Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 25, 2013

CLAIM NO. 201193042

INDUSTRIAL SERVICES OF AMERICA PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

DOUGLAS E. LANE
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

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

ALVEY, Chairman. Industrial Services of America ("ISA") seeks review of the opinion, order and award rendered June 28, 2012, by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits,

and medical benefits to Douglas E. Lane ("Lane") for a right knee injury he sustained on November 12, 2010. ISA untimely filed a petition for reconsideration which the ALJ declined to consider.

On appeal, ISA argues the ALJ erred in relying upon Dr. Bilkey's opinion, and in not finding Lane's condition was pre-existing and active prior to the date of injury. ISA also argues the ALJ erred in application of KRS 342.730(1)(c)1 & 3. We affirm in part, vacate in part and remand.

Lane filed a Form 101 on November 5, 2012 alleging an injury to his right knee, which he twisted while working in a maintenance pit. At the time of the accident, Lane was employed as a diesel mechanic by ISA. Lane was born on December 22, 1960, and resides in Salem, Indiana.

Lane testified by deposition on January 31, 2013, and at the hearing held April 23, 2013. He completed the eleventh grade, and subsequently obtained a GED. According to his Form 101, Lane also attended Riverside Community College in Riverside, California. Lane served in the United States Marine Corps from 1979 until 1986, and has worked as a vehicle mechanic ever since. He has worked for two employers since leaving ISA. He is currently employed

as a diesel mechanic, but is unable to perform all aspects of the job previously performed at ISA.

At the time of the November 12, 2010 accident, Lane had entered a maintenance pit to adjust the clutch on a truck which had been installed the previous day. As he turned to avoid burning himself on a light in the pit, his foot caught in a grate causing his knee to twist and buckle. Since he was working by himself, he reported the accident to his supervisor the following day. Lane inquired about medical treatment several times over the next few days, and at one point was advised to follow up with the Veteran's Administration ("VA"). Lane was terminated on November 23, 2010 for reasons unrelated to the accident.

After contacted by the Kentucky Department of Workers' Claims, ISA eventually advised Lane to seek treatment at Baptistworx in Louisville. Baptistworx recommended physical therapy and an MRI which were denied by ISA's workers' compensation insurer. Lane eventually had an MRI performed through the VA. Lane stated he continues to experience right knee pain and soreness for which he takes 5 milligrams of Hydrocodone. He stated he is unable to wear a knee brace because it interferes with his work. He also stated he has had no surgery, and none

has been recommended. At his deposition, Lane denied any previous right knee problems. At the hearing, Lane testified he had experienced problems around his right kneecap in the past, and had undergone injections to his right knee in 2007 and 2008. He admitted he had previously testified he had no previous problems with his right knee.

In support of the Form 101, Lane submitted the records from Baptistworx for treatment on December 6, 2010; December 10, 2010; and December 15, 2010. Those records reflect Lane could work with no prolonged standing or walking, and he should be allowed to sit as needed. The notes also reflect he had a swollen right knee, and should avoid climbing and squatting.

Lane filed the November 14, 2012 report of Dr. Warren Bilkey of Louisville. Dr. Bilkey stated Lane twisted and injured his right knee on November 12, 2010 while working in an oil pit, for which he treated with the VA due to denial of his claim. Dr. Bilkey observed swelling, laxity and crepitus of Lane's right knee. He also stated Lane had an antalgic gait. He diagnosed a right knee strain due to the November 12, 2010 work accident; lateral meniscus tear, patella chondromalacia, and chronic right knee pain. Dr. Bilkey stated he saw no evidence of active right knee impairment prior to the date

of injury. He also stated Lane had not reached maximum medical improvement ("MMI"), and may be a surgical candidate. He imposed restrictions of no limited running, carrying and stair climbing, and advised against jumping. Dr. Bilkey assessed an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

ISA filed the February 13, 2013 report of Dr. Ellen Ballard. Dr. Ballard noted Lane denied a prior history of right knee pain. Dr. Ballard diagnosed Lane with right knee pain, status post work injury. She noted a 2007 radiograph of the right knee from the VA, with findings no different than his current findings. Dr. Ballard stated, "There is no evidence he has incurred a harmful change to the human condition based on his alleged injury." Dr. Ballard opined Lane has reached MMI, and assessed a 3% impairment rating pursuant to the AMA Guides, due to pre-existing active conditions. She recommended no restrictions on his activities.

