Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 2, 2014

CLAIM NO. 201397786

JEREMY C. DUTY PETITIONER

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

INSTEEL WIRE PRODUCTS; ZURICH
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Jeremy Duty ("Duty") seeks review of the opinion and order rendered November 25, 2013 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), dismissing his claim for failing to prove a causal relationship between his right knee condition and a work-related event. Duty also

seeks review of the December 23, 2013 order denying his petition for reconsideration.

On appeal, Duty argues the ALJ erroneously rejected Dr. Bennie Fulbright's opinion because he did not specifically state it was rendered within the bounds of reasonable probability. Duty also argues there is no evidence supporting the ALJ's conclusion he sustained a non-work injury between December 3, 2010 and January 18, 2013 which tore his meniscus and anterior cruciate ligament ("ACL"). Because the ALJ failed to make separate determinations regarding each injury date alleged in the Form 101, we vacate and remand for additional findings.

Duty filed a Form 101 on April 29, 2013 claiming he sustained injuries on December 3, 2012 and January 18, 2013 while employed by Insteel Wire Products ("Insteel") as a wire welder. Duty alleged he injured both knees on December 3, 2012 when he fell while walking down the stairs at work. He alleged on January 18, 2013, he fell while walking down the same steps, re-injuring his right knee, as well as his right elbow and back. In the Form 104 work history, Duty stated he has worked as a wire welder, line catcher for a chicken processing facility, binder operator at a printing company, factory worker, and deckhand.

Duty testified by deposition on June 19, 2013, and at the hearing held September 24, 2013. Duty is a resident of Hickman, Kentucky. He is a high school graduate, and has some training in automobile mechanics. He stated all of his work has consisted of heavy manual labor. He denied any previous work-related injuries, but stated he had aching pain in his right knee prior to December 3, 2012. He applied for leave in September 2010 due to his aching knee. He stated Insteel makes wire mesh products. His job required standing 90-95% of the time, and he was required to lift up to eighty pounds.

Duty stated the back and elbow injuries he claimed in the Form 101 have resolved, and no longer bother him. He stated he fell on December 3, 2012 when his knee popped as he was going down stairs. At the hearing, he testified he was walking up the stairs when he fell. Duty stated he reported this to Christy Travis, and she specifically noted the fall. He was sent to Dr. John Hale, who referred him to Dr. Michael Calfee, an orthopedic surgeon. He continued to work on light duty until January 18, 2013, when he again fell down the same stairs. After the January 2013 fall, he went to the emergency room at the Parkway Regional Hospital. He was given a shot and a knee brace, and was scheduled to see Dr. Fulbright.

Duty saw Dr. Fulbright who recommended surgery based upon a torn meniscus seen on an MRI which had been performed prior to January 18, 2013. Dr. Fulbright performed a meniscal repair of the right knee on January 31, 2013, but Duty's knee pain persisted. Dr. Fulbright performed a second surgery on June 13, 2013 to repair a torn ACL. Duty stated he told Dr. Hale on December 3, 2012 he had experienced ongoing knee pain for three years, but it was different after his work injury.

Duty stated he received short-term disability, then long-term disability benefits after January 18, 2013. He stated he has received no workers' compensation benefits for either alleged injury date. He stated he is unable to do the job he held at Insteel due to his injuries.

In support of the Form 101, Duty attached a January 22, 2013 office note from Dr. Fulbright, an orthopedic surgeon. Dr. Fulbright stated Duty reported a December 3, 2012 work-related right knee injury which was treated with a steroid pack and knee immobilizer. He stated Duty reported two subsequent falls, from which his pain had progressively worsened. Dr. Fulbright diagnosed a right knee lateral meniscal tear, based upon his review of the MRI, and recommended a right knee arthroscopy.

