Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 3, 2015

CLAIM NO. 200874103

JOHN HORN PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. John Horn ("Horn") seeks review of the October 8, 2014, Opinion, Award, and Order of Hon. J. Landon Overfield, former Chief Administrative Law Judge ("CALJ") finding he sustained a work-related right ankle injury while in the employ of Laborers International Union of North America ("LIU") and awarding temporary total

disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the three multiplier, and medical benefits.[1] Horn also appeals from the November 6, 2014, Order overruling his petition for reconsideration.

Horn sustained multiple fractures of the right ankle as a result of fall at work occurring on October 7, 2008. He underwent surgery performed by Dr. Howard Jefferson, board certified in orthopedics, that same day. On June 4, 2009, Dr. Jefferson performed surgery to remove certain hardware. On January 7, 2010, Dr. Brian Thomson, Assistant Professor at the Department of Orthopedics and Rehabilitation at Vanderbilt University, performed ankle fusion surgery.

At issue on appeal is the award of TTD benefits and the CALJ's reliance upon the impairment rating assessed by Dr. Daniel Wolens. The August 12, 2014, Benefit Review Conference ("BRC") Order and Memorandum reveals the parties stipulated Horn sustained a work-related injury on October 7, 2008, and TTD benefits were paid at the rate of $605.68 per week from October 20, 2008, through December 21, 2008, and from July 13, 2009, through April 15, 2012, for a total of $92,669.04. There was no stipulation as to Horn's

[1] The CALJ retired at the end of 2014.

average weekly wage ("AWW"). The parties also stipulated Horn returned to work on December 22, 2008, at a wage equal to his AWW and worked through July 12, 2009. The contested issues were benefits per KRS 342.730 including multipliers, AWW, and unpaid or contested medical expenses.

Horn's testimony at his July 18, 2014, deposition and at the August 27, 2014, hearing reveals that after he stopped working for LIU on July 29, 2009, he has not been employed as he had been unable to obtain employment. He continues to experience significant right ankle problems for which he takes Percocet and Lorcet. At the hearing, the parties stipulated Horn's AWW was $1,029.29. The parties agreed the contested issues were benefits pursuant to KRS 342.730 and the compensability of certain medical expenses. Horn's hearing testimony reflects he continued to have significant ankle pain. He walks using a cane and was placed under significant physical restrictions by Dr. Thomson. Horn argued he is totally occupationally disabled.

Horn submitted the June 8, 2012, letter from Dr. Riley Love, with Lourdes Pain Management Center, who assessed an 11% impairment rating based on the 5th Edition of the American Medical Association, Guides to the

Evaluation of Permanent Impairment ("AMA Guides") on his physical examination of June 6, 2012.

Horn introduced the December 7, 2010, letter of Dr. Thomson in which he assessed a 4% impairment rating pursuant to the 6th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment.

LIU relied upon the 7% impairment rating assessed by Dr. Wolens pursuant to the 5th Edition of the AMA Guides in an October 29, 2012, report. His impairment rating was not based upon an examination but upon a review of various medical records including the records of Drs. Jefferson, Thomson, and Love.

In the October 8, 2014, Opinion, Award, and Order, the CALJ provided the following discussion of the impairment ratings assessed by Drs. Thompson, Love, and Wolens:

> The December 7, 2010 report from Dr. Thompson [sic] also expressed his opinion concerning Plaintiff's functional impairment rating. As [sic] result of the fusion of Plaintiff's ankle, which was healed in a neutral position, pursuant to the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition (hereafter, the *Guides*), Plaintiff had a 10% functional impairment to the lower extremity which was converted to a whole person functional impairment rating of 4%.

. . .

Dr. Love noted his examination of Plaintiff's right leg found sensation normal above the ankle and identical to the examination of the left leg. In the nerve distributions there was complete lack of sensation. Because it was associated with a gait and pain, Dr. Love felt it was worthy of an impairment rating. In the *5th Edition* of the *Guides*, sensation losses without motor loss and without dysesthesias would be assessed 7% whole body impairment. Combined with the 4% impairment for the fusion, Plaintiff would be assigned 11% functional whole body impairment. In discussing the 7% functional impairment for sensation loss without motor loss, Dr. Love referenced "page 522, table 17-37". Page 522 of the *Guides* is a blank page. It appears the reference to page 522 was a typographical error as table 17-37 appears at page 552 of the *Guides.* The CALJ is of the opinion this is an acceptable error and the 7% functional impairment assigned by Dr. Love was assigned under table 17-37 of the *Guides.*

. . .