ISA also filed records from the VA which reflect Lane received treatment for his right knee from July 2007 through March 2009. The treatment included multiple right knee injections and medications. No records document

treatment subsequent to that time until after the November 2010 accident.

A Benefit Review Conference ("BRC") was held on April 9, 2013. The BRC order and memorandum lists the contested issues as benefits per KRS 342.730; work-relatedness/causation; notice; unpaid or contested medical expenses; injury as defined by the Act; TTD; and exclusion for prior active disability. In his decision rendered June 28, 2013, the ALJ found as follows:

> Oft times in these cases, small details in the medical record are of significance to the fact finder in trying to determine issues of fact. As admitted in her deposition, Dr. Ballard knew of no previous active disability suffered by the Plaintiff concerning his right knee. She can ascribe no other physical vehicle that would have brought it into disabling reality, yet she assigns the Plaintiff a 0% WPI, opining that his condition was pre-existing. However, her opinion that [sic] must be discounted because although the condition may have been pre-existing in part, there is no probative evidence that it was "active" prior to the work related incident of November 12, 2010.
>
> To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the *AMA Guidelines* immediately prior to the occurrence of the work related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App., 2007). So,

when work related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change. Hence, the harmful change comes within the definition of injury. *McNutt Construction v. Scott*, 40 S.W.3d 854 (Ky., 2001).

Here, Dr. Ballard gives as her opinion that the Plaintiff suffered nothing more than sprain or strain of a pre-existing condition, but she is unable to absolutely exclude Plaintiff's fall at work as the vehicle that brought the right knee condition into disabling reality.

As to the issues of the Plaintiff suffering an injury as defined by the Act, whether that injury was, within the bounds of reasonable medical probability caused by the work related accident of November 12, 2010, and whether the injury was related to the work, the ALJ finds on the record taken as a whole that the testimony of Dr. Warren Bilkey is most persuasive as it comports most closely with the facts of the case.

As to the percentage of whole person impairment, the ALJ finds the testimony of Dr. Warren Bilkey to be persuasive, as he assigns to the Plaintiff a whole person impairment of 8% based upon the *AMA Guidelines to the Evaluation of Permanent Impairment, 5th ed.*

As to the application of statutory enhancement under KRS 342.730 (the "3 multiplier), the ALJ finds the testimony of Dr. Warren Bilkey to be persuasive. He opines that the plaintiff is precluded from being able to resume the full scope of his work activities

successfully performed prior to November 12, 2010. The Plaintiff himself testified that he can no longer do tire work or fieldwork. He now has trouble with clutch work as well. Further, even the job duties that he now performs that are similar in nature to those he performed for the Defendant employer must be undertaken at a slower pace due to the condition of his right knee. This is starting to "become an issue" with his current employer.

Regarding TTD, Plaintiff's sworn testimony was that after he was terminated by the Defendant employer on November 23, 2010 he worked briefly at Onsite Fleet Services beginning in late March or early April 2011. He had to discontinue his job at Onsite because he could not tolerate the physical demands of the job. In July 2011 he began working at Bagshaw Trucking where he has worked ever since, although he makes a dollar less an hour and works less overtime than he did while in the employ of the Defendant employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Facts as stipulated by the parties and set out herein above.

