OPINION ENTERED: July 2, 2012

CLAIM NO. 201100579

JESSE OWENS PETITIONER

VS. **APPEAL FROM HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE**

PEPSI MIDAMERICA CO.
CONSTITUTION STATES SERVICES, LLC
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Jesse Owens ("Owens") appeals the November 29, 2011, opinion and order of Hon. Joseph W. Justice, Administrative Law Judge ("ALJ") dismissing Owens' claim for benefits for alleged injuries to his left knee and shoulder while working for Pepsi MidAmerica Co. (“Pepsi”). Owens filed a petition for reconsideration that

was overruled by order dated January 24, 2012, from which Owens also appeals.

Owens' Form 101 alleges on January 17, 2009, he injured his left knee in the following manner: "I was in the back of a delivery truck when I turned and felt pain in my left knee."

Owens was deposed on June 30, 2011. Owens testified that at the time of the alleged January 17, 2009, incident, John Thompson ("Thompson") was his supervisor. Thompson no longer works for Pepsi, and Owens no longer has any contact with him. Owens testified he told Thompson of the incident "directly when it happened" on January 17, 2009. Owens testified as follows:

> Q: At this point, I want to ask questions about the work injury itself, when and where. I guess to begin with, when did this happen?
>
> A: The date-- I had told my supervisor, John Thompson, directly when it happened.
>
> Q: On the day that it happened?
>
> A: Yes, sir.
>
> Q: What was it that you told Mr. Thompson had happened?
>
> A: January the 17th, I believe.
>
> Q: Yeah. But what is it that you told him?

A: That I was in the back of the truck at Parkview Nursing Home, my feet were stationed, and I had to twist to the left to grab product. And I just heard a loud crunch.

Q: So you were inside the truck when it happened?

A: Yes, sir.

Q: Where was Mr. Thompson when it happened?

A: I'm not completely sure.

Q: Well, he wasn't out there with you?

A: No.

Q: Okay. And when you twisted to the left, you felt a crunch or you heard a crunch?

A: Yeah.

Q: Any immediate symptoms?

A: It was pretty excruciating.

Q: Did those symptoms abate? Did they go away?

A: No, sir.

Q: Did they change at all over the next couple [sic] days?

A: Not so much.

Regarding whether Owens typically worked on the weekends, Owens testified as follows:

Q: How about weekends?

A: Not so much.

> Q: When would you work weekends?
>
> A: It's hard to say. Whenever they needed the help.

Owens testified that he did not remember if he completed his shift on January 17, 2009. He allegedly reported the incident to Thompson the same day via telephone. Owens testified that the day after the incident, although he drove his same route, he "believe[s]" Thompson put somebody with him to help. Owens testified he does not remember how many days he worked at Pepsi following the alleged injury of January 17, 2009. He testified as follows:

> Q: How many days do you think you did that work after this injury?
>
> A: Honestly, I'm not for sure.
>
> Q: Was it a week? Was it a-- two weeks. Was it a month?
>
> A: I'm not completely sure. I apologize.
>
> Q: You can't even guess whether it's a day or two days or three days or a month?
>
> [text omitted]
>
> Q: Would it be fair to characterize it as a few days?
>
> A: I believe they had someone helping me out, if I remember correctly, for about two or three weeks. And...

> Q: Do you recall who that someone would have been?
>
> A: I don't off of the top of my head. I'm sorry.
>
> Q: Was it the same person every time?
>
> A: Usually, yes.

Owens does not remember when he first sought medical treatment following the alleged incident on January 17, 2009. Owens also briefly testified about an incident that happened at his home on January 30, 2009, as follows:

> Q: The next note on there says, then he was walking a short time after that at home in Metropolis, and stepped off a small step. Metropolis, is that the address that you gave me earlier?
>
> A: Yes, sir.
>
> Q: Do you recall having an incident at home where you increased your knee pain?
>
> A: It didn't really increase it, but I was walking off the step and in it just pretty much got excruciating. So I decided to go to Metropolis and get x-rays done and whatnot.

At the hearing, concerning the January 30, 2009, incident at home, Owens testified as follows:

> Q: Then on January 30, 2009, did you have an incident at home?
>
> A: Yes sir.
>
> Q: If you would, tell the Judge what happened on that day.

