Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 28, 2014

CLAIM NO. 201293415

IVAN CHASE BELILES PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

GENERAL MINE SERVICES
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Ivan Chase Beliles ("Beliles") seeks review of the opinion, award and order rendered September 9, 2013 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits in a claim he filed against General

Mine Services ("General"). Beliles also seeks review of the October 23, 2013 order denying his petition for reconsideration.

On appeal, Beliles argues the ALJ erred in finding him permanently partially disabled rather than permanently totally disabled. In the alternative, Beliles argues the ALJ erred in failing to award the three multiplier pursuant to KRS 342.730(1)(c)1. Finally, Beliles argues General waived any objection to his entitlement to mileage reimbursement, and the ALJ erred in determining this issue was not preserved. Because the ALJ did not abuse his discretion, the issue of mileage reimbursement was not properly preserved, and his decision is supported by substantial evidence, with a contrary result not compelled, we affirm.

Beliles filed a Form 101 on October 4, 2012 alleging he injured his left knee on September 17, 2010 when he was pulled to the ground at a coal mine located in Vincennes, Indiana while working for General. Beliles is a high school graduate, and possesses a master's license in barbering. Beliles indicated his work experience included employment as a coal miner and barber. In support of the Form 101, Beliles filed the September 18, 2010 emergency room record from the Regional Medical Center in

Madisonville, Kentucky. The record reflects Beliles complained of left knee and lower extremity pain from falling on a steel cube the day before.

Beliles testified by deposition on January 30, 2013, and at the hearing held July 11, 2013. Beliles was born on July 9, 1982 and resides in Greenville, Kentucky. He testified he delivered pizza during the time period he worked as a barber. On the date of the accident he was crossing under a beltline at a gated crossing. The belt activated while he and a co-worker were underneath. The co-worker panicked, and pulled Beliles' utility belt causing him to twist and fall. During the fall, he experienced a pop in his left knee. He reported the incident, and sat by the mantrip until the shift ended.

After work, he noticed his knee was swollen and he could barely walk. He was given Tylenol, and drove to the hotel where he was staying for the job assignment. He took a shower, then drove home to Greenville, Kentucky. The next morning he went to the emergency room at the Regional Medical Center in Madisonville, where he was given pain medications and crutches. He returned to work at General's Madisonville office for two weeks, and then returned to work in the mine for a week and a half, until

he had an MRI. He was then advised he could not return to work until he had surgery.

Left knee surgery was performed by Dr. Jenna Lee, an orthopaedic surgeon at Tri-State Orthopaedics in Evansville, Indiana, in December 2010. Beliles stated the surgery worsened his left knee condition, and he began experiencing low back pain. On December 27, 2010 Beliles was advised by his employer to return to light duty work, but he did not because he could not drive. His TTD benefits were then terminated. Beliles attended physical therapy. In late April 2011, he called his supervisor and advised he had completed physical therapy and was ready to return to work. Beliles was advised he was no longer employed, and he has not returned to work.

Although Dr. Lee eventually released him from her care, Beliles stated he continues to have low back pain, and difficulty with his left knee. He occasionally wears a knee brace. He stated he has difficulty with driving a vehicle with a stick shift, and can only walk thirty minutes at a time.

In support of his claim, Beliles filed the January 24, 2012 report of Dr. Warren Bilkey, who he saw on one occasion for the purpose of an evaluation. Dr. Bilkey noted Beliles fell at work and tore his medial meniscus

which required surgical repair. Dr. Bilkey stated Beliles has chronic left knee pain, thigh atrophy and impairment. He opined Beliles reached maximum medical improvement ("MMI") on June 13, 2011, and assessed a 5% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He stated no restrictions should be imposed, and Beliles retains the physical capacity to return to work as an underground coal miner.

Beliles also filed numerous treatment records from the Regional Medical Center; records from Trover Sports Medicine and Rehabilitation; Tri-State Orthopaedics; Deaconess Hospital; and the Muhlenberg Community Hospital outlining his treatment including surgery and physical therapy. Beliles also filed the physical therapy report prepared by Mr. James Hawkins, Jr., a physical therapist in Owensboro, Kentucky who performed a functional capacity evaluation ("FCE") on January 15, 2013. Mr. Hawkins opined Beliles would be, "hard pressed to work in the mines again unless the knee stability was addressed." He also stated the prognosis was poor for Beliles to return to work in the coal mines.

General filed records from Dr. Lee, and also filed the report of the FCE performed at Tri-State Orthopaedics at

her request. The opinions contained in the FCE report are as follows:

> The results of this evaluation indicate the client is capable of work in the Very Heavy Physical Demands Category of work based upon the client's demonstrated material handling activities, based upon guidelines expressed in the Dictionary of Occupational Titles (DOL, 1991). Cardiovascular testing revealed the client has a Heavy physical endurance capacity.
>
> A review of test findings indicate[sic] the client is capable of returning to their[sic] previous position without restrictions.
>
> . . .
>
> We recommend a return to work without restrictions, as the client appears to meet and/or exceed the physical requirements of the pre-injury job.

On June 29, 2011, Dr. Lee acknowledged the May 9, 2011 FCE. She stated Beliles had reached MMI, and assessed a 2% impairment rating pursuant to the AMA Guides. She further stated Beliles could return to work without restrictions.

