Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 19, 2014

CLAIM NO. 201301442

JEFFREY WILSON PETITIONER

VS. **APPEAL FROM HON. JONATHAN R WEATHERBY, ADMINISTRATIVE LAW JUDGE**

H T HACKNEY CO., INC.
HON JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Jeffrey Wilson ("Wilson") seeks review of the Opinion and Award rendered April 22, 2014 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") awarding temporary medical expenses, with the exception of a repeat left shoulder MRI. Wilson also seeks review of the

June 16, 2014 order denying his petition for reconsideration.

On appeal, Wilson argues the ALJ failed to find whether he suffered an injury as defined by the Act, erred in his assessment of impairment, and erred in failing to order H.T. Hackney Co. Inc. ("Hackney") to pay his unpaid medical bills. We vacate and remand for a determination of whether Wilson sustained an injury as defined by the Act, and if so, whether it was permanent or temporary in nature. The ALJ is also directed to make a determination of entitlement to medical benefits in accordance with Roberts v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001) and FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007).

Wilson filed a Form 101 on September 24, 2013 alleging he injured his neck, left shoulder and left arm in a work-related motor vehicle accident ("MVA") on October 4, 2012 while working for Hackney as a merchandising manager. Hackney filed a medical dispute on February 21, 2014 contesting a request for a repeat left shoulder MRI performed on February 1, 2014. In his utilization review report dated February 14, 2014, Dr. Dmitry Golovko opined the repeat left shoulder MRI was medically unnecessary since a previous one performed in October 2012 was completely normal.

Wilson testified by deposition on December 9, 2013 and at the hearing held February 26, 2014. Wilson resides in LaGrange, Kentucky and is right-handed. Wilson began working for Hackney on September 11, 1992, and has held several positions during his tenure of employment. Wilson had worked as a merchandising manager for eight years at the time of the MVA on October 4, 2012 which required him to travel to convenience stores and set up products. He was required to move and lift racks, boxes and shelving. He regularly lifted forty to fifty pounds, and estimated the heaviest item he lifted weighed up to eighty pounds.

On October 4, 2012, Wilson testified he was traveling alone from Indiana to Kentucky. While he was waiting at a stop light, another vehicle rear-ended him. Wilson stated he experienced immediate pain in his left shoulder, left arm and chest. Wilson sought medical treatment approximately a week later at First Stop Urgent Care when his symptoms did not subside. He later sought treatment with Drs. George Raque and John Guarnaschelli. Wilson has undergone conservative treatment, which he testified has been unsuccessful. Surgery has not been recommended. Wilson testified Hackney has accommodated the five pound lifting restriction imposed for his left arm. Throughout the course of treatment, Wilson testified his

neck, left shoulder and arm pain worsened and he developed numbness and tingling throughout his left arm and hand. He stated his left arm is weak and he drops things.

Wilson missed no work following the MVA and continued his job as merchandising manager until June 2013. He delegated his lifting duties to the employees he managed. In June 2013, he became a sales representative with Hackney which paid the same salary as he earned at the time of the accident. However, Wilson testified his supervisor notified him he would “be strictly commission” beginning in April 2014. Wilson indicated the position as a sales representative is much easier and he has no problems performing this job. Wilson testified he is physically incapable of returning to the merchandising manager position due to its lifting and moving requirements.

Jane Mooney (“Mooney”), an accounting manager with Hackney since 2007, testified at the hearing. Mooney confirmed Wilson was a merchandising manager at the time of the MVA, and was later moved into a sales representative position. His current position requires him to lift and carry sample products, write up credits, and collect payments. Mooney confirmed Wilson has been and continues to be paid a salary. Mooney disputed Wilson’s testimony

indicating he would be switched to commission-based pay later in the year.