Dr. Wolens noted Dr. Thomson had assigned 4% functional impairment for the fusion, continued pain, and arthrodesis, using the *Guides* after having diagnosed Plaintiff with a healed right ankle fusion and right foot neuropathic pain.

Plaintiff underwent pain management by Dr. Love who, using the *5th Edition* of the *Guides*, recalculated Plaintiff's impairment. Dr. Love reported for the arthrodesis alone the impairment under both the *5th* and *6th Editions* of the *Guides* would be 4%.

Dr. Love awarded impairment for a complete lack of sensation, assessing 7% for complete sensory loss involving the superficial peroneal, sural, lateral plantar and medial plantar nerves. Combining the 7% whole body impairment with the 4% impairment would total 11% functional whole body impairment.

Dr. Wolens noted the difference between the two doctors was that Dr. Love reported there was a complete sensory loss in the four nerves. The question would then become were virtually all the sensory nerves to the foot were [sic] completely dysfunctional. Dr. Wolens reviewed the entire pain management record and noted it did not discuss whether there was a history or physical examination findings of sensory loss, nor did it state there was no sensory loss. Sensation was reported to be intact on September 2, 2009, which was prior to the January 7, 2010 ankle fusion. There was no mention of sensory loss or physical examination findings after that date. Dr. Love noted on August 10, 2011 there was no numbness, tingling or burning. He further noted that if these four nerves would have been damaged at the time of the surgery that damage would have been manifested immediately. If there was no sensory loss on August 10, 2011 there would not now be sensory loss as a result the injury or the operative procedures directed at that injury. This would be consistent with what was known about ankle procedures. It was certainly not the norm for one and, in Dr. Wolens' opinion, for four sensory nerves being damaged as a result of an operative procedure to the ankle.

> Dr. Wolens concurred with Dr. Love with regard to his using the *5th Edition* of the *Guides* and assigning 4% functional impairment for the ankle. Where Dr. Wolens would differ was that he would not consider Plaintiff to have impairment for complete sensory loss of the superficial peroneal, sural, lateral plantar, and medial plantar nerves. The records do not show this as being present. However, as pain was reported as a dominant aspect of Plaintiff's condition, 3% would be added for pain but not combined to the remaining impairment. Plaintiff's total functional impairment would be 4% for ankylosis and 3% for pain, which would equal 7% functional whole body impairment. If Dr. Love's impairment calculation was followed, and one would consider the sensory loss of the four nerves to be partial, as noted by Dr. Thomson, rather than complete, the impairment would be the same as calculated using a pain rating rather than a neurological rating.

The CALJ determined Horn was not permanently totally disabled. The CALJ relied upon the impairment rating of Dr. Wolens explaining as follows:

> Without question, Plaintiff, in the incident at work October 7, 2008, suffered a permanent injury as defined by the Kentucky Workers Compensation Act. Based on the opinions of Dr. Wolens which, concerning the functional impairment rating most appropriate for Plaintiff's injury, the CALJ finds to be the most credible and convincing medical evidence in the record, Plaintiff has a 7% functional impairment to the body as a whole. That functional impairment rating, pursuant to KRS 342.730(1)(b),

> is converted to a 5.95% permanent partial disability.

Concerning the award of TTD benefits, the CALJ determined as follows:

> The parties stipulated Plaintiff suffered a work-related injury October 7, 2008 and, following that injury, received his normal salary through October 17, 2008. Based on Plaintiff's testimony and the opinions of Dr. Thompson [sic] and Dr. Wolens, the CALJ finds as a result of his work-related injury Plaintiff was temporarily totally occupationally disabled for the period from October 18, 2008 through December 21, 2008 and from July 13, 2009 through December 7, 2010, the date Dr. Thompson [sic] pronounced him to be at maximum medical improvement after his last surgical treatment. Plaintiff returned to work on December 22, 2008 at a wage equal to his average weekly wage and continued working at that wage through July 12, 2009.

