Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 30, 2013

CLAIM NO. 201276492

JAMES D. WINNANS PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

BROWN TRANSPORTATION;
OLD REPUBLIC GENERAL
INSURANCE CORPORATION;
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. James Winnans ("Winnans") seeks review of the opinion and order rendered March 28, 2013 by Hon. Chris Davis, Administrative Law Judge ("ALJ"), dismissing his claim against Brown Transportation ("Brown") for failure to prove a work-related injury, temporary or permanent,

occurred on January 13, 2011. Winnans also seeks review of the May 6, 2013 order denying his petition for reconsideration.

On appeal, Winnans argues the ALJ erred in dismissing his claim because he was bound by the following stipulation agreed upon by the parties at the January 15, 2013, benefit review conference ("BRC"): "Plaintiff sustained a work-related injury or injuries on 1/13/11." Winnans further argues the ALJ abused his discretion by allowing Brown to file into evidence Dr. Jeana Lee's report subsequent to the expiration of proof time. We disagree and affirm since the parties also identified "work-relatedness/ causation" and "injury as defined by the ACT" as contested issues at the BRC and the ALJ did not abuse his discretion in allowing the late filing of Dr. Lee's report.

Winnans filed a Form 101 on September 4, 2012, alleging he injured his right shoulder on January 13, 2011, when he slipped and fell on ice. In support of the claim, he attached the August 15, 2012 letter from Dr. Clint Hill. A scheduling order was issued on September 18, 2012 assigning the claim to the ALJ.

On October 16, 2012, Brown filed a Form 111 Notice of Claim Denial, stating the alleged injury did not arise out of and in the course of employment. Brown further

asserted Winnans provided a conflicting history regarding the onset of his right shoulder problems. Brown specifically declined to admit Winnans' injury was covered under the Act, or occurred and became disabling on January 13, 2011. Brown admitted Winnans gave due and timely notice of the alleged injury, but denied the claim on the basis of causation.

Subsequently, both parties filed treatment records from the Orthopaedic Institute of Western Kentucky, indicating Dr. Brian Kern performed a right shoulder rotator cuff repair on August 17, 2012. Brown also filed treatment records from Winnans' family physician, Dr. Danny Butler, from 2005 through 2012. Several of Brown's employees also testified by deposition.

On January 9, 2013, Brown filed a "Motion For Permission to File IME Report of Dr. Jeana Lee." As grounds for the motion, Brown stated Dr. Lee evaluated Winnans on December 11, 2012. However, through an oversight, the claim was not diaried for the expiration of proof time and a prior motion was not filed. Brown argued Winnans was fully aware the evaluation had taken place and a report by Dr. Lee would be forthcoming. Brown also noted it would have no objection to Winnans being allowed fifteen days for rebuttal. Brown attached Dr. Lee's December 11, 2012 report. Dr. Lee opined

Winnans' right shoulder condition and subsequent August 2012 surgery are not causally related to the January 13, 2011 fall.

The January 15, 2013 BRC Order and Memorandum contains eleven pre-printed issues the parties may identify as contested issues. The following stipulations were indicated:

> 1. Jurisdiction under the Act. YES.
>
> 2. An employment relationship existed between the plaintiff and defendant-employer at all times herein relevant. YES.
>
> 3. Plaintiff sustained a work-related injury or injuries on 01/13/11.
>
> 4. The defendant-employer received due and timely notice of plaintiff's injury(ies). YES.
>
> . . . .

Directly below the stipulation section, the parties indicated with an "X" the following contested issues: work-relatedness/causation, average weekly wage, unpaid or contested medical expenses, injury as defined by the ACT, and temporary total disability. In addition, the BRC also stated as follows: "Other: Plaintiff's Oral Motion to Bifurate Claim on causation and injury as defined by the Act is SUSTAINED."

Following the BRC, the ALJ entered an order on January 22, 2013 allowing Dr. Lee's report to be filed, and granted Winnans fifteen days for rebuttal. Despite his objection, Winnans submitted a January 24, 2012 letter by Dr. Kern for rebuttal purposes.

Winnans testified by deposition on November 28, 2012, and at the hearing held February 20, 2013. At the hearing, counsel for Winnans noted his objection to the late filing of Dr. Lee's report, but acknowledged he filed a rebuttal report. The ALJ indicated Winnans' objection had been orally overruled at the BRC.