Wilson filed the records from First Stop Urgent Care, indicating he treated from October 11, 2012 to March 10, 2013. The records note complaints of left chest, shoulder, neck and left arm pain, as well as numbness and tingling throughout the left arm and hand. X-rays of the left shoulder revealed no acute abnormality, and x-rays of the cervical spine demonstrated mild degenerative disc disease with no acute findings. A left shoulder MRI is reported to demonstrate subcoracoid bursitis, although it was not filed in the record. A cervical MRI was performed in October 2012, however, there is neither a discussion of the results nor a copy of the report contained in the records of First Stop Urgent Care. Wilson was treated conservatively with medication, home exercises, heat and massage, and physical therapy. He was also referred to Norton Leatherman Spine for a consultation. The most recent note dated March 10, 2013 reflects a diagnosis of pain in the neck and shoulder region. Wilson was returned to work with restrictions of no lifting with the left arm in excess of five pounds for two weeks.

Wilson also filed the records of Dr. Raque, who he saw on two occasions. On February 16, 2013, Dr. Raque noted

a cervical MRI “revealed a left C6-7 disc herniation. It does flatten the anterior aspect spinal cord or foraminal stenosis. There is no signal change in the cord however in the cord deformity is not severe.” His examination revealed normal range of motion in the neck, no tenderness, and an essentially normal musculoskeletal and neurologic exam. He noted Wilson complained of neck pain on flexion and turning to the left. Dr. Raque diagnosed cervical spondylosis without myelopathy and recommended epidural steroid injection. On April 8, 2013, it was noted the first injection relieved his pain by thirty percent, but a second injection worsened his symptoms. Wilson was diagnosed with a herniated cervical disc and neck pain, and prescribed pain medication.

Hackney filed the records of Dr. Guarnaschelli, who treated Wilson on April 11, 2013 and May 28, 2013. Dr. Guarnaschelli noted the neck and neurologic examinations were essentially normal, but there was “some pain in reshifted the range of motion of the left paracervical spinous processes paraspinous muscles and left shoulder . . . .” Dr. Guarnaschelli also noted his examination did not support a finding of true radiculopathy or myelopathy. He opined Wilson sustained a musculoskeletal and/or whiplash-related disorder for which he ordered cervical diagnostic

studies. On May 28, 2013, Dr. Guarnaschelli noted cervical spine x-rays ruled out a fracture, dislocation or spondylolisthesis; and a cervical MRI demonstrated mild degenerative changes and osteophyte complex formation. He determined Wilson is not a candidate for surgery after noting his diagnosis of a whiplash-related disorder and pre-existing age-related degenerative disc changes with no radiculopathy or myelopathy.

Wilson filed the August 13, 2013 report of Dr. Warren Bilkey who diagnosed a "10/4/12 work related [MVA], cervicothoracic strain injury, myofascial pain involving left scapular muscles." He noted "MRI findings are benign" and found no evidence of any surgical pathology affecting the neck or shoulder. He also noted there was considerable spasm involving the scapular musculature. Dr. Bilkey opined the above-referenced diagnoses are due to the October 4, 2012 work injury. Dr. Bilkey stated Wilson has reached maximum medical improvement and assessed a 7% impairment rating using the Cervical DRE Category II, pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Bilkey restricted Wilson from lifting over ten pounds with his left arm and recommended home exercises and medication for pain control. He also found the lifting restriction

would preclude Wilson from returning to his usual work duties performed prior to MVA.

Hackney filed the January 17, 2014 report of Dr. Robert Jacob. He noted a left shoulder MRI was within normal limits except for evidence of a subacromial bursitis. Diagnostic studies of the cervical spine revealed age-related, multi-level degenerative changes and small disc osteophyte complexes at C4-5 and C6-7, which are non-impinging and age appropriate changes. Dr. Jacob noted the records do not indicate Wilson manifested any radicular symptoms, verifiable or non-verifiable, in the C5 or C7 nerve roots. Dr. Jacob stated the disc protrusions are small and are not clinically relevant. Dr. Jacob noted his examination demonstrated a completely normal cervical spine, normal upper extremity neurological exam, and normal left shoulder, chest wall, and shoulder girdle exam with no evidence of muscle spasm. Dr. Jacob stated as follows regarding diagnosis and injury:

