Broadcasting's petition for reconsideration and corrected the calculation of PPD benefits. In overruling that portion of the petition for reconsideration relating to the award of TTD benefits, the ALJ provided the following explanation:

> As to the employer's assertion that the award of TTD benefits was a patent error altogether and specifically in error after January 22, 2007, following plaintiff's evaluation with Dr. Keck, the petition is denied. As indicated in the Opinion and Award, the ALJ was persuaded by the testimony of Dr. Meriwether that the plaintiff should be taken off work as of January 15, 2007 as he was to undergo further evaluation with Dr. Keck. Dr. Keck recommended epidural injections which the plaintiff underwent over the next several months and then he continued treating with Dr. Sean McDonald. During this time plaintiff received a history that he experienced "progressive worsening symptoms." (Dr. McDonald report April 19, 2007). Dr. McDonald provided regular and active treatment throughout 2007 and diagnosed plaintiff on September 10, 2007 as having a clinical L5 radiculopathy on the right side. He gave a history on September 10, 2007 that "he is not wanting to go on disability and really wants to get back to work" and the ALJ believes it is fair to infer that Dr. McDonald was aware plaintiff was off work at that time. Plaintiff underwent an EMG study

> on October 30, 2007 and Dr. McDonald was considering implantation of a spinal cord stimulator. On December 3, 2007 Dr. McDonald referred him to Dr. Richardson for pain management and then on January 17, 2008 Dr. McDonald assessed an impairment rating pursuant to the AMA Guidelines which the ALJ determined was the ending point for plaintiff's TTD benefits. The ALJ believes the above medical records support the award of TTD and the finding that plaintiff was not at MMI and had not been released to return to work until January 17, 2008. Further, the findings in the above records must be viewed in light of the testimony of Dr. Loeb who found that on the date of his examination, September 28, 2009, plaintiff was not at MMI and not able to work, testimony which would support an award of TTD on an open ended basis. As such, the employer's petition on this issue is OVERRULED.

Concerning Ham Broadcasting's argument regarding causation/notice, in overruling that portion of the petition for reconsideration, the ALJ provided the following additional reasoning:

> In regard to the issues of causation and notice, the employer asserts error in the ALJ's assessment of Melissa Noel's and D.J. Everett's testimony insofar as it supports causation or notice. The ALJ has the authority and discretion to determine which evidence is persuasive even to the extent that the ALJ can believe one part of a witnesses' testimony and not another. In regard to Melissa Noel's testimony, the ALJ was persuaded by Ms. Noel's testimony that "Yes, I can remember him referring to it" and "I

know he referred to hurting his back there yes I remember him saying that" to support the finding that the plaintiff gave notice to Ms. Noel and that her acknowledgment of plaintiff’s telling her about the injury supported the finding of causation. The ALJ continues to believe Noel's testimony supports the findings made on both causation and notice.

As to D.J. Everett's testimony, the ALJ pointed out in the opinion that the e-mail messages do not reference a work-related event but they did reference the performance of the job that plaintiff alleged he was injured on, the setting of a concrete post, and they were proof that plaintiff developed an issue with his back in the same general timeframe that he alleged his work injury. The ALJ concluded that these facts supported plaintiff’s claim in regard to work relatedness and notice and the ALJ believes these conclusions were correct and hence no patent error exists.

As to the medical records of Mary James, she treated the plaintiff at the Trigg County Primary Care office and the records were attached to plaintiff's Form 101 and reflect that she treated plaintiff on September 12, 2006 for low back and right leg pain and plaintiff gave a history that “He did have an injury to his back about three years ago when he lifted a 300 pound pipe." As the ALJ indicated in the Opinion, while the timeframe is inconsistent, the mechanism of injury as described is consistent with plaintiff’s alleged work injury. The ALJ believes the inference drawn from Mary James medical record is appropriate and not erroneous. Given that the employer summarized the medical records attached to the Form 101 including the records of Mary James in

its’ [sic] brief, the ALJ believes the recitation of the relevant contents of James’ records on page 17 of the Opinion was sufficient for the employer to understand the basis for the ALJ’s conclusions.