> A: I was walking down my steps and my knee-- Ever since the accident, it hinges up and it buckles and it's pretty excruciating. And when I was walking down my steps, it did that and went out.
>
> Q: And did you go to the emergency room over that?
>
> A: Yes sir.
>
> Q: And what did they do for you there?
>
> A: They took x-rays.

Owens also testified he believes he first sought medical treatment for the alleged January 17, 2009, work injury around February 17 or 18 at Prime Care. Owens was questioned about certain language in a medical report from Prime Care, and his testimony is as follows:

> Q: Now this medical note dated February 17th of 2009 from Prime Care that's been filed, it says that -- And it's written by a Diana Hann, nurse practitioner. Do you recall Ms. Hann?
>
> A: No, I don't. Sorry.
>
> Q: Okay. According to Ms. Hann, you told her that you did not report it at the time that it happened, that you thought it would get better.
>
> A: I don't remember saying that. I apologize.
>
> Q: Okay. You're not sure whether you said that or not?
>
> A: I don't remember saying that.

Regarding the number of days he missed following the alleged injury, Owens testified as follows:

> ALJ: When did you last work for Pepsi?
>
> A: June the 18th, 2009.
>
> ALJ: June 18, 2009?
>
> A: Yes sir.
>
> ALJ: How many days of work did you miss from January 17, 2009?
>
> A: I'm not sure off the top of my head.
>
> ALJ: Give me an estimate.
>
> A: There was [sic] quite a few. I don't know, ten to fifteenish [sic].
>
> ALJ: Okay. From January 17, when did you go back to work?
>
> A: I went right back to work.
>
> ALJ: The next day?
>
> A: Yes sir.
>
> ALJ: And worked continuously?
>
> A: Yes sir.
>
> ALJ: For how long?
>
> A: Until February 18th. That's when they took me off the truck completely.

Wage records filed in the record by Pepsi indicate that immediately surrounding the alleged work incident of Saturday, January 17, 2009, Owens was paid for

the weeks ending Saturday, January 3, 2009; Saturday, January 10, 2009; Saturday, January 24, 2009; and Saturday, January 31, 2009; however, Owens was not paid for the week ending on the day he was allegedly injured- Saturday, January 17, 2009. A review of the wage records indicate that following the alleged incident of January 17, 2009, Owens worked forty hours per week during the week ending on Saturday, January 24, 2009; Saturday, January 31, 2009; and Saturday, February 7, 2009. The last week on the wage records is the week ending with Saturday, February 14, 2009, during which Owens worked 13 hours.

Medical records from Massac Memorial Hospital, dated January 30, 2009, indicate the following under history: "fell off steps tonight- twisted pain in knee cap- has had problems for 2-3 wks- made it worse tonight."

Dr. Kurt P. Spindler, an orthopedic surgeon, was deposed on September 23, 2011. Dr. Spindler testified he performed an independent medical examination on June 22, 2011. The report concerning Dr. Spindler’s examination is attached to his deposition as Exhibit 2. Dr. Spindler was asked to express an opinion as to whether Owens' knee injury was caused by the alleged work incident of January 17, 2009, and he testified as follows:

A: And, Doctor, having reviewed these records [from Massac Memorial Hospital] in your report, you did feel that Mr. Owens' knee condition was the result of a work-related injury that occurred on January 17, 2009?

Q: Yes. If you look at the report, what he filled out, at this point in the-- he basically stated in here that he fell off a few steps, twisted pain. And his pain, he relates to the kneecap.

He also clearly states that he's had problems in this knee preceding this-- this time period for two to three weeks that were just made worse by the night [sic], which is consistent with the prior injury.

They got routine x-rays, which is fine, which is expected. And they gave a brace and they requested if he continued to have problems, to follow up with a MRI.

[text omitted]

Q: Is it not possible within reasonable medical probability that this injury described in [sic] January 30, 2009 is the cause of Mr. Owens' condition as opposed to the fall he described in January-- or not the fall, but the injury he described on January 17th of 2009?

[text omitted]

A: Well, you know, if you look at-- if you look at his statements on there saying he had knee pain before and saying that he also had an injury before, based upon the sequence of events, I would-- it points the most likely-- the most reasonable degree of

> probability is, his injury occurred at work at that point.
>
> And though he could have aggravated it with this fall-- although this fall couldn't have been done, it just-- it's-- nothing points to the fact that his was the-- this was the primary cause of his injury. And plus, he says his pain is in his kneecap. And really, the pain is related-- his pain is really in a different place. It's more medial and more below in the femoral tibial relationship.