Accordingly, after performing the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) the CALJ enhanced Horn's benefits by the three multiplier. The CALJ found Horn was entitled to TTD benefits as follows:

> Plaintiff suffered a work-related injury on October 7, 2008 which resulted in periods of temporary total occupational disability from October 20, 2008 through December 21, 2008 and July 13, 2009 through December 7, 2010. While he was temporarily totally occupationally disabled Plaintiff was entitled to temporary total disability benefits paid at the rate of $670.02 per week. This is calculated as follows:

> $1,029.29 x 66-2/3%= $686.19, reduced to $670.02, the maximum payment allowed in 2008. In making this finding, the CALJ has relied on the stipulations and Plaintiff's testimony.

The CALJ awarded PPD benefits of $89.70 per week beginning October 7, 2008, to be suspended during the periods TTD benefits were paid.

Horn filed a petition for reconsideration asserting the CALJ's award of TTD benefits disregarded the fact a period of TTD benefits had been stipulated. He noted in the August 12, 2014, BRC Order, "TTD" and "credit for" TTD benefits were not listed as contested issues. Additionally, Horn argued LIU never identified over-payment of TTD benefits as a contested issue either at the final hearing or its brief to the CALJ. In support of his argument he made the same arguments he now makes on appeal. Horn also took issue with the CALJ's reliance upon the impairment rating assessed by Dr. Wolens, making many of the same arguments he now makes on appeal.

In the November 6, 2014, Order overruling the petition for reconsideration, the CALJ stated as follows:

> Defendant Employer voluntarily paid temporary total disability (TTD) benefits for two extended periods of time. The parties stipulated Plaintiff had received TTD benefits paid at the rate of $605.68 per week from October 20, 2008 through December 21, 2008 and

from July 13, 2009 through April 15, 2012. This stipulation related to what had been paid, not the amount and duration of TTD to which Plaintiff is entitled under the evidence. Prior to the hearing, the parties entered into a stipulation concerning Plaintiff's average weekly wage which would have entitled Plaintiff to TTD benefits paid at the rate of $670.02 per week and that Defendant Employer continued paying Plaintiff's regular salary after the date of the injury through October 17, 2008. At neither the benefit review conference nor at the hearing did the parties reserve issue relating to the amount or duration of TTD to which Plaintiff is entitled.

In the Opinion, Award and Order, the CALJ found Plaintiff reached maximum medical improvement December 7, 2010 and, based on that finding, determined that Plaintiff's entitlement to TTD benefits ended December 7, 2010. Plaintiff was awarded TTD benefits at the rate of $670.02 per week from October 18, 2008 through December 21, 2008 and from July 13, 2009 through December 7, 2010.

In his petition, Plaintiff argues that since Defendant Employer made no mention of a contested issue of overpayment of TTD the stipulation rules and Plaintiff is entitled to TTD benefits through the date of last voluntary payment of those benefits on April 15, 2012. Based on that argument, Defendant Employer could argue that all TTD benefits awarded should be awarded at the rate of $605.68, the amount Plaintiff stipulated had been paid voluntarily. The CALJ made no specific finding of an overpayment of TTD or an underpayment of TTD. The Opinion, Award and Order awards permanent partial

> disability (PPD) benefits and TTD benefits in the amounts and for the duration deemed appropriate by the CALJ based on the evidence.
>
> Plaintiff next argues an error patently appears on the face of the Opinion, Award and Order concerning the CALJ's findings relating to the extent and duration of permanent occupational disability benefits. Plaintiff argues he should have been found to be permanently totally occupationally disabled or, if not totally disabled, PPD benefits should have been awarded based on the functional impairment rating assessed by Plaintiff's treating physician, Riley D. Love, M.D. Plaintiff actually makes no assignment of error but rather re-argues his case requesting permanent total occupational disability or a higher PPD rate. The CALJ made specific findings and, to the best of his ability, explained the evidence upon which the specific findings were based.

On appeal, Horn again argues the parties agreed at the BRC hearing to the period of TTD benefits and there was a discussion that the TTD benefit rate may change depending upon the resolution of Horn's AWW. He notes that at the final hearing the parties stipulated to the AWW. He asserts the period of TTD benefits continued to be a "stipulated issue" but there would now be an underpayment of TTD benefits due to the amount of his AWW. Horn contends the CALJ ignored the BRC Order and the stipulations of the parties. Further, he notes that in the

November 6, 2014, Order overruling his petition for reconsideration, the CALJ acknowledged the parties did not preserve as an issue, either at the BRC or the final hearing, the amount and duration of TTD benefits to which Horn was entitled. Horn notes TTD benefits and a credit for TTD benefits was not listed as contested issues. Horn observes the BRC Order states: "Only the following issues are subject to further proceedings pursuant to 803 KAR 25:011 8(6)."