Dr. Fulbright's July 10, 2013 report indicates he first saw Duty on January 22, 2013. Duty stated his right knee gave out at work, causing him to fall. Dr. Fulbright reiterated he diagnosed a right lateral meniscus tear, for which he performed surgery on January 31, 2013. Duty continued to exhibit symptoms after the surgery, and a second surgery was performed on June 13, 2013 to repair a torn ACL. In the note, Dr. Fulbright indicated Duty was still under his care, and he had not been released to perform any work. He indicated Duty would retain a permanent partial impairment, however because he had not reached maximum medical improvement ("MMI"), it could not yet be assessed. Regarding causation, Dr. Fulbright stated as follows:

> Assuming the history Mr. Duty gave me is true, I believe his knee injury is related to his accidents at work. The mechanism of injury he describes is consistent with a meniscus tear and ACL tear.

Insteel filed the December 3, 2012 first report of injury and the December 4, 2014 incident investigative report, both of which were prepared by Kristy Travis ("Travis"), Human Resource Manager. The December 3, 2012 report indicates Insteel was notified Duty injured both knees that morning. Under "How injury or illness/abnormal

health condition occurred," Travis states Duty "claims working with carriage on a machine he hasn't worked on in 2 years." The investigative report states as follows regarding the nature and extent of injury:

> No specific incident given however EE states both knees are hurting. Right knee hurts worse than left . . . EE claims his knees began to give him problems when he worked on the 284 which was over 2 years ago. He states pain comes and goes but wanted to let us know now that the pain is now unbearable.

Attached to the incident report, is a December 3, 2012 statement hand-written and signed by Duty which states as follows:

> I approached my HR manger(sic) this morning about problems I've been having over my knee's(sic). It all started back when I was working on the 284 machine, pushing that carriage back to its spot every time it finished a roll. Back then and up till recently it has been rough manually pushing it back. I would take Tylenol and Advil to help with knee, it would act up for days and I take medicine and few days later it quit hurting. This (sic) been going on for about 2 yrs. Now for past 5-6 months its been getting worst (sic), and now my knee is giving out right, but my left is hurting as well. The reason I decided to wait is that it is getting to the point of unbearable and now that my knee is giving out I knew it was time to let work know before I fell and hurt myself.

He made no mention of actually falling on December 3, 2012.

Insteel also filed Duty's recorded statement taken on December 4, 2012 by Linda McDonald, a representative of Gallagher Bassett Services, regarding the alleged December 3, 2012 incident. Duty stated in relevant part as follows:

> Q: Now we are getting into the date of injury which they have listed as December 3, 2012 is that the date you believe you were injured?
>
> A: No I been injured for awhile, it just comes and goes and it just gotten worse and worse and I went in and told them about it yesterday.

Duty described his ongoing knee symptoms, which began two years prior when he was operating a 284 machine, and continued thereafter, stating it "comes and goes." Duty confirmed his symptoms did not result from one specific incident, but developed over a period of time while working on this particular machine for three years. Duty stated he told his supervisor at the time he did not want to continue to work on the machine due to his knee problems. Duty indicated he stopped working on the 284 Machine one and a half to two years in the past, and he did not seek any additional treatment for his knees until December 3, 2012. He indicated he reported his knee problems and sought treatment with the company doctor because his knee symptoms are "just getting worse and worse." Duty denied any prior

injuries or problems with his knees. Duty did not mention falling on December 3, 2012.

Insteel filed the first report of injury regarding the January 18, 2013 injury, prepared by Travis. The report indicates Insteel was notified on January 18, 2013 Duty injured his “right back/elbow” at 8:10 a.m. when “EE states used the steps and knee gave out.” Insteel also filed the January 18, 2013 incident investigative report prepared by Jeff Crittendon, team leader. The investigative report indicates Duty injured his right knee, back and elbow under the following circumstances: “EE walking over platform down stairs on MG330, right knee gave out. EE fell down 2 steps onto floor.” A hand-written statement signed by Duty was attached, which provided a consistent account of the accident.