Dr. Spindler testified further:

> Q: Assuming that when he came to the hospital-- to Massac Hospital on January 30th of 2009, Mr. Owens did not mention that he had had any trouble for two or three weeks prior and simply stated that he had slipped down the stairs at home, would that then change your opinion regarding whether or not [sic]?
>
> [text omitted]
>
> A: You know, if he did-- he did state that he had problems for two to three weeks. It's stated on there in the notes. And if he had no prior injury and no prior pain and was back to full duty, sure, that injury could cause it. But that's not the history that we're given here with this man.
>
> Q: So based upon Mr. Owens' history that he provides, the injury occurred, as far as you're concerned, on January 17th--
>
> A: It's all we have to go by. It's always related to the temporal history that's related to the patient and to

> the documentation and to the information that we have, yes.

In a June 22, 2011, medical record, Dr. Spindler set forth the following "history":

> This is a 26-year-old working at Pepsi, who originally injured himself in [sic] January 17, 2009. He was in a truck and felt something pop and had pain.
>
> His past medical history is well summarized in prior reports; however, the quick summary is he underwent an MRI at Western Baptist Hospital in March 11, 2009. He then underwent surgery by Dr. Dwese [sic] for debridement of microfracture in June 2009. He did not return to work. He then continued to have problems, for which he under [sic] OATS procedure, as [sic] we referred [sic] to Dr. Kern for [sic] which [sic] he continued not to do well and the OATS procedure that was done in January 2010, was followed by a repeat arthroscopy for debridement of a failed OATS procedure and microfracture in June 2010. He continues not to be able to do work. He is on sedentary [sic]. He has had an FCE impairment and there are many questions related to causation whether he is an [sic] MMI [sic] to [sic] what his future activity and treatment could be.

Dr. Spindler noted causation "cannot be determined at this visit."

Regarding causation, Dr. Spindler's August 31, 2011, record states as follows:

> Further evaluation of new imagings [sic]. Films have come up from Jesse Owens to help determine causation [sic]

> whether there [sic] is a [sic] maximum medical improvement or [sic] any further treatment [sic]. A disc [sic] of the MRI, he has had three MRIs, first dating in March 2009, the last dating June 2010 had been reviewed. The March 2009 MRI which is right after [sic] injury clearly shows he has a focal isolated defect on his medial femoral condyle. This is consistent with causation related to the work-related injury. The final MRI in June 2010 shows a completely increased signal in the medial compartment as well as medial compartment OA, which is [sic] result of the injury and surgery and patellofemoral OA. My summation of the MRIs, the [sic] knee [sic] is clear that the work-related injury was the cause of the focal defect and the related problems he has now is a result of the work-related injury based upon the time sequence, MRI, and treatment. Based upon his recent MRI in June 2010 that showed increasing edema in his medial femoral condyle and his continued pain now, I do not believe his [sic] maximum medical improvement. I think he needs further workup that should include [sic] repeat MRI to evaluate his condyle and to evaluate if anything further can be done. In the meantime, he can only work [sic] sedentary job.

The September 8, 2011, benefit review conference ("BRC") order lists the following contested issues: "benefits per KRS 342.730, work-relatedness/causation, notice, average weekly wage, injury as defined by the ACT, TTD overpayment." Under "other" is the following: "Amendment of Def.s Form 111."

In the November 29, 2011, opinion and order, the ALJ made the following findings of fact and conclusions of law:

> Defendant has defended this claim on work-relatedness, notice, and idiopathic condition. The ALJ has carefully reviewed the evidence in this claim with a view of determining if any of the evidence herein supported Plaintiff's assertion that he experienced an injury to his left knee on January 17, 2009, while turning to his left to pick up some light product he was unloading to place in vending machines. There is no direct evidence in the record to support his testimony of [sic] injury on January 17, 2009, other than some of the testimony of Dr. Spindler, an orthopedic surgeon at Vanderbilt University. Dr. Spindler was not furnished Plaintiff's history of a fall at Plaintiff's home on January 30, 2009, resulting in injury to his knee for which he sought treatment at Massac Memorial Hospital in Metropolis, IL. Dr. Spindler's deposition was taken, in which he was questioned about causation of the knee injury. He basically said that he had to rely on the history given him by the patient of an injury on the 17th. The issue was clarified more in the last question by defense counsel on Page 18 of the deposition, when he was asked to assume Plaintiff made no complaints with his knee prior to January 30. He said the mechanism of injury described at the ER on the 30th could have been the cause of the defect.
>
> The ALJ has reviewed the wage records of Plaintiff. They show that for the week of January 11 through January 17, Plaintiff did not earn any wages. He