2. As to the issue of work-relatedness, causation or injury as defined by the Act, the Plaintiff suffered a work related injury, timely reported same and actively sought relief from his symptoms. The ALJ finds that the Claimant, **DOUGLAS E. LANE** suffered a work-related injury on November 12, 2010 while in the employ of the Defendant/ Employer, **INDUSTRIAL SERVICES OF AMERICA**. In making this finding, I have relied upon the opinion of Dr. Warren Bilkey and Plaintiff's testimony which,

concerning the work causation of Plaintiff's injury, I find to be the most credible and convincing evidence in the record.

3. As a result of his November 12, 2010 work-related injury, the Plaintiff has a whole person impairment rating of 8% according to the *AMA Guides, 5th ed.* In making this finding, I have relied upon the opinion of Dr. Warren Bilkey which, concerning Plaintiff's functional impairment rating as a result of the subject injury, I find to be the most credible and convincing evidence in the record.

4. As opined by Dr. Bilkey, the Plaintiff does not retain the physical capacity to return to the type of work performed at the time of the injury. Further, Dr. Bilkey recommended work restrictions, limited carrying and stair climbing, no jumping or running. The Plaintiff is therefore entitled to the statutory enhancement of a 3 multiplier pursuant to KRS 342.730 (1) (c) 1.

5. Plaintiff is thus entitled to a weekly benefit calculated at $522.49 x 8% (WPI) x 0.85 (grid factor, KRS 342.730 (1) (b) x 3.2 (statutory plus education multiplier) = $113.69 per week.

On appeal, ISA, citing to Cepero v. Fabricated Metal Corporation, 132 S.W.3d 839 (Ky. 2004), argues the ALJ erred in not concluding Lane had a pre-existing active condition and relying upon Dr. Bilkey's opinion regarding causation. ISA argues Dr. Biley was provided an inaccurate or incomplete history regarding Lane's pre-existing knee

problems, and therefore his opinions cannot be relied upon. ISA also argues the ALJ erred in assessing the three multiplier pursuant to KRS 342.730(1)(c)1, and in particular the additional .02 enhancement for the "education multiplier" pursuant to KRS 342.730(1)(c)3.

Regarding ISA's first argument, since Lane was successful before the ALJ regarding the causation of his work injury, the question on appeal is whether his determination is supported by substantial evidence. 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 the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). 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, 16

(Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

ISA did not timely file a petition for reconsideration, which is tantamount to filing no such petition. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated differently, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence

in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). Here, the ALJ based his determination upon Dr. Bilkey's findings. There is no evidence of any attempt to discredit Dr. Bilkey's opinions either on cross-examination, or to provide him with records of previous treatment for commentary. Likewise, there is no evidence outlining the records Dr. Bilkey was provided in reaching his determination. The ALJ's reliance upon Dr. Bilkey's opinion is a factual determination, and does not constitute reversible error as a matter of law. Therefore, the ALJ's determination relying upon that report shall remain undisturbed.

Regarding ISA's second argument, the ALJ's determination of Lane's entitlement to the three multiplier pursuant to KRS 342.730(1)(c)1 again is a factual determination supported by the evidence which will not be disturbed. However, we determine enhancement of the award of PPD benefits by .2 pursuant to KRS 342.730(1)(c)3 is in error, and is hereby vacated.

As noted by ISA, Lane testified he had obtained his GED, which is the equivalent of a high school diploma, and the additional enhancement pursuant to KRS 342.730(1)(c)3 is inapplicable. KRS 342.730(1)(c)3 specifically states as follows:

> If at the time of injury, the employee had less than eight (8) years of formal education, the multiplier shall be increased by four-tenths (0.4); if the employee had less than twelve (12) years of education **or a high school General Educational Development diploma**, the multiplier shall be increased by two-tenths (0.2)

Therefore, the ALJ erred as a matter of law in applying the additional .2 enhancement, and on remand, he is directed to issue a revised opinion, award and order without the enhancement.

Accordingly, the opinion, award and order rendered February 21, 2013, and the order denying the petition for reconsideration rendered June 12, 2013, by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART,** and **REMANDED** for a determination of pending medical disputes in conformity with the views expressed herein.

ALL CONCUR.

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