Beliles then filed the vocational report prepared by Dr. Stephanie Barnes, who evaluated him on January 30, 2013 at the request of his attorney. Dr. Barnes stated because Drs. Lee and Bilkey released Beliles with no

restrictions, “This would indicate he should be able to return to his prior work and/or any other work he was suited for pre-injury.” She further stated based upon the FCE performed by Mr. Hawkins, Beliles would be limited to sedentary and light work activity, despite his ability to lift into the medium category, and would be expected to compete for jobs only in the $12.00 per hour range, as opposed to the $21.00 per hour he was earning prior to his injury.

A benefit review conference (“BRC”) was held on June 13, 2013. The BRC order and memorandum reflects the contested issues to be decided were benefits per KRS 342.730 and multipliers, and the correct calculation of the average weekly wage. At the hearing held July 11, 2013, the parties designated the payment of additional TTD benefits as an issue. No mention was made of payment of travel expenses being a contested issue. In his brief before the ALJ, Beliles for the first time argued he had attended thirty-seven physical therapy sessions for which he should receive a mileage reimbursement, although he had never previously made such request, and had not preserved the issue.

In his decision rendered September 9, 2013, the ALJ awarded additional TTD benefits through May 9, 2011, the date of the FCE ordered by Dr. Lee. He also awarded

PPD benefits based upon the 5% impairment rating assessed by Dr. Bilkey. Based upon the fact both Drs. Lee and Bilkey assessed no restrictions, the ALJ declined to award the three multiplier pursuant to KRS 342.730(1)(c)1. Because Beliles had not returned to work, he declined to enhance the award by the two multiplier pursuant to KRS 342.730(1)(c)2. The ALJ did not address the issue of the mileage reimbursement.

On September 19, 2013, Beliles filed a "motion to modify defects in the ALJ's opinion and to reconsider the issue of plaintiff's ability to return to work", which the ALJ treated as a petition for reconsideration. Beliles again argued entitlement to mileage reimbursement for the physical therapy sessions he attended. Beliles also requested the ALJ to reconsider his ability to return to work, and assess the three multiplier. General filed a petition for reconsideration on September 20, 2013 noting a scrivener's error on page thirteen of the decision, and asked the weekly benefit award be corrected to reflect $17.35 per week.

In an order issued October 23, 2013, the ALJ amended his decision to reflect the correct weekly rate, as pointed out by General. The ALJ denied the issues raised by Beliles. The ALJ advised he had not addressed the

mileage reimbursement request because it had not been preserved for resolution. Regarding the second issue raised by Beliles, the ALJ stated he had clearly outlined the basis of his decision, and pointed to specific evidence supporting his determination.

Beliles, as the claimant, is the party with the burden of proof regarding all aspects of his claim. Because the ALJ determined he was partially, not totally disabled, and declined to apply the three multiplier pursuant to KRS 342.730(1)(c)1, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). We conclude there was no such evidence.

The ALJ, as fact-finder, is the sole judge of the weight and inferences to be drawn from the evidence and determines the quality, character, and substance of the evidence. *See* Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence. *See* Magic

Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). Although an opposing party may note evidence supporting a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The ALJ relied upon the FCE performed at Tri-State Orthopaedics, as well as the opinions of both Drs. Bilkey and Lee in determining Beliles is neither permanently totally disabled, nor entitled to any enhancing multiplier because he retains the ability to return to unrestricted work. These opinions constitute substantial evidence upon which the ALJ could rely in determining the extent of Beliles' injuries.

Beliles merely points to the conflicting records and opinions of Mr. Hawkins which would support a conclusion contrary to the ALJ's decision. This is not an adequate basis for reversal. It cannot be said the record compels a finding of permanent total disability, or entitlement to any enhancing multiplier. This Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded evidence on questions of fact. *See* KRS 342.285(2).

Finally, the record clearly establishes Beliles did not submit a request for mileage reimbursement, or assert this as a contested issue until he filed his brief before the ALJ. The intent behind 803 KAR 25:010 Section 13(14), which states, "[o]nly contested issues *shall* be the subject of further proceedings" following the BRC, is to identify the contested issues which are being pursued by the parties and to be decided by the ALJ. The BRC order and memorandum did not list mileage reimbursement as a contested issue. There is likewise no evidence this issue was tried by consent. Although Beliles argues otherwise, the only evidence of consent by General was the agreement to allow Beliles to assert an issue regarding entitlement to additional TTD benefits. Thus, the ALJ correctly concluded in his October 23, 2013 order this issue was not preserved at the BRC and therefore was not a subject to be addressed in his decision. Because this issue was not properly preserved for a decision by the ALJ, it may not be considered on appeal.

Accordingly, the opinion, award and order rendered by Hon. Edward D. Hays, Administrative Law Judge, on September 9, 2013 and the order on reconsideration issued October 23, 2013 are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON BRENT YONTS
PO BOX 370
GREENVILLE, KY 42345

COUNSEL FOR RESPONDENT:

HON A STUART BENNETT
PO BOX 2150
LEXINGTON, KY 40588

ADMINISTRATIVE LAW JUDGE:

HON EDWARD D HAYS
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601