had a full period for the week ending January 10, and a full period for the week ending January 24; the week ending January 31; and a full period for the week ending February 7. For the week ending February 14, he only had 13 hours. This was the last recorded wage earnings for Plaintiff. The records do not show what days he missed in the week ending on the 14th.

Plaintiff testified that his work-injury occurred on January 17, a Saturday. He testified he usually did not work on Saturday, only when they [sic] needed help. (Dep. 28). The wage report filed does not show any wages for that week. Plaintiff had no memory whether he completed work that day or whether he worked the weeks thereafter. He did testify that he worked for a 'couple of months' in light capacity following the injury. He said after January 18, 'I believe they had someone helping me out, if I remember correctly, for about two or three weeks.' He could not remember the name of the person.

Plaintiff went to Massac ER on January 30, which was a Friday. He did not miss any work during the week ending on January 31, a Saturday. He must have fallen at home after work on Friday, because his admission time was 21:30 military time (9:30 P.M.). The odd thing is that he worked a full week ending February 7, and worked 13 hours the following week. If Plaintiff sustained an injury on January 17, he did not miss any work because of that for the next three weeks. He even worked a full week after his fall at home on the 30th for which he visited the Massac ER. He only worked 13 hours in the week ending on the 14th, which is all the wage summary records show.

In reviewing the report from the Prime Care Clinic dated February 17, it is reported that Plaintiff had an appointment with a Dr. Seton on the following Friday. (This is the same physician that admitted and attended him in the ER at Massac.) He had approached his employer for reimbursement for that visit. Then it is reported, '[t]hey have therefore sent him here to Prime Care for evaluation of his Workman's Comp injury.' At the hearing, Plaintiff testified that 'I thought Pepsi was taking too long because we were in a big merger and everything else; so I called a doctor and made an appointment and I called John Thompson to let him know I had an appointment on such date and I was needing a day off.[sic] This or some other information must have precipitated Defendant's HR Department sending him to Prime Care and filling out an accident report. This may explain the short work week ending 2/14/2009. An accident report was generated on 2/18/2009, signed by Plaintiff that he sustained an injury on February [sic] 17, 2009 at 11:00 AM. The date reported to employer was 2/18/2009. He had not missed any time from work. He was moving product from his truck and felt a pop in his knee. The first day of treatment was BaptistWorx on 2/17/2009, with x-ray, ice wrap and Motrin. The contact was listed as Brenden Caronogan, HR manager. He testified he had called John Thompson, his supervisor on 1/17/2009, informing him of his injury. Plaintiff did not inform Mr. Caronogan that he had been to the ER on 1/30 for treatment of knee injury.

Plaintiff has not convinced the ALJ that he called Mr. Thompson on the 17th, a Saturday. Defendant must be a

pretty sizable operation as they [sic] have an HR Department. If the injury was serious enough to call Mr. Thompson right after the injury, and later that day informing him, it is difficult to understand why HR would not have gotten involved before 2/17/2009. Plaintiff knew of the drug testing policy following an injury, and he knew he had not done a drug test following 1/17/09. He did one on the 2/17 Prime Care visit.

At his deposition on June 30, 2011, Plaintiff testified that on 1/30/2009, he injured his knee acutely from simply 'walking off the step and it just pretty much got excruciating.' (Page 42). At the hearing, he testified that, 'ever since the accident [1/17], it hinges up and it buckles and it's pretty excruciating. And when I was walking down my steps, it did that and went out.' The history recorded at the ER is: 'fell off steps tonight-twisted pain in knee cap- has had problems for 2-3 wks- made it worse tonight.' He turned the injury in on his Blue Cross insurance and gave the name of his employer, but did not mention a work injury on January 17th, or that his knee had been hinging, buckling or going out on him.