Duty again provided a recorded statement to Linda McDonald on January 21, 2013. Duty stated his right knee gave out while walking down some steps causing him to fall. He hit his right elbow and experienced a sharp pain in his low back. He indicated it was the same knee he had trouble with before. He went to Dr. Hale the same day, but was “kicked out” because of his brother’s conduct at the doctor’s office. Later that night, Duty went to the emergency room at Parkway Regional Hospital and was given a

knee brace and an injection in his back. He also made an appointment with Dr. Fulbright. Duty indicated his back and elbow no longer bother him, but he still has knee symptoms. In the same recorded statement, Duty indicated Dr. Calfee, an orthopedic surgeon, had ordered an MRI a week or two after the first incident, which showed two tears and a cyst. He again denied any prior knee injuries.

Insteel filed the records of Dr. Hale, outlining treatment he rendered to Duty on December 3, 2012, the day of the first alleged accident. Dr. Hale noted "both knees hurting from pushing carriage on machine. Last worked on this machine December of 2010." He also noted the following:

> He comes in today stating his knee has been hurting. It used to be his right knee, but now it is his left knee. He has been taking ibuprofen and Naproxen, and it is not any better. He states it has been going on for about three years. He denies any type of specific injury.

Dr. Hale diagnosed bilateral knee pain, restricted Duty to sitting jobs, and recommended a follow-up office visit a week later.

Insteel filed the records from Hickman-Fulton County Medical Center regarding previous knee treatment received by Duty in 2010. On September 15, 2010, Duty complained of right knee pain of four months duration, with

no known injury. An x-ray of the right knee was ordered and Duty was given pain medication. A September 16, 2010 Health Status Certificate indicates Duty had been under its care from “9-16 to 9-20” and can “RTW 9-21-10.” On December 13, 2010, Duty returned complaining of right knee pain, along with other unrelated complaints. Duty was prescribed a Z-pack and Medrol, and was referred for an MRI of the right knee. The record does not contain the report of the right knee MRI. Insteel also filed a September 16, 2010 Request for Leave of Absence by Duty who requested leave from September 16, 2010 to September 21, 2010 for his “right knee.”

Dr. William Gavigan, an orthopaedic surgeon, evaluated Duty at Insteel’s request. In his report dated August 1, 2013, Dr. Gavigan noted Duty reported his right knee gave way when he was walking down two steps, causing his knee to twist and pop. Duty reported his knee gave way again at work when he was walking down the same two steps causing him to fall onto his right elbow and twist his back. Duty reported an MRI of the right knee was taken and Dr. Fulbright subsequently performed two surgeries. Dr. Gavigan also noted Duty was off work for five days in September 2010 following an episode with his knee, but he reported this did not bother him again until the December 3, 2012 event. Dr.

Gavigan performed a physical evaluation, and reviewed the medical reports of Dr. Hale, Dr. Calfee, Dr. Fulbright, Parkway Regional Hospital, and a January 10, 2013 MRI report. He also reviewed Duty's job descriptions, his June 19, 2013 deposition, his December 4, 2012 recorded statements and his December 3, 2012 handwritten statement. Dr. Gavigan diagnosed a lateral meniscus tear, right knee age-indeterminate, and an anterior cruciate ligament deficiency, right knee age-indeterminate.

Dr. Gavigan completed multiple medical questionnaires dated August 2, 3013. He opined Duty's job duties as an operator of the 284 Machine ending in November 2010, the alleged December 3, 2012 fall, nor the alleged January 18, 2013 fall resulted in a harmful change to the human organism as evidenced by objective findings to his right knee. He also opined Duty's meniscus tear and ACL tear, which were both surgically repaired, were caused by "some event or cumulative injury occurring over the previous two years." Dr. Gavigan assessed a 4% impairment rating for Duty's right knee condition utilizing the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, all of which he attributed to a pre-existing and symptomatic condition. He assigned restrictions but could not provide an opinion whether Duty

retains the capacity to return to work at his regular job since he is only seven weeks post-op. He opined Duty will reach MMI on December 13, 2013 following his June 13, 2013 ACL reconstruction surgery and recommended follow-up care for six months.