> My diagnosis for Mr. Wilson's neck, shoulder, and left arm pain are subjective complaints of pain without objective findings. Based on the physical evidence, the impact was minimal and he was wearing a seatbelt, no airbag deployment, and he sought no medical attention for one week. He has preexisting age-related degenerative cervical spine disease which has been neither aggravated nor exacerbated by

> the auto accident. Although he underwent treatment for neck complaints following the accident, his subjective complaints in my opinion were out of proportion to his objective findings and mechanism of injury. I do not find any residual musculoskeletal pathologic conditions that could be attributed to this accident and no evidence of radiculopathy, chronic cervical sprain, or muscle spasms or weaknesses.
>
> It is my opinion based on my evaluation, review of his medical records and diagnostic studies that he had not sustained a harmful change to the human organism as evidenced by objective medical findings.

Dr. Jacob opined Wilson qualified for a Cervical DRE Category I, and assessed a 0% impairment rating pursuant to the AMA Guides. He opined Wilson is capable of returning to his former position without any lifting restrictions, and he declined to recommend additional medical management or diagnostic testing.

A benefit review conference ("BRC") was held on February 11, 2014. The parties stipulated jurisdiction, the existence of an employment relationship and Wilson "sustained a work-related injury or injuries on 10/4/12." The parties identified the following as contested issues: benefits per KRS 342.730, unpaid or contested medical expenses, injury as defined by the ACT and vocational rehabilitation benefits.

In the Opinion and Award rendered April 22, 2014, after summarizing the evidence of record, the ALJ made the following findings of fact and conclusions of law:

> **Injury as Defined By the Act/ Benefits Per KRS 342.730**
>
> 10. Injury is defined as "any work-related traumatic event or series of traumatic events, including cumulative trauma, 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 findings." KRS 342.0011(1).
>
> 11. Drs. Jacob and Guarnaschelli have opined that the Plaintiff's subjective complaints are not consistent with the diagnostic studies conducted or the physical examinations performed. This consensus of opinion is consistent with the normal neurological findings noted by Dr. Raque.
>
> 12. The ALJ finds that the objective medical findings listed above are more convincing than the independent medical examination conducted by Dr. Bilkey. Dr. Bilkey references table 15-5 when placing the Plaintiff in a DRE Category II. The impairment rating that he assigned requires a clinical history and examination findings consistent with a specific injury. The consensus of the objective medical evidence does not contain a history or examination consistent with a specific injury. The ALJ finds that the objective medical evidence supports a DRE Category I as assigned by Dr. Jacob because there were no significant clinical findings.

> 13. The ALJ therefore finds that the Plaintiff has sustained a 0% whole person impairment.

The ALJ found the second recommended left shoulder MRI medically unnecessary and therefore not compensable. He also found Wilson was not entitled to vocational rehabilitation benefits. In the "Award" section of the opinion, the ALJ awarded "such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances as may be reasonably required for the cure and relief from the effects of the work-related injury, not to include the MRI conducted in 2014."

Wilson filed a petition for reconsideration essentially raising the same argument he now makes on appeal. In his petition for reconsideration, Wilson specifically requested additional findings of fact and analysis to address whether he had sustained an injury as defined by the Act. In the June 16, 2014 order, the ALJ summarily denied Wilson's petition.

On appeal, Wilson argued the ALJ never made a specific finding whether he sustained an injury as defined by the Act, and requests the claim be remanded with instructions to make such a determination. Wilson noted the

BRC order reflects the parties stipulated he sustained a work-related injury on October 4, 2012 and Hackney received due and timely notice of the same. Wilson also noted the ALJ referred to an "injury" several times in summarizing his testimony. Wilson quotes portions of the records from First Stop Urgent Care, Dr. Raque, Dr. Guarnaschelli, Dr. Bilkey and Dr. Jacob he contends support a finding of an injury in his favor.

Wilson also argues the ALJ erred in finding his injury did not warrant a permanent impairment rating pursuant to the AMA Guides. Finally, Wilson requests the opinion be remanded with instructions to order Hackney to pay unpaid medical bills of First Stop Urgent Care.

