Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 26, 2013

CLAIM NO. 201177228

J. C. BARKER PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

ELMO GREER & SONS,
MICHAEL RATLIFF, M.D.,
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING AND REMANDING

* * * * * *

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

ALVEY, Chairman. J.C. Barker ("Barker") seeks review of the amended opinion, award and order rendered February 18, 2013 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") awarding permanent partial disability ("PPD") benefits and medical benefits for a hernia injury sustained on June 30, 2011 while employed by Elmo Greer & Sons

("Elmo"). The ALJ determined Barker's lumbosacral/ sacrococcygel injury is not work-related. Barker also seeks review of the March 11, 2013 order denying his petition for reconsideration.

On appeal, Barker argues the ALJ's finding "the injury to [his] back, hip and/or sacrococcygel" is unrelated to the work accident is not supported by substantial evidence. We disagree. The ALJ's finding is supported by substantial evidence, and no contrary result is compelled. However, we *sua sponte* determine the ALJ failed to address any period of temporary total disability ("TTD") benefits in the award, despite the stipulation by the parties at the Benefit Review Conference ("BRC") such benefits were paid. On remand, the ALJ shall review the claim for determination of any appropriate award of TTD benefits.

Barker filed a Form 101 indicating on June 30, 2011 he was thrown from a dozer when it slid off a large rock. Barker alleged the following body parts were injured as a result of the accident: "right side in pelvic area with rupture leading to right inguinal hernia and lumbosacral and sacroccygel strain and contusion."

Barker testified by deposition on September 17, 2012 and at the hearing held December 19, 2012. Barker was born on May 30, 1940, and completed the eighth grade.

Barker testified his permanent residence is Hudson, Florida, but he has been living in Pikeville, Kentucky for the past three years while working for Elmo. Barker's work history consists primarily of working as a dozer operator in the construction injury. He has worked for Elmo on and off for approximately thirty years. From September 2010 to August 2011, Barker testified he worked for Elmo as a dozer operator where he engaged in finishing work at the completion of road construction. He worked fifty to sixty hours per week earning approximately thirty dollars an hour. Prior to June 30, 2011, Barker testified he experienced no problems with his low back and only took medication for an irregular heartbeat. Barker continued to work his usual job following the work incident on June 30, 2011 until a few days before his hernia repair surgery on August 19, 2011. Barker has not returned to work since the hernia surgery, and currently receives regular Social Security benefits and a Steelworkers' pension.

Barker testified on June 30, 2011, he was operating a dozer on top of large boulders. Near the end of his shift, the dozer slipped off the boulders and slammed into a wall, throwing Barker backward. As a result, Barker "busted" his right elbow. Barker testified as follows

regarding additional symptoms he experienced after the accident:

> Q: . . . Now after this incident what kind of pain were you having?
>
> A: When I first hit, I was numb all over, kind of halfway between knocked out and not knocked out.
>
> Q: Now did you actually lose consciousness?
>
> A: No. I was just numb and I was, I don't know if you've ever been hit real hard or not, I was seeing stars.
>
> . . . .
>
> Q: And when that happened what pain did you feel, where did it bother you?
>
> A: Well, like I said, I was numb. It hit pretty hard and I was numb.
>
> Q: Where were you numb?
>
> A: I think my hair was hurting too. But I was numb all over. And, you know, I got it back out. Then it was pretty close to quitting time, then I told Roger what happened, the superintendent.
>
> Q: Okay.
>
> A: And the next thing I knowed [sic] I was busted here and swelled up here.
>
> Q: It looked like you referred to your right side again, around your hip area?
>
> A: Right.

At the hearing, Barker testified as follows:

Q: Now after you had this incident which you described at your deposition on the bulldozer, what started happening, what areas were bothering you?

A: Well, it was the hernia part that, I didn't even know what it was. It was a knot popped out of me. Right after the accident, I guess when I got out of the shower I seen it. And then I went to the little clinic down there, Coal Run Clinic. And the lady doctor, she checked it and, and she got all excited and got me [sic] appointment with Dr. Stephens. I didn't know what it was.

Q: And Dr. Stephens is a surgeon?

A: Yeah. And I busted my elbow, too, when I went backwards.

Q: Where all were you hurt?

A: Just around in here over my hip, kindly[sic] in my leg, just in this area.

Q: Okay, and it went into your right leg?

A: Yeah.

Q: How did it go in to your leg, what kind of symptoms were you having?