In an addendum dated August 26, 2013, Dr. Gavigan stated Duty's meniscus and ACL tears are non-work-related conditions. He indicated it was impossible to state Duty's work activities from November 2010 through December 2012 resulted in a harmful change to the human organism to his right knee. Dr. Gavigan indicated all of his opinions and answers had been provided within a reasonable degree of medical probability.

A Benefit Review Conference ("BRC") was held on September 10, 2013. The contested issues listed in the BRC order and memorandum included work-relatedness/causation; unpaid or contested medical expenses; injury as defined by the ACT; TTD; and credit for ST/LT benefits. Section IV. Other Matters, states the case is bifurcated as to benefits per KRS 342.730, extent & duration. The ALJ also noted Insteel was to provide the job information relied upon by Dr. Gavigan, and the name of the employer representative who will testify at the hearing.

The ALJ rendered his opinion on November 23, 2013. He specifically found as follows:

> KRS 342.0011(1) defines "injury" as "any work related traumatic event or a series of traumatic events 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." "Objective medical findings" includes information gained through direct observation and testing applying objective or standardized methods. KRS 342.0011(33). Objective medical findings are necessary to support the finding of an "injury." Gibbs v. Premier Scale Co., 50 S.W.2d 754 (Ky. 2000).
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> In order to succeed before the ALJ, Duty must prove that his impairment/ disability was caused by a work-related event. Markwell & Hartz, Inc. v. Pigman, 473 S.W.2d 842 (Ky. 1971); Stauffer Chemical Co. v. Greenwell, 713 S.W.2d 825 (Ky. App. 1986). In order for an injury to arise out of and in the course of employment, there must be a causal relationship between the condition and the work-related activity. McCracken County Health Spa vs. Henson, 568 SW 2d 240 (Ky. App. 1977). A causal relationship must be established by expert medical testimony. Mengle v. Hawaiian-Tropic, 618 S.W. 2d 184 (Ky. App. 1981); See also Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986). In fact, a causal relationship must be established within the realm of reasonable medical probability as the mere possibility that such a relationship exists is insufficient to form the basis of an award. Dealer Transport v. Thompson, 593 S.W.2d 84 (Ky. App. 1980).

Unfortunately, Mr. Duty has not met the burden of proof set forth above. Rather, the facts of this claim fit squarely with the facts presented to the ALJ in Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001). In Robertson, supra., the medical evidence established that the work activity temporarily aggravated the claimant's pre-existing condition. The Court upheld the ALJ's conclusion that there was no change in the human organism so as to substantiate a finding that an injury had occurred as defined by the Act that would entitle the claimant to worker's compensation benefits. Like the claimant in Robertson, supra, there is no medical evidence in the record expressed within a degree of reasonable medical probability that Plaintiff suffered anything more than a temporary exacerbation of a pre-existing condition from the occurrence of December 3, 2012. The evidence supports a strong inference that something happened between 12/3/2010 and 12/3/2012 to tear Plaintiff's meniscus and ACL, but does not prove it was work related.

Further, the medical opinion of Dr. Fulbright cannot be relied upon because he was not apprised of the true history of Plaintiff's condition and his opinion was not expressed within the bounds of reasonable medical probability. Therefore, his opinion is based on inaccurate or incomplete information and cannot constitute substantial medical evidence. *Special Fund v. Francis* 708 S.W.2d 641 (Ky. 1986); *Cepero v. Fabricated Metals Corp.* 132 S.W.3d 839 (Ky. 2004).

For all of the foregoing reasons, I am compelled to find that Mr. Duty has failed to bear his burden of proof that

> he has sustained or suffered a compensable injury.
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> **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
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> 1. Stipulations as agreed to by the parties and set out herein above.
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> 2. Plaintiff has failed to bear his burden of proof that he has sustained or suffered a compensable injury. KRS 342.0011 (1).
>
> **ORDER**
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> Based upon the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED AND ADJUDGED** that the Plaintiff's claim be **DENIED** and **DISMISSED**.