In the visit to Prime Care on 2/17/09, the following history is reported:

> This is a 22-year-old male who presents to the clinic today with left knee pain. The patient states he was standing at work, twisted to move some soda drinks and when he did he felt a pop in the left knee. This was over a month ago. He did not report it at the time it

> happened. He thought it would get better. Then he was walking a short time after that at his home in Metropolis and stepped off a small step. He had again [sic] sudden sharp pain. At this point he did go to the Emergency Room at Massac Hospital. X-rays were obtained which were read as negative. He was diagnosed with a left knee strain, placed in a brace and told to follow up with his personal physical [sic]. He now has an appointment on Friday with Dr. Staton and he has approached his employer for reimbursement for that visit. They have therefore sent him here to Prime Care for evaluation of his Workman's Comp injury. He describes the pain over the kneecap. It hurts more when he extends the leg than when he flexes it.

This history confirms that he did not call Mr. Thompson or take any other action relating to an alleged injury on January 17. The ALJ is not convinced that he worked on a Saturday, the 17th, as the wage records do not record that he worked any that week. If his fall on 1/30 had been as a result of his knee 'hinging, buckling or going out on him' from a 1/17 injury, he would have contacted HR at Defendant immediately to supplement the notice he allegedly gave to Mr. Thompson. Instead he turned the ER visit in on his Group Blue Cross policy.

Further doubt is placed on Plaintiff's veracity, when he did not list the

> January 30 injury and visit to the ER on his Form 105 filed with his Form 101. He did not give that history to any of the examining physicians, including Drs. Spindler and Goris.
>
> Defendant has made an argument that an injury as described by Plaintiff as happening on January 17, would simply be an idiopathic condition that is 'no more related to activities of daily living' and therefore would be entirely idiopathic. In view of the analysis and findings by the ALJ, the ALJ does not reach this argument of Defendant.
>
> The ALJ finds that Plaintiff has not proven that he sustained a work-related injury on January 17, 2009.

Owens' first argument on appeal is that the ALJ erred by dismissing Owens' case based on a lack of credibility. Owens asserts as follows:

> It has been a long time since the undersigned has seen a Workers' Compensation decision which was as flagrantly contrary to the evidence as this one. In this case the Employer voluntarily paid over Thirty-two Thousand and 00/100 Dollars in TTD benefits for a period of more than two (2) years, along with medical benefits in excess of Thirty-five Thousand and 00/100 ($35,000.00) Dollars. If the Employer was seriously contesting work-relatedness or notice, one would expect the Employer would call some witness to contradict Mr. Owens' testimony. The Employer did not.
>
> In spite of this, the ALJ rejected Mr. Owens' uncontradicted proof and dismissed his claim. The reason given

> by the ALJ was his feeling that Mr. Owens was not credible. However, if an ALJ is going to reject uncontradicted proof, he must make specific findings of fact and give reasons for his decisions. [citations omitted]. A mere feeling that the claimant is not honest is insufficient.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id. Kentucky law holds that if the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. 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). So long as any evidence of substance supports the ALJ’s opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, and substance of the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). 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 may even reject unrebutted medical testimony, so long as he adequately sets forth his rationale for doing so. *See* Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540 (Ky. App. 1985); Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). Although a party may note evidence supporting a different outcome than that 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). Rather, it must be shown there was no evidence of substantial probative value to support the ALJ's decision. Special Fund v. Francis, supra. Our task on appeal is to determine if substantial evidence exists in support of the ALJ's decision to dismiss Owens' claim.

A review of the November 29, 2011, opinion and order reveals the ALJ did not find Owens to be credible, consequently, he determined Owens failed to prove "that he sustained a work-related injury on January 17, 2009." We need only verify if the evidence cited by the ALJ in support of this conclusion is in the record. We have cited the evidence herein that supports the ALJ's decision to dismiss Owens' claim. This includes the wage records that do not show Owens received wages for the week ending on the alleged injury date- Saturday, January 17, 2009. This also includes Owens' deposition and hearing testimony in which Owens, as noted by the ALJ in the final order, testified he did not remember many critical events surrounding the alleged January 17, 2009, injury, including whether he was able to work afterwards.