A: Well, Stephens, he wanted to get the operation done as quick as he could. So after he got that done--But I had told him that I had pain that was in my hip here, I didn't know what it was, had no idea. I think he ordered a MRI and they refused it. And maybe he tried it again, I don't know for sure. Then they wouldn't let him do anything so he referred me to Dr. Ratliff.

Barker reported the work incident to his supervisor and completed the remainder of his shift. Barker testified he first sought treatment at the Coal Run Clinic "probably the next day," and was then referred to Dr. Grady Stephens. Dr. Stephens performed a hernia repair on August 19, 2011. Thereafter, Dr. Stephens requested a lumbar spine MRI, which was denied by the insurance carrier.

Dr. Stephens subsequently referred Baker to Dr. Michael Ratliff for pain management. Dr. Ratliff administered an injection to his incision area, which "numbed it for like a day." He also recommended a lumbar MRI and alcohol ablation of the right ilioinguinal nerve, both of which were denied by the insurance carrier. Barker has not received any treatment for his lower back since all requests have been denied by the insurance carrier. Barker confirmed he did not miss any work from June 30, 2011 to August 2011, and continued to perform the same job duties earning the same rate of pay during this time. Barker has not worked since the August 2011 surgery.

Barker testified he continues to experience constant pain which "starts from about my belt all the way down to my foot on the right, right leg." He also complained of low back pain on the right side above his hip. Barker testified his hernia surgery worsened his symptoms

and he experiences constant pain and heat around the surgical area. The right hip, back and leg pain also make it difficult to walk and sleep. Barker testified he could not operate a dozer with his current hernia condition.

Regarding the first report of injury, Barker testified the preparer of the report, Angela Howard, never interviewed or talked to him about the June 30, 2011 incident and/or injuries. Likewise, he was never provided a report to review it. He also testified Dr. Richard Sheridan did not examine his hip, back or leg.[1]

In support of his claim, Barker attached to the Form 101 the June 26, 2012 Form 107-I report and a letter from Dr. Anbu Nadar. Dr. Nadar evaluated Barker on May 15, 2012 and diagnosed right inguinal hernia, and lumbosacral and sacrococcygeal strain and contusion. He opined Barker's injuries are the cause of his complaints. Dr. Nadar noted Barker "continues to complain of pain in his right groin, radiating down to his scrotum." Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, ("AMA Guides"), Dr. Nadar assessed a 10% impairment rating for the inguinal hernia condition

[1] The deposition of Don Cox was also taken on November 1, 2012 which will not be summarized since it addresses the allegation of a safety violation which was not been appealed to the Board.

and a 5% impairment rating for the lumbar spine condition, yielding a combined 15% impairment rating. Dr. Nadar stated Barker has limitation in work activities which require frequent bending, lifting, twisting, turning and prolonged sitting. He further opined Barker is unable to return to his former employment. Dr. Nadar recommended continued treatment for Barker's persistent inguinal hernia pain, including nerve ablation, and further work-up for his complaints of sacrum, coccyx and right leg pain.

Subsequently, Elmo filed two separate medical fee disputes, as well as a motion to join Dr. Ratliff, on August 24, 2012. The disputes contest the compensability of the lumber spine MRI and alcohol ablation of the right ilioinguinal nerve requested by Dr. Ratliff in January 2012 and February 2012, respectively. In support of the dispute, Elmo attached the January 25, 2012 utilization report ("UR") by Dr. Bart Olash. After reviewing the medical records, Dr. Olash determined the requested lumbar spine MRI is not medically necessary or appropriate for the June 30, 2011 work injury. He noted Dr. Ratliff listed no findings in the history, functional evaluation or physical evaluation to suggest the need for a lumbar MRI. He found Barker's pathology located in the inguinal area, and not at all

related to the low back. He further found the MRI was ordered because Barker thought one should be performed.

Elmo also attached the February 23, 2012 UR report by Dr. James Patrick Murphy. He concluded the alcohol ablation of the right ilioinguinal nerve is not medically necessary or appropriate for the June 30, 2011 work injury.

He noted the local anesthetic block should be repeated and the degree of immediate relief should be documented, along with the duration of the block and extent of any numbness or weakness. Dr. Murphy opined "simply documenting that a nerve block helped for a few days does not prove the necessity of an alcohol neuroablation."