The employer has also asserted that the ALJ shifted the burden of proof in regard to causation based upon the statement on page 17 of the Opinion that Dr. McDonald's medical records did not contain a history of the work accident and did not contain any history of injury at all which the ALJ acknowledged does not support the plaintiff’s claim but neither “did it support an alternative, non-work-related mechanism of injury." The statement was made in response to the opinion of Dr. Loeb, the employer's medical expert, who stated “I would have to relate this to the work injury if no other credible history can be brought forth to show he had some severe intervening mechanical accident that could have possibly caused this incredibly rare anatomic situation that has developed.” (Page 8 Loeb report). As such, Dr. Loeb, the employer's own witness, stated plaintiff's injury was probably work-related unless there was evidence of an intervening accident, and the ALJ was merely pointing out that Dr. McDonald's records do not contain such. The ALJ did not shift the burden of proof.

As to the employer’s assertion that the ALJ disregarded plaintiff’s testimony regarding “crushed discs”, this assertion is not accurate as the “crushed discs” were specifically mentioned on page 20 of the Opinion in regard to the issue of pre-existing active disability. The ALJ noted that there was no medical testimony to support the employer’s argument that the

> "crushed discs" history mandated a finding of pre-existing active disability and therefore the employer did not meet the requirements for a finding of pre-existing active disability as set forth in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky.App. 2007). Given the lack of corroboration in the medical records for the "crushed discs" theory, the ALJ finds that not only does it not support a finding of pre-existing active disability, neither is it persuasive in regard to a finding of work relatedness.

On appeal, Ham Broadcasting challenges the ALJ's opinion and award on two grounds. First, it asserts the ALJ relied almost exclusively upon Dr. Loeb's report in finding a causal relationship between Alexander's back condition and the February 10, 2005, event. It asserts the ALJ's reliance upon Dr. Loeb's report is misplaced, as Dr. Loeb's deposition reflects he completely changed his opinion regarding causation. Ham Broadcasting asserts the ALJ's statement that Dr. Loeb "retreated considerably" from the opinions expressed in his report is erroneous as Dr. Loeb changed his opinion in his deposition. Ham Broadcasting asserts Dr. Loeb corrected the findings in his report after receiving additional information provided to him at the deposition. During his deposition, Dr. Loeb stated he could find no objective evidence in the record that Alexander's present condition was in any way caused by

the event of February 10, 2005. Further, Dr. Loeb testified the x-rays performed on the day of his examination revealed an extremely advanced degenerative condition. He opined a comparison of those x-rays to the 2007 studies which show no evidence of such degeneration, establish most of Alexander's problems developed in the past two years.

Alternatively, Ham Broadcasting also challenges the ALJ's award of TTD benefits from January 15, 2007, until January 17, 2008, arguing as following:

> However, during that year time period, there is no mention in any medical records from any of respondent's treating physicians of him being placed off work, or of even having restrictions placed on him. Admittedly Dr. Merriweather [sic] did take respondent off work on January 15, 2007 until he could be seen by Dr. Keck for surgical recommendations. That appointment occurred on January 22, 2007 and surgery was not an option. There is no further mention of respondent being kept off work. Additionally, respondent had continued working following the alleged injury until December 2006, almost two years later, until he was terminated for reasons unrelated to his alleged work related injury. At most, respondent was taken off work for seven days and therefore does not qualify for TTD benefits.

We find no merit in Ham Broadcasting's argument the decision is not supported by substantial evidence and

the ALJ relied almost exclusively upon the report of Dr. Loeb. As can be gleaned from his opinion, the ALJ relied upon numerous portions of the evidence in determining Alexander sustained a work-related injury. The ALJ specifically found the testimony of Alexander and Owen as to what occurred on February 10, 2005, to be credible. The ALJ also relied upon the February 16, 2005, e-mails between Everett and Alexander in resolving the causation and notice issues. The ALJ concluded Noel's testimony supports Alexander's testimony that he hurt his back while at work setting a satellite post in February 2005.

The ALJ relied in part on the September 12, 2006, note of Mary James ("James"), a nurse practitioner, in which she noted Alexander sustained an injury to his back three years ago when he lifted a 300 pound pipe.[2] As is his prerogative, the ALJ concluded James erroneously stated the year when Alexander lifted the pipe, but was impressed by the fact Alexander had provided a history of injuring his back while lifting a 300 pound pipe.