Duty filed a petition for reconsideration on December 13, 2013, arguing, as he does on appeal, the ALJ erred in rejecting Dr. Fulbright's opinion in part because he did not indicate it was within reasonable medical probability. Duty also argues no evidence supports the ALJ's inference something occurred between December 3, 2012 and January 18, 2013 to tear his meniscus. Duty also renewed his objections to the admissibility of certain documents introduced by Insteel. In the order rendered December 23, 2013, the ALJ denied Duty's petition for reconsideration. He stated medical opinions must be expressed within a reasonable medical probability, and cited

to Lexington Cartage Co. v. Williams, 407 S.W.2d 396 (Ky. 1966). He denied the remainder of the petition for reconsideration as a re-argument of the case.

As the claimant in a workers' compensation proceeding, Duty had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Duty provided inconsistent testimony and statements concerning his alleged December 3, 2012 injury. Duty alleges the ALJ erred in discrediting Dr. Fulbright's report because he did not state it was rendered within the realm of reasonable medical probability. However, this is not completely accurate. While the ALJ noted Dr.

Fulbright's opinion was not expressed within the "bounds of reasonable medical probability", he specifically stated it was rejected because "his opinion was based on inaccurate or incomplete information." If an ALJ believes a medical opinion is based upon an inaccurate history, he is free to reject it. Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004).

It is within the ALJ's discretion as fact-finder to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has the sole authority to judge the weight of the evidence and inferences to be drawn from that evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The fact-finder 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). Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). 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 that 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).

Based upon the information provided by Duty in his hand-written statement, his recorded statement, the history provided to Dr. Hale, and his previous medical records, the ALJ could reasonably conclude Dr. Fulbright was provided an inaccurate history. Therefore, pursuant to Cepero, supra, he did not err in discrediting Dr. Fulbright's opinion regarding causation. Dr. Fulbright stated his opinion regarding causation was based upon the presumption the history provided by Duty was true. The ALJ did not err in exercising his discretion in discounting Dr. Fulbright's opinion regarding causation after reviewing the entirety of the record. Regarding the second issue raised on appeal, it is noted Dr. Fulbright, in his office note dated January 22, 2013, stated Duty had fallen twice since December 3, 2012. However, in reviewing the ALJ's decision, this does not appear to be a primary consideration in his dismissal of the claim.

That said, this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal.

KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). The ALJ did not make specific findings regarding each of the alleged injury dates, nor did he discuss the impact of the exacerbation he determined Duty had sustained.

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), 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.

Here, the ALJ determined no evidence exists supporting a determination Duty suffered, "anything more than a temporary exacerbation of a pre-existing condition from the occurrence of December 3, 2012." Therefore, the ALJ is required to determine whether Duty sustained a temporary injury on either alleged date, and if he so determines, he must make a determination of whether Duty is entitled to medical benefits pursuant to KRS 342.020 based upon the holding in FEI Installation Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007). Clearly, the ALJ may award medical benefits despite the lack of a permanent injury after providing sufficient reasons for the award.

Duty alleged two separate and distinct traumatic injuries in the Form 101. The first allegedly occurred on December 3, 2012, and the second on January 18, 2013. On remand, the ALJ is therefore directed to address each alleged injury to determine whether Duty sustained an injury. If he so determines Duty sustained an injury on either or both dates, he must then determine whether the injury was temporary or permanent, and the duration of entitlement to income and medical benefits, if any. We do

not direct any particular result, and the ALJ may make any determination supported by the evidence. The ALJ is directed to provide a basis for his decision which would permit meaningful review.

Accordingly, the opinion and order is **VACATED**, and **REMANDED** to the ALJ for entry of an amended opinion and award containing additional findings of fact as to each alleged injury, including whether Duty sustained an injury, temporary or permanent on each alleged date. If the ALJ determines Duty sustained an injury on either date, he must determine entitlement to any income benefits, temporary or permanent, and medical benefits to which he may be entitled.

ALL CONCUR.

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