In addition, Horn notes LIU never identified overpayment of TTD benefits as a contested issues at any time in the proceedings. Horn asserts that before the CALJ, he assumed there was no issue concerning the payment of TTD benefits and since he filed his brief two days before LIU, LIU likely reviewed his brief and did not dispute or address the period of TTD benefits in its brief to the CALJ. Horn maintains that if the period to which he was entitled to TTD benefits was an issue, LIU's counsel would have advised the CALJ or addressed it in its brief. He relies upon LIU's response to his petition for reconsideration noting it stated as follows:

> Defendant agrees that TTD was not listed as a contested issue by either party, whether it be an overpayment or underpayment, as not only was the

> period of TTD benefits stipulated to, but so was the amount.

Horn asserts the CALJ's opinion and award specifically addresses the stipulations and the contested issues none of which included any issue regarding the payment of TTD benefits. He maintains the parties will be greatly disadvantaged if they cannot rely upon the process of entering into stipulations and contested issues. Horn contends this issue is analogous to a promissory estoppel situation in that he relied upon the stipulation to his financial detriment in deciding whether or not to consider the settlement offer. Horn requests the opinion and award be amended to reflect an award of TTD benefits for the period stipulated in the BRC Order based on an AWW of $1,029.29.

Concerning the CALJ's reliance upon Dr. Wolens' impairment rating, Horn notes impairment ratings were submitted by three doctors. Since Dr. Thomson relied upon the 6th Edition of the AMA Guides, the CALJ disregarded his impairment rating.

Horn observes Dr. Riley's 11% impairment rating was assessed pursuant to the 5th Edition of the AMA Guides and Dr. Wolens' impairment rating was assessed based solely upon a records review. Horn argues the CALJ could not rely

upon Dr. Wolens' opinions because he never took a history or examined him. Further, he contends Dr. Wolens either misconstrued or did not review Dr. Love's medical report of June 8, 2012. He notes Dr. Wolens refused to accept the 11% impairment rating assessed by Dr. Love because Dr. Love's records did not note a sensory loss. Horn asserts that statement is not true and notes Dr. Love's report of July 8, 2012, specifically notes a finding of sensory loss. He posits that if Dr. Wolens had been asked if Horn had a complete sensory loss in his foot, Dr. Wolens could not respond within a reasonable degree of medical probability because he had never seen Horn. Therefore, Dr. Wolens had no independent basis for disagreeing with Dr. Love's July 8, 2012, report.

Citing to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), Horn asserts an opinion by a physician based on inaccurate or a largely incomplete history is corrupt and cannot constitute substantial evidence. He argues the situation in the case *sub judice* is far worse than a situation involving an inaccurate history since the doctor relied upon "did not consider and/or see the finding of the treating physician." Therefore, Dr. Love's 11% impairment rating is the only valid impairment rating and should have served as a basis

of an award of PPD benefits. He requests the opinion and order be vacated with directions to enter the appropriate award of TTD benefits and PPD benefits. We affirm.

In the August 12, 2014, BRC Order, the parties stipulated the amount and duration of TTD benefits paid. The parties did not stipulate AWW. More importantly, the parties did not stipulate to the periods during which Horn was entitled to TTD benefits. As a result, the issue of entitlement to TTD benefits was clearly a question to be resolved by the ALJ as a determination of Horn's AWW may result in an underpayment or overpayment of TTD benefits. When at the hearing the parties stipulated the amount of Horn's AWW, it was obvious that depending on the length of TTD benefits awarded, Horn may be entitled to additional TTD benefits as the amount of TTD benefits paid was less than the amount of TTD benefits to which Horn was entitled utilizing the statutory formula contained in KRS 342.730(1)(a). In the opinion and order, the CALJ awarded TTD benefits based on the 2008 statutory maximum of $672.02. As noted by the CALJ, the parties did not stipulate Horn was entitled to TTD benefits from October 20, 2008, through December 21, 2008, and then again from July 13, 2009, through April 15, 2012. The parties stipulated as to the amount of TTD benefits paid and the

period during which TTD benefits were paid. The August 12, 2014, BRC Order reflects AWW was an issue along with benefits per KRS 342.730 including multipliers. Horn correctly notes TTD benefits and credit for TTD benefits were not listed as issues. However, since the parties did not stipulate the amount of TTD benefits to be paid and the duration TTD benefits were to be paid, the amount and duration of TTD benefits were contested issues. Clearly, the parties did not enter into a stipulation as to the correct amount and duration of TTD benefits to be paid.