In the March 28, 2013 opinion and award, the ALJ dismissed Winnans' claim in its entirety for failure to prove a work-related injury, either temporary or permanent. After summarizing the lay and medical evidence, the ALJ found Winnans fell at work after slipping on ice on January 13, 2011. Winnans failed to convince the ALJ he sustained a rotator cuff tear at the time of the fall. In support of his conclusion, the ALJ noted a lack of contemporaneous medical records from January 13, 2011 through April 2012 documenting a right shoulder injury or right rotator cuff tear. He noted Winnans did not inform Brown his condition was work-related until he was terminated on July 16, 2012. He noted no records support Winnans' assertion he regularly

updated his employer about his condition. Finally, the ALJ noted his reliance upon the opinion of Dr. Lee.

Winnans filed a petition for reconsideration, asserting the same argument he now raises on appeal. In the May 6, 2013 order denying his petition, the ALJ stated as follows:

> . . . . The case law and common practice usage make it clear that the stipulation of a date of injury on a Benefit Review Conference Memorandum is only a stipulation of an allegation and/or occurrence and in no way binds a party or the [ALJ] to a finding of any injury sufficient to trigger even temporary benefits. The Plaintiff's objection to the evidence from Dr. Lee was not timely. The Petition is DENIED.

On appeal, Winnans argues the ALJ was bound by the stipulation stating he sustained a work-related injury or injuries on January 13, 2011 and erred in interpreting it as only a "stipulation of an allegation and/or occurrence." Winnans relies upon Miami Oil Producers, Inc. v. Gillum, 418 S.W.2d 656 (Ky. 1967). Winnans argues the parties entered into the above referenced stipulation, which the ALJ ignored by finding he did not sustain any work-related injury. He states the ALJ's interpretation of the stipulation in the order on reconsideration is incorrect. Winnans also argues the ALJ abused his discretion in allowing the late filing of

Dr. Lee's report since Brown did not provide good cause and he was prejudiced by such error.

We find the ALJ did not err in interpreting the stipulation Winnans "sustained a work-related injury or injuries on 01/13/11" as referring to only an allegation and/or occurrence" of a work-related injury. The BRC Order and Memorandum is a pre-formatted document in which several possible stipulations are listed. Each stipulation contains a blank space allowing parties to enter specific facts to which they are agreeing. Generally, stipulation number three states "Plaintiff sustained a work-related injury or injuries on _____." In this instance, the date "01/13/11" was entered in the blank space.

In the case *sub judice*, we find the ALJ reasonably interpreted the stipulation as referring only to an allegation and/or occurrence. We find important the fact the parties agreed work-relatedness/causation and injury as defined by the Act as contested issues subject to further proceedings pursuant to 803 KAR 25.010 §13(14) in the same BRC order and memorandum. Likewise, the BRC order and memorandum reflects the ALJ sustained Winnans' oral motion to bifurcate the claim on the issues of causation and injury as defined by the Act. Clearly, the parties understood whether Winnans sustained a work-related injury was a

contested issue. Further, we note Brown specifically denied Winnans sustained a work-related injury in its Form 111. Finally, a review of the record reveals conflicting evidence regarding the onset date of the right shoulder symptoms.

We find no abuse of discretion by the ALJ in allowing the late filing of Dr. Lee's report. As trier of fact, the ALJ is the gatekeeper and arbiter of the record both procedurally and substantively. For purposes of KRS Chapter 342, it has long been accepted the ALJ has the authority to control the taking and presentation of proof in a workers' compensation proceeding in order to facilitate the speedy resolution of the claim and to determine all disputes in a summary manner. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Searcy v. Three Point Coal Co., 134 S.W.2d 228, 231 (Ky. 1939). Brown's proof time expired on December 17, 2012. Prior to its expiration, Dr. Lee evaluated Winnans on December 11, 2012 at Brown's request, from which a report was prepared. Subsequent to the expiration of proof time on January 9, 2013, Brown filed a motion for permission to file Dr. Lee's report which was granted over Winnans' objection at the BRC.

We find the ALJ acted well within his authority in allowing the late filing of the report. Importantly, the ALJ allowed Winnans fifteen days to submit rebuttal proof as provided in 803 KAR 25.010 §15. Winnans, in fact submitted a rebuttal report by Dr. Kern. After considering all the evidence submitted by the parties, the ALJ found Dr. Lee's opinion more persuasive. He noted the lack of contemporaneous medical records from January 13, 2011 through April 2012 documenting a right shoulder injury, and the fact Winnans did not inform Brown his condition was work-related until he was terminated. The ALJ acted well within his authority in determining the weight of the evidence and in finding Dr. Lee's opinion more persuasive. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Therefore, the March 28, 2013 opinion and order and the May 6, 2013 order denying Winnans' petition for reconsideration by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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