While we acknowledge Dr. Spindler's opinions regarding causation, the ALJ is not obligated to rely on Dr. Spindler’s opinions. Instead, the ALJ has the discretion to reject his opinions, particularly in light of the ALJ's conclusion that Owens failed to provide Dr. Spindler with a history of the January 30, 2009, incident at his home. Indeed, Owens' brief to this Board states as follows regarding when Dr. Spindler finally reviewed the medical records pertaining to the January 30, 2009,

incident: "As stated above in considerable detail, defense counsel reviewed the January 30, 2009 hospital records with Dr. Spindler **immediately prior to his deposition**." (emphasis added). The ALJ provided adequate explanation of the rationale behind his rejection of Dr. Spindler's opinions. *See* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As substantial evidence exists in the record in support of the ALJ's dismissal of Owens' injury due to a lack of credibility, this determination will remain undisturbed.

Owens' second argument on appeal concerns the fact that Pepsi supplemented its Form 111 to include the additional contested issues of work-relatedness/causation and notice. Owens makes the following argument:

> Finally, we wish to preserve our objection and argument regarding the Employer's 'supplement' to its Form 111. This claim was filed on April 15, 2011. On May 13, 2011, the Employer filed a Form 111, Notice of Claim Denial or Acceptance. In that pleading, the Employer stated, 'This claim is accepted as compensable, but there is a dispute concerning the amount of compensation owed to the Plaintiff.' The Employer went on to stipulate that 'The alleged incident occurred on 1/17/2009' and that 'Plaintiff gave due and timely notice of the alleged incident(s)'.
>
> Then, without filing a motion or obtaining leave from the ALJ, on June

> 15, 2011, the Employer filed a 'supplement' to its Form 111 withdrawing its stipulation of work-relatedness/causation and notice. It was not until after the Benefit Review Conference that the Employer filed a 'Motion for Leave to Amend Form 111'. By then, the motion was not timely.

A brief procedural history is necessary to frame this issue. Pepsi filed its Form 111 on May 13, 2011, in which it indicated as follows:

> This claim is accepted as compensable, but there is a dispute concerning the amount of compensation owed to the Plaintiff.
>
> This claim is denied for the following reasons:
>
> The other reason for denial. Explain: The Defendant-Employer preserves Plaintiff's failure to follow medical advice as a defense to this claim, and preserves this as a Special Answer required by 803 KAR 25:010.

Pepsi's Form 111 also states as follows:

> Any allegation in the Form 101 not herein specifically admitted is denied.
>
> ***This Defendant reserves the right to amend or supplement this notice as additional claim information is received.***

(emphasis added).

On May 31, 2011, Pepsi supplemented its Form 111 with wages records by filing a document styled "Defendant-

Employer's Supplement to Form 111." Also on May 31, 2011, Pepsi supplemented its Form 111 with treatment records from Dr. Brian Kern and physical therapy records from Orthopedic Institute of Western Kentucky by filing a document styled "Defendant-Employer's Notice of Filing Records of Brian Kern, M.D. as Supplement to Special Answer."

On June 16, 2011, Pepsi filed a document styled "Defendant-Employer's Supplement to Form 111 to Raise Additional Defenses" in which Pepsi stated as follows:

> Comes the Defendant-Employer, Pepsi MidAmerica Company, by and through Counsel, and notifies the parties of its supplementation of the Form 111 Notice of Claim Denial to add as contested issues: 1) work-relatedness/causation of Plaintiff's condition; and 2) notice under KRS 342.185. This is based in part on the 2/17/09 record of Baptist Prime Care obtained during the course of discovery.

Significantly, Owens did not file an objection to Pepsi's June 16, 2011, "Defendant-Employer's Supplement to Form 111 to Raise Additional Defenses." On September 8, 2011, Pepsi filed a document styled "Contested Issues, Stipulations and Witness List of the Defendant-Employer" in which it listed the following contested issues:

> 1. Work-relatedness/causation;
> 2. Intervening, superseding injury on 1/30/09;

> 3. Notice;
> 4. Extent and duration;
> 5. Motion for extension of time to file report of Kurt Spindler, M.D.; and
> 6. TTD overpayment (both rate and duration)

Owens did not file an objection to Pepsi's list of contested issues which included notice and work-relatedness/causation.