Identifying benefits per KRS 342.730 as a contested issue also preserved as an issue the amount and duration of TTD benefits to which Horn was entitled. In United Parcel Service, Inc. v. Stoudemire, 251 S.W.3d 331 (Ky. App. 2008), the Court of Appeals held a worker properly preserved as an issue whether she was entitled to additional TTD benefits, even though the employer contended the issue was not raised at the BRC, when extent and duration of disability was specifically designated as a contested issue before the ALJ. *See also* Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman, 233 S.W.3d 710, 713 (Ky. 2007), where the Court held the parties' listing of contested issues which included the extent and duration of disability also included the worker's claim for

additional TTD benefits. Although the above-cited cases dealt with the preservation by the employee of her entitlement to additional TTD benefits, it stands to reason the employer's total liability for TTD benefits is also preserved as an issue when extent and duration is identified as a contested issue. We note the issue of extent and duration was not listed in the BRC Order as a potential contested issue. However, we believe benefits per KRS 342.730 replaced and necessarily encompasses the issue of extent and duration of disability. Since KRS 342.730(1)(a) provides the formula for calculating TTD benefits, entitlement to and the total liability for TTD benefits are included within the issue of "benefits per KRS 342.730." Logic dictates that if the issue of benefits per KRS 342.730 includes the worker's claim for additional TTD benefits, it also includes the employer's claim for overpayment of TTD benefits.

Significantly, we note the CALJ determined entitlement to TTD benefits for the period beginning on July 13, 2009, based upon the date Dr. Thomson, the surgeon performing ankle fusion surgery, assessed maximum medical improvement ("MMI") in his report of December 7, 2010, when he stated "at this point, he is at maximum medical improvement." KRS 342.0011 defines temporary total

disability as a condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a return to employment. By statute and since there was no stipulation as to the period Horn was entitled to TTD benefits, the CALJ could not award TTD benefits beyond the date Horn attained MMI.

Pursuant to the stipulation of the period TTD benefits were paid, Horn argues he is entitled to an additional amount of TTD benefits during this period since the CALJ determined Horn was entitled to TTD benefits at the rate of $670.02. Horn would have us remand for entry of an award entitling him to additional TTD benefits during the periods from October 20, 2008, through December 21, 2008, and from July 13, 2009, through April 15, 2012, which would result in a windfall to him. Horn argues LIU is bound by the stipulated period TTD benefits were paid but he is not bound by the stipulated amount of TTD benefits. In that regard, entitlement to additional TTD benefits was also not listed as a contested issue. Thus, we find no merit in Horn's argument he is entitled to additional TTD benefits over and above the $605.68 paid for the entire period the parties stipulated TTD benefits were paid. Since the award of TTD benefits is in conformity with the statute and applicable law and is not contrary to the

stipulations, the CALJ's decision on this issue shall be affirmed.

Concerning Horn's argument the CALJ should have relied upon the impairment rating assessed by Dr. Love, we note in his October 29, 2012, report, Dr. Wolens reviewed the December 7, 2010, letter of Dr. Thomson and his report concerning his last evaluation on June 5, 2012. Dr. Wolens also discussed the surgical procedures performed by Drs. Jefferson and Thomson, and Dr. Love's 11% impairment rating. He noted the difference in the impairment ratings assessed by Dr. Thomson and Dr. Love is Dr. Love reported there had been a complete sensory loss in four nerves that serve the foot. Dr. Wolens further noted as follows: "The question then becomes is this a valid consideration, that virtually all of the sensory nerves to the foot are completely dysfunctional." In answering that question, he stated it was important to review the pain management records in total. Dr. Wolens provided a summary of Dr. Love's records of September 2, 2009, May 4, 2010, June 16, 2010, November 15, 2010, August 8, 2011, September 7, 2011, and December 8, 2011. He noted in September 2009, Dr. Love indicated Horn's sensation was intact. On April 4, 2010, there was no mention of sensory loss and no physical examination. On April 16, 2010, there was no discussion of