Elmo filed the First Report of Injury, which was prepared by Angela Howard, a claims coordinator, on August 4, 2011. The report indicates Barker sustained a "knot on left elbow & possible hernia on R side" on June 30, 2011 when "operating dozer to push rock, dozer slipped off rock & jarred employee."

Barker filed the generally illegible treatment records of Dr. Stephens. The July 26, 2011 patient health history indicates Barker sought treatment for a "hernia." Dr. Stephens diagnosed right inguinal hernia and "HBP." The August 19, 2011 operative report reflects Dr. Stephens performed a repair of the right inguinal hernia with

micromesh. It appears Barker followed up with Dr. Stephens on at least three occasions. On September 1, 2011, Dr. Stephens requested a lumbar MRI after Barker complained of right hip pain, and right leg weakness and numbness. On October 25, 2011, Barker was referred to Dr. Ratliff.

Barker filed the records of Dr. Ratliff of the Pain Management Clinic. On October 25, 2011, Dr. Ratliff noted Barker complained of right lower quadrant pain, and increased pain since surgery in the right inguinal regional radiating into his scrotum and down the medial aspect of his thigh. He diagnosed Barker with right ilioinguinal nerve entrapment from the surgery and recommended a right ilioinguinal block, which was performed on December 1, 2011. On December 7, 2011, Dr. Ratliff noted complaints of right groin and hip pain, radiating to his right scrotum and testicle. He also noted Barker obtained reduced pain relief for approximately four days following the December 1, 2011 injection. Dr. Ratliff recommended an MRI of the lumbar spine and noted Barker "states that he would like to undergo an MRI of the lumbar spine to rule out any other possibilities for his pain." On February 7, 2012, Dr. Ratliff noted continued complaints of right groin and hip pain radiating into the testicles. After noting Barker's pain was reduced by 70-80% for several days following the

December 1, 2011 block, Dr. Ratliff recommended an alcohol ablation of the right ilioinguinal nerve. On April 6, 2012, Dr. Ratliff noted insurance had denied his request for the ablation.

Elmo filed the April 25, 2012 report of Dr. Sheridan who noted complaints of intermittent pain and burning in the right groin area and diagnosed direct and indirect right inguinal hernias. He assigned a 5% impairment rating for the hernia pursuant to the AMA Guides. Dr. Sheridan stated he agreed with the UR reports finding the lumbar MRI and alcohol ablation of the right ilioinguinal nerve not medically necessary for the June 30, 2011 work injury. He again stated the lumbar MRI request is not related to the June 30, 2011 work event in any way. Dr. Sheridan noted Barker has reached maximum medical improvement ("MMI"), can return to his job without restriction and does not need ongoing treatment.

Elmo filed the November 8, 2012 report of Dr. Gregory Snider who noted complaints of right groin and right lower quadrant pain radiating to his right leg, as well as numbness and tingling. Dr. Snider diagnosed status post right inguinal repair with postop pain; left elbow olecranon bursitis by history, now resolved; and low back pain and right sciatica, cannot rule out radiculopathy. Dr. Snider

reviewed the treatment records and noted there is no clear documentation of a work-related injury or incident, and specifically no clear documentation of an acute work injury to the lower back. He opined Barker's elbow and hernia conditions are at MMI. Pursuant to the AMA Guides, Dr. Snider assigned a 2% impairment rating for his groin complaints. He recommended no further treatment for the resolved elbow condition, but opined a workup for his low back complaints are appropriate including an MRI and/or electrodiagnostic studies. He further stated prognosis is poor for prompt resolution of post-operative inguinal hernia pain. He recommended anti-inflammatory medication, a topical cream, and a trial of Neurontin or Lyrica. Dr. Snider stated with maximized conservative treatment, Barker should be able to return to his former work without restrictions.

The December 5, 2012 BRC order reflects the following stipulations: Jurisdiction under the act; an employment relationship; a June 30, 2011 work-related injury for which Elmo received due and timely notice; TTD benefits were paid at the rate of $721.97 per week from August 19, 2011 to May 1, 2012 for a total of $26,506.61; Elmo has paid $9,242.42 in medical expenses; average weekly wage of $1372.01; and Barker continued working until August 19,

2011. The BRC order listed the following contested issues: benefits per KRS 342.730, work-relatedness/causation-back; unpaid or contested medical expenses-MRI of back; injury as defined by the Act, KRS 342.165 violation, TTD, medical fee disputes and proper rating under the AMA Guides. The hearing and the February 15, 2013 opinion, award, and order reflect the same contested issues and stipulations. After reviewing the lay and medical evidence, in the opinion, award and order rendered February 18, 2013, the ALJ stated as follows regarding work-relatedness and injury as defined by the Act:

> **Work relatedness; Injury as defined by the ACT.** The first issue under consideration is whether Plaintiff has supported his burden of proving he suffered an injury as defined in KRS 342.0011(1) which defines "injury" as a work related traumatic event arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical evidence. Where a 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 an injury. *McNutt Construction First General Services v. Scott,* 40 SW 3d 854 (Ky., 2001). In order for an injury to arise out of employment, there must be a causal relationship between the employment and

> the injury. ***Hayes Freight Lines v. Burns,*** 290 S.W. 2d 836 (Ky, 1956).
>
> The medical records and testimony of Plaintiff consistently support the hernia as a work related injury. However, the same is not true for the allegation of lumbosacral and sacrococcygel injury occurring at the same time. While the undersigned ALJ found Plaintiff to be generally credible, the totality of the evidence does not support a harmful change resulted at the time of the injury. Plaintiff's counsel is correct that there are notes, specifically in the records of Dr. Stephens that mention right leg weakness, pain and other low back problems. However, there is no evidence from the time of the injury of problems with those areas as a result of the incident with the bulldozer. Therefore, I find that Plaintiff has not met his burden of proving a harmful change as a result of the work accident other than the hernia.

The ALJ also determined Barker failed to prove Elmo committed an intentional safety violation pursuant to KRS 342.165. The ALJ found the opinion of Dr. Sheridan most persuasive regarding the impairment for Barker's hernia condition, and assigned a 5% impairment rating. Further, the ALJ increased the award of income benefits by the two multiplier. The ALJ calculated Barker's award of benefits as follows: $1,372.01 x 2/3 = $914.58 → $721.97 (max) X 5% x .65 x 2 = $46.93 per week.

Regarding the medical fee disputes and TTD benefits, the ALJ found as follows:

> **Medical fee dispute; Unpaid or contested medical expenses.**
>
> Plaintiff believes he is entitled to further diagnostic studies regarding his back claim including an MRI. As the back claim has been found not to be work related, the diagnostic studies related thereto are not the responsibility of the workers' compensation carrier.
>
> However, Plaintiff is convincing regarding his continued pain related to the hernia surgery (which has been found to be work related) and is entitled to treatment related to the cure and/or relief of the symptoms related thereto including inguinal nerve block recommended by Dr. Nadar.
>
> **Temporary Total Disability Benefits.**
>
> Plaintiff worked from the time of the injury through the day before his surgery, a little less than two months later on August 19, 2011, and was paid TTD from that day through May 1, 2012 after Dr. Sheridan found him to be at MMI. Plaintiff contends he is entitled to temporary TTD benefits from May 1, 2012 until he reaches MMI or until his two year timeframe for the award of benefits expires (since Plaintiff was over 70 at the time of the injury).
>
> KRS 342.0011(a) has been interpreted by our courts as establishing a two-pronged test for the determination of the duration of an award of TTD. *Double L Const., Inc. v. Mitchell*, 182 S.W.3d 509 (Ky. 2005). TTD benefits are payable so long as:

> (1) MMI has not been reached, and (2) the injury has not reached a level of improvement that would permit a return to employment. ***Magellan Behavioral Health v. Helms***, 140 S.W.2d 579 (Ky. App. 2004).
>
> Based on a careful review of the medical records, I do not find proof to support Plaintiff's allegation that TTD should be extended beyond May 1, 2012. It is not just the finding by Dr. Sheridan that Plaintiff had reached MMI by that time but the absence of proof to the contrary. Since I have found that the record does not support the allegation of a work related lumbar injury, TTD cannot be tied to such a claim.

In the "Award and Order" section, the ALJ awarded PPD benefits in the sum of $46.93 and medical benefits associated with the work-related hernia condition, including alcohol neuroablation.

In an amended opinion, award, and order dated February 18, 2013, the ALJ, on her own motion, amended the decision to "correct the patent error on Page 13 of the Opinion where the incorrect rate of $721.97 was used to calculate the PPD rate rather than $541.47." The ALJ calculated Barker's PPD benefits as follows: $1,372.01 x 2/3 = $914.58 → $541.47 (max) x 5% x .65 x 2 = $35.20 per week. Likewise, the "Award and Order" section was corrected to reflect an award of PPD benefits in the amount of $35.20 per week. All other aspects of the decision

remain unchanged from the February 15, 2013 opinion, award and order.