As the claimant in a workers' compensation case, Wilson bore the burden of proving each of the essential elements of his cause of action before the ALJ, including injury as defined by the Act and entitlement to benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was unsuccessful in his burden, 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).

We agree the ALJ did not make essential findings of fact and determinations necessary to support his ultimate award of medical benefits. We also conclude the ALJ's analysis regarding "Injury as Defined by the Act/Benefits Per KRS 342.730" are unclear and deficient. As noted by the ALJ, KRS 342.0011(1) defines "injury" as "any work-related traumatic event or series of traumatic events, including cumulative trauma . . . 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 findings." KRS 342.0011(33) defines "objective medical findings" as "information gained through direct observation and testing of the patient applying objective or standardized methods." While the ALJ provided the definition, he made no specific finding Wilson sustained a work-related injury.

In Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), the Court recognized in addition to objective diagnostic tools such as x-ray, CT scan, EMG/NCV or MRI, there is a wide array of standardized laboratory tests and tests of physical and mental function available to the medical practitioner. Therefore, the Court

held the existence of a harmful change can be established indirectly, through information gained by direct observation, and/or by testing which applies objective or standardized methods demonstrating the existence of symptoms of such a change. Id. at 762.

In the opinion, the ALJ stated Drs. Jacob and Guarnaschelli opined Wilson's subjective complaints are inconsistent with the diagnostic studies conducted or the physical examinations performed, an opinion consistent with the normal neurological findings noted by Dr. Raque. The ALJ specifically found "the objective medical findings listed above are more convincing than the independent medical examination conducted by Dr. Bilkey." The ALJ then rejected Dr. Bilkey's assessment of impairment, and found Wilson sustained a 0% impairment rating based upon Dr. Jacob's opinion. At best, the ALJ's statements regarding whether Wilson sustained an injury are unclear. Although arguably the ALJ found Wilson did not sustain an injury, in the award section of the opinion, he awarded medical benefits for Wilson's "work-related injury."

Therefore, the April 22, 2014 opinion does not contain a specific determination or sufficient findings of fact and explanations regarding whether Wilson sustained an injury as defined by the Act. The evidence is conflicting

regarding this issue and the parties identified "injury as defined by the ACT" as a contested issue at the BRC. Importantly, Wilson requested additional findings of fact addressing whether he sustained an injury in his petition for reconsideration, which was summarily denied by the ALJ in the June 16, 2014 order. The ALJ's findings regarding Wilson's subjective complaints are inconsistent with the diagnostic studies conducted or the physical examinations performed. An opinion consistent with the normal neurological findings noted by Dr. Raque does not adequately address whether he sustained an injury as defined by the Act. Therefore, the opinion and order is vacated and the claim is remanded for a determination of whether Wilson sustained an injury as defined by the Act pursuant to the above- referenced analysis. If the ALJ finds Wilson did in fact sustain an injury, he must also determine whether it was temporary or is permanent.

If the ALJ determines Wilson sustained only a temporary injury, he then must determine whether he is entitled to temporary benefits pursuant to Robertson v. United Parcel Service, supra, and FEI Installation, Inc. v. Williams, supra. Since the rendition of Robertson v. United Parcel Service, supra, this Board has consistently held it is possible for an injured worker to establish a

temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

> Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Id. at 286

It is well established an ALJ can award future medical benefits for a work-related injury, although a claimant has reached maximum medical improvement and did not have a permanent impairment rating resulting from the injury. *See* FEI Installation, Inc. v. Williams, supra. Finally, if the ALJ determines he did not sustain an injury,

either permanent or temporary, as a result of the MVA, Wilson is not entitled to indemnity or medical benefits and his claim must be dismissed in its entirety. We do not direct any particular result and the ALJ may make any determination which is supported by the evidence. This Board's decision renders the remainder of Wilson's arguments on appeal moot.

Accordingly, the April 22, 2014 Opinion and Award and the June 16, 2014 order on reconsideration is **VACATED AND REMANDED** to the ALJ for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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