Finally, the ALJ also relied upon the opinions expressed in Dr. Huffnagle's report and Dr. Loeb's report. We concede Dr. Loeb changed his opinion regarding the

[2] There appears to be no dispute that James is a nurse practitioner at Trigg County Primary Care.

existence of a causal connection between the work injury of February 10, 2005, and Alexander's condition. During his deposition, Dr. Loeb stated he changed his opinion based upon the Tennessee prison records revealing Alexander provided a history of having "crushed lumbar discs," Dr. McDonald's January 17, 2008, letter in which he stated his medical records contained no specific reference to a work related injury, and the testimony of Ham Broadcasting's employees that Alexander had back problems and used a cane prior to February 10, 2005. However, the ALJ was free to attach no significance to what Dr. Loeb relied upon in changing his opinion and was free to accept the opinions expressed in Dr. Loeb's report over those expressed in his subsequent testimony.

We believe Dr. Loeb's opinions contained in the September 28, 2009, report are extraneous, as the lay testimony relied upon by the ALJ and Dr. Huffnagle's opinions constitute substantial evidence in support of the ALJ's decision. Dr. Huffnagle opined Alexander's "work history is consistent with the type of injury that occurs with an annular tear."

Alexander, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including

causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Alexander 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a

different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Here, substantial evidence supports the ALJ's determination Alexander sustained a work-related injury. As noted by the ALJ, there is no question Alexander has severe back problems. The sole question was whether his back problems are related to the February 10, 2005, event. In concluding Alexander's problems were related to that event, the ALJ relied on far more than Dr. Loeb's opinions.

The ALJ cited to the evidence which led him to conclude Alexander sustained a work-related injury. As the evidence cited by the ALJ in support of his decision constitutes substantial evidence, we are unable to disturb the ALJ's decision on this issue. Special Fund v. Francis, supra.

Similarly, we are unconvinced by Ham Broadcasting's argument regarding the award of TTD benefits. Temporary total disability means the condition of an employee who has not reached maximum medical improvement ("MMI") from an injury and has not reached a level of improvement that would permit a return to employment. KRS 342.0011. Temporary total disability is a factual finding in which the ALJ is called upon to analyze the evidence presented and determine the date the injured employee either 1) reaches MMI, or 2) attains a level of improvement such that a he is capable of returning to gainful employment. KRS 342.0011(11); W.L. Harper Construction Co. v. Baker, 658 S.W.2d 202 (Ky. App. 1993); Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000). Generally, the duration of an award of temporary total disability may be ordered only through the earlier of those two dates.

Dr. Robert P. Meriwether took Alexander off work on January 15, 2007, and referred him to Dr. Daniel B.

Keck. Although the medical records of Drs. Keck and McDonald do not specifically state Alexander should remain off work, we believe the medical records firmly establish during the period from January 15, 2007, until January 17, 2008, Alexander was undergoing significant treatment, was not capable of returning to work, and had not attained MMI. The January 15, 2007, record of Dr. Meriwether reveals the myelogram showed significant problems in the lumbar spine. As a result, Dr. Meriwether directed Alexander remain off work until Dr. Keck had a chance to review his records and make a recommendation. Dr. Keck's January 22, 2007, note reflects the following assessment:

> 1. Lumbar degenerative disc disease with evidence of neural compromise at the L3-L4 and L4-L5 level.
>
> 2. Lower extremity radiculitis.

Dr. Keck noted surgical intervention had been discussed which Alexander wanted to avoid. He noted Alexander was eager to explore other options available to him. Dr. Keck concluded the most reasonable option would be a trial of lumbar epidural steroid injections. Consequently, Alexander underwent right L4-5 lumbar epidural steroid injections on February 8, 2007, February 19, 2007, and March 5, 2007.

Dr. Keck's March 30, 2007, note reveals Alexander reported his back and leg pain had become unbearable and expressed the desire to obtain an opinion from Dr. McDonald as to whether he was a surgical candidate.

Dr. McDonald's April 19, 2007, note reflects he "did not see a surgical cause to explain [Alexander's] symptoms." Dr. McDonald was quite concerned with the progressive worsening symptoms without any relief and with the development of constant numbness in Alexander's right foot. He recommended an EMG nerve conduction study of the right leg.

In his May 7, 2007, note Dr. McDonald recommended another MRI scan of the lumbosacral spine due to progression of Alexander's symptoms. Dr. McDonald stated he was concerned this was not just a pain problem but also a function problem. Dr. McDonald expressed a desire to be extremely aggressive in determining whether to rule out a possible surgical lesion, and if a surgical lesion was found, then surgery would be the best option. However, if pain control was involved, the dorsal column stimulator would probably be the best option.