Barker filed a petition for reconsideration, asserting the same arguments he now raises on appeal. Elmo also filed a petition for reconsideration, requesting the February 15, 2013 decision be corrected to reflect a maximum PPD rate of $541.47 and weekly PPD amount of $35.20.

In the March 11, 2013 order on the petitions for reconsideration, the ALJ found Elmo's petition moot since the matter was already addressed in the February 18, 2013 amended opinion, award and order. The ALJ denied Barker's petition, stating as follows:

> Plaintiff states the ALJ's finding that Plaintiff's lumbar injury claim is not work related is not supported by substantial evidence. On the contrary, the ALJ found on page 11 and 12 of her opinion that no records from the time of injury mention back complaints. In fact, the first mention is three months later when a request was made for an MRI without substantiation relating it to the work injury.

On appeal, Barker argues the ALJ's finding his back, hip and/or sacrococcygel injury is unrelated to the June 30, 2011 accident is not supported by substantial evidence. Barker points to his testimony establishing he did not experience back, hip or leg symptoms prior to this

accident. He cites to his testimony regarding his symptomology following the accident. He also cites to the notes and reports of Drs. Stephens, Ratliff and Nadar. Barker argues the ALJ "has essentially rewarded the obstinence and refusal of the insurance company in this case" to pay for a lumbar spine MRI. Barker also cites to Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979) which held a worker's testimony is competent evidence of his physical condition and of his ability to perform various activities before and after being injured. Barker argues the ALJ lacked the authority to reject uncontradicted testimonial evidence establishing an injury to his hip, lower back and right leg absent sufficient explanation for her reasons for rejection.

As the claimant in a workers' compensation case, Barker bore the burden of proving each of the essential elements of his cause of action before the ALJ, including the work-relatedness and causation of an injury. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Barker was unsuccessful in proving his lumbosacral and sacrococcygel injury was the result of the June 30, 2011 work accident, 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 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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 supporting a different outcome than 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).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We find the evidence does not compel a finding Barker sustained a lumbosacral and sacrococcygel injury as a result of the June 30, 2011 work accident. Barker essentially points to conflicting evidence supporting a favorable outcome and attempts to have the Board re-weigh the evidence, substituting its opinion for that of the ALJ. We may not do so. It was the ALJ's prerogative to rely upon the treatment records of Dr. Stephens. As noted by the ALJ in her decision, although Dr. Stephens indicates right hip pain, and right leg weakness and numbness in the September 1, 2011 record, it does not indicate whether the problems arose from the work accident. Additionally, the ALJ reiterated in the order on reconsideration there are no records from the time of injury which demonstrate low back

complaints and specifically found such complaints were not made until "three months later when a request was made for an MRI without substantiation relating it to the work injury." The ALJ's reliance on the treatment records of Dr. Stephens alone constitutes substantial evidence and no contrary result is compelled. Further, the January 25, 2012 opinion of Dr. Olash and the April 25, 2012 report of Dr. Sheridan also constitute substantial evidence supporting the ALJ's finding on work-relatedness for the alleged lumbosacral and sacrococcygel injury.

With that said, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). At the BRC, as reflected in the ALJ's opinion, the parties stipulated to a payment of a period of TTD benefits, including the dates and amount of benefits paid. The ALJ further found in the decision Barker is not entitled to additional TTD benefits. However, in the "Award and Order" section, the ALJ awarded PPD and medical benefits, but failed to address entitlement to TTD benefits. Neither party addressed this oversight in a petition for reconsideration. Because the parties stipulated TTD benefits were paid, we *sua sponte* remand the ALJ's decision and direct her to consider whether Barker

was entitled to TTD benefits, and if so, the appropriate duration and rate. Although neither party raised this issue, KRS 342.285 clearly grants the Board the authority to decide questions of law regardless of whether they are raised on appeal. It is within the Board's province on appeal to assure orders and awards of an ALJ are in conformity with Chapter 342. In this case, the ALJ's award is not in conformity with the law.

Accordingly, regarding the issue raised on appeal, the amended opinion, award and order rendered February 18, 2013 by Hon. Jane Rice Williams, Administrative Law Judge, and the order on reconsideration rendered March 11, 2013, are hereby **AFFIRMED.** This claim is **REMANDED** to the ALJ to enter a decision consistent with the views expressed in this opinion.

ALL CONCUR.

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