As noted, the September 8, 2011, BRC order indicates the following contested issues: "benefits per KRS 342.730, work-relatedness/causation, notice, average weekly wage, injury as defined by the ACT, TTD overpayment." Under "other" is the following: "Amendment of Def.s Form 111."

On September 12, 2011, Pepsi, "out of an abundance of caution," filed a "Motion for Leave to Amend Form 111" and stated, in part, as follows:

> Comes the Defendant-Employer, Pepsi MidAmerica Company, by and through Counsel, and out of an abundance of caution, moves the Administrative Law Judge for leave to amend the Form 111 to include additional defenses of work-relatedness/causation and notice. [footnote omitted] As grounds for this Motion, the Defendant-Employer states as follows:
>
> 1) Defendant-Employer incorporates by reference its <u>SUPPLEMENT FORM 111 TO RAISE ADDITIONAL DEFENSES</u> filed on 6/15/11 by which the Employer notified

> all parties and the administrative law judge of these additional issues. This supplemental pleading was timely filed, it was filed promptly upon the Defendant-Employer's receipt of medical records giving rise to these defenses [footnote omitted], and there has been no prejudice to anyone by the raising of issues on 6/15/11- nearly three full months before the Benefit Review Conference. In point of fact, no *objection was raised* to the filing of this supplemental pleading until the BRC. Accordingly, even *if* (as Plaintiff asserts) additional issues can only be raised by formal motion, Plaintiff's objections are long since waived.

Owens did not file an objection to Pepsi's motion.

By order dated October 2, 2011, the ALJ sustained Pepsi's September 12, 2011, motion ordering as follows:

> ...
>
> IT IS HEREBY ORDER [sic], that said Motion is SUSTAINED. The issues noticed by the Defendant-Employer in its 6/15/11 supplementation of the Form 111 are appropriately raised and will remain contested issues to be decided on the merits in these proceedings.

We note Owens failed to address the issue of the supplementation of Pepsi's Form 111 with additional contested issues in its brief to the ALJ but did in fact present the argument in both of its petitions for

reconsideration.[1] Interestingly, Owens seemingly acknowledges the supplemented contested issues of work-relatedness/causation and notice were properly raised by arguing the ALJ made inadequate findings of fact on *all six* contested issues listed in the November 29, 2011, opinion and order. The contested issues listed in the November 29, 2011, opinion and order are as follows:

1. Work relatedness/causation.
2. Notice.
3. Benefits per KRS 342.730.
4. Average weekly wage.
5. Injury as defined by the Act.
6. TTD overpayment.

Owens states as follows in his petitions for reconsideration:

> The Opinion & Order lists six (6) contested issues in this claim. However, the Opinion & Order contains no findings of fact regarding any of those issues. In order for there to be meaningful appellate review for this decision, it must contain specific findings of fact.

There is nothing in Kentucky Workers' Compensation statutory or case law that supports Owens' argument against Pepsi's supplementation of its Form 111 with additional contested issues on June 16, 2011, and again via motion on September 12, 2011. There is no

[1] For reasons unclear to this Board, Owens filed two seemingly identical petitions for reconsideration on December 12 and 14, 2011.

requirement that said supplementation be carried out within a certain timeframe or via motion. We note Pepsi was not filing a "special answer" which does have a pertinent timeframe in which it can be filed; however, even a supplemented "special answer" does not require a motion. See 803 KAR 25:010, Section 5(2)(d). Additionally, Pepsi clearly reserved the right to supplement its Form 111 by virtue of the language included in its Form 111. We deem Owens' objections to Pepsi's supplementation, made for the first time at the September 8, 2011, BRC, to be untimely. Owens failed to file any motions or objections to Pepsi's June 16, 2011, supplementation, September 8, 2011, list of contested issues, or Pepsi's September 12, 2011, motion. Owens's failure to object to Pepsi's supplementation of its Form 111 throughout the litigation is tantamount to a waiver, and the additional contested issues raised by Pepsi on June 16, 2011, and again via motion on September 12, 2011, were tried by implied consent up through but not including the BRC. Following the BRC, by order dated October 2, 2011, the ALJ dispensed with this issue, sustained Pepsi's September 12, 2011, motion, and determined the contested issues added by virtue of Pepsi's June 16, 2011, supplementation were "appropriately raised." This determination will remain undisturbed.

Accordingly, the November 29, 2011, opinion and order and the January 24, 2012, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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