Dr. McDonald's June 4, 2007, note reflects Alexander was continuing to have problems with his back and right leg. He was concerned Alexander had classic L5

radiculopathy without an obvious surgical lesion and that he was continuing to get worse from a pain and function standpoint. Dr. McDonald stated he had exhausted the radiographic imaging options, and a sitting or standing MRI scan was an option. He recommended a referral to Dr. Metcalf, a neurologist, for a non-surgical opinion.

Dr. McDonald's September 10, 2007, note again reflects Alexander continues to have clinical L5 radiculopathy on the right side and Alexander believes he continues to get worse. Dr. McDonald stated it was hard for him to offer surgery as an option. He requested Alexander to "think long and hard" about whether he wanted to consider an exploratory procedure.

Dr. McDonald's November 19, 2007, note reflects Alexander has L5 radiculopathy and the EMG studies show chronic L5 radiculopathy without nerve root compression. Alexander's symptoms were back pain with lower extremity weakness, hip pain and weakness, as well as lower extremity radicular pain and numbness. Dr. McDonald noted he provided information to Alexander about a dorsal column stimulator.

Dr. McDonald's December 3, 2007, record reveals Alexander continued to have back pain with right lower extremity radicular pain and numbness increased when

ambulating. He stated Alexander was a possible candidate for a dorsal column stimulator trial. He recommended a referral to Dr. Richardson for pain management.

In the May 14, 2013, order the ALJ specifically explained in depth the basis for the award of TDD benefits. As noted by the ALJ, after Dr. Keck administered epidural steroid injections over several months, Dr. McDonald provided “regular and active treatment” throughout the remainder of 2007. During this time, Alexander underwent a number of diagnostic tests and implantation of a dorsal column cord stimulator was discussed. On December 3, 2007, Dr. McDonald referred Alexander to Dr. Richardson for pain management evaluation. The above evidence constitutes substantial evidence supporting the ALJ’s award of TTD benefits.

Interestingly, when Dr. Loeb saw Alexander on September 28, 2009, he did not believe he had attained MMI. Given Dr. Loeb’s assessment Alexander had not attained MMI as of September 28, 2009, and the fact he was undergoing aggressive treatment from the time Dr. Meriwether took him off work in early 2007 through December 2007, the ALJ’s award of TTD benefits is amply supported by the evidence.

In light of the above evidence, and despite any conflicting testimony which may have supported a different

conclusion, we believe the ALJ could reasonably infer that prior to January 17, 2008, Alexander had not reached MMI from the effects of his injury, and due to the injury had not yet reached a level of improvement that would permit a return to his regular and customary employment with Ham Broadcasting. Such reasonable inferences are fundamental to the ALJ's role as fact-finder, and the ALJ is vested with broad authority to decide such matters. Dravo Lime Co. v. Eakins, supra; Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Jackson v. General Refractories Co., supra. Hence, we find no error regarding the ALJ's award of TTD benefits.

However, pursuant to KRS 342.285, we determine the award of PPD benefits is not in conformity with the statute and applicable case law and *sua sponte* vacate the ALJ's award of income benefits. The December 13, 2010, BRC order reflects one of the contested issues was whether the claimant returned to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury. At the conclusion of the hearing testimony on January 18, 2013, the ALJ noted the BRC reflected this was an issue.[3] He then stated it appeared Alexander had returned to work at a wage equal to or greater than the

[3] See pages 34-36 of the hearing transcript.

average weekly wage at the time of the injury. Counsel for the parties agreed with the ALJ's statement. The ALJ then stated the record was to reflect there was a stipulation that Alexander had returned to work at a weekly wage equal to or greater than his average weekly wage at the time of the injury and this was no longer an issue. The ALJ determined the three multiplier was applicable and Ham Broadcasting has not appealed that determination. Further, based on the parties' stipulation, the two multiplier was also applicable. Therefore, it was incumbent upon the ALJ to conduct the requisite analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006) and determine whether Alexander is "unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future." Fawbush v. Gwinn, supra at 12. Consequently, this claim is remanded to the ALJ to determine whether Alexander's PPD benefits should be enhanced by the two or three multiplier.

Accordingly, the ALJ's determination Alexander sustained a work-related injury and the award of TTD benefits is **AFFIRMED**. However, the ALJ's award of PPD benefits is **VACATED**. This matter is **REMANDED** to the ALJ

for entry of an amended opinion and award in accordance with the views expressed herein.

ALL CONCUR.

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