sensory loss and no physical examination. On November 15, 2010, there was no discussion regarding sensory loss and no physical examination. On August 10, 2011, Dr. Love stated that occasionally Horn's toes have a "funny type sensation but he does not have any numbness, tingling, or burning at this time." On September 7, 2011, and on December 8, 2011, no physical examination was conducted. Consequently, Dr. Love stated the pain management records did not "discuss whether there was a history or physical examination findings of sensory loss or frankly states there is no sensory loss." Dr. Wolens noted the August 10, 2011, record does not specifically address sensory loss and states there is no numbness, tingling, or burning. He concluded as follows:

> Furthermore, as this is now 1 1/2 years post-ankle fusion, if those four sensory nerves mentioned have been damaged at the time of the surgery, that damage would have manifested itself immediately. Therefore, if there was no sensory loss on 8/10/2011, there would not now be sensory loss now [sic] as a result of the injury or the operative procedures directed at that injury. This would also be consistent with what is known about ankle procedures. It is certainly not the norm for one, let alone four sensory nerves being damaged as a result of an operative procedure to the ankle.

Based on the 5th Edition of the AMA Guides, Dr. Wolens determined the impairment rating for ankylosis of the ankle in the neutral position is 4%. He concurred with Dr. Love in that aspect. However, he differed with Dr. Love because he would not consider Horn to have an impairment for complete sensory loss of the superficial peroneal, sural, lateral plantar, and medial plantar nerves as the record does not demonstrate the presence of this sensory loss. Noting pain is reported as a dominant aspect of Horn's condition, Dr. Wolens stated an argument could be made an additional impairment for pain be awarded pursuant to Chapter 18 of the 5th Edition of the AMA Guides. Therefore, he added 3% for pain to the 4% impairment rating for a total impairment rating of 7%.

We find no error in the CALJ's reliance on the impairment rating assessed by Dr. Wolens. As part of his evaluation, Dr. Wolens reviewed Dr. Thomson's surgical records and Dr. Love's records, except for possibly Dr. Love's June 8, 2012, report. Dr. Wolen's opinions as set out herein qualify as substantial evidence sufficient to support the CALJ's conclusion Horn had a 7% impairment rating as a result of the work-related injury.

We understood Horn's frustration with the fact Dr. Wolens assessed an impairment rating without performing

a physical examination. However, the administrative regulations do not require a physical examination as a prerequisite for a physician to assess an impairment rating. Horn does not raise as an issue Dr. Wolens' competency to assess an impairment rating pursuant to the 5th Edition of the AMA Guides. Similarly, Horn does not argue Dr. Wolens' impairment rating was not in accordance with the 5th Edition of the AMA Guides. His argument is that Dr. Wolens' impairment rating is based on incomplete information and is also unreliable since no examination was performed. The fact Dr. Wolens did not examine Horn and may have misconstrued or did not review Dr. Love's medical report of June 8, 2012, in formulating his opinion does not mean his opinions cannot constitute substantial evidence. Rather, such information merely goes to the weight to be assigned Dr. Wolens' opinions which is a question solely to be decided by the CALJ in his role as fact-finder. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995).

Further, after an examination of the record, we conclude Cepero, supra, is inapplicable in the case *sub judice*. Cepero, supra, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to

the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. We find nothing akin to Cepero in the case *sub judice*.

The only possible problem with the history Dr. Wolens received is he did not consider the contents of Dr. Love's June 8, 2012, report. That does not cause Dr. Wolens' opinions to be invalid pursuant to Cepero, supra. Since Horn does not assert Dr. Wolens does not have the expertise to assess an impairment rating pursuant to the 5th Edition of the AMA Guides or his impairment rating was not assessed pursuant to the 5th Edition of the AMA Guides, this Board is without authority to disturb the CALJ's reliance upon Dr. Wolens' impairment rating. Only the CALJ has the discretion to determine the physician upon which he will rely.

Accordingly, the October 8, 2014, Opinion, Award and Order and the November 6, 2014, Order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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