Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 31, 2015

CLAIM NO. 201400511

JOSEPH ATKINSON PETITIONER

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

VENDOME COPPER & BRASS WORKS
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Joseph Atkinson ("Atkinson") appeals from the December 29, 2014 Opinion and Order and the February 3, 2015 Order denying his petition for reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). The ALJ determined Atkinson failed to prove he suffered a work-related injury on February 13, 2014, and dismissed the

claim. Atkinson appeals, arguing the evidence compels a finding a work-related injury occurred and he provided due and timely notice of such injury.

Atkinson began working at Vendome Copper and Brass Works ("Vendome") in 2011 as a sheet metal worker. In 2013, he experienced a gradual onset of symptoms in his right shoulder, and was treated by Dr. Peter Bueker. Dr. Bueker found impingement in the right shoulder and eventually released Atkinson from his care when the symptoms fully resolved. No workers' compensation claim was filed for this injury, and Atkinson ceased treating with Dr. Buecker on August 6, 2013. He was not working under any restrictions or limitations on February 13, 2014.

At a deposition on May 14, 2014, Atkinson testified he was transferring metal from one building to another on February 13, 2014. He stated he injured his shoulder while pushing large pieces of metal into the racks, though he could not identify a specific incident or moment the injury occurred. Atkinson acknowledged he was aware of the requirement to report a work injury, and stated he informed his supervisor, Wylie Whitenack, that he was hurt. He left work early to go see a doctor, and went to Audubon Hospital where he found an orthopedic office, the name of which he could not recall. However, according to Atkinson,

the physician's office told him he needed a workers' compensation claim number in order to be treated. So, Atkinson stated he called Vendome's secretary, Monica Owens, and was instructed to file an injury report and to see a company doctor. Atkinson admitted he did not return to work that day.

Atkinson returned to work the following day, and completed an accident report. He then visited Occupational Physician Services ("OPS") in the afternoon. According to Atkinson's deposition testimony, he was given medication and returned to work with some restrictions. However, five days later on February 19, 2014, Atkinson was terminated by Vendome for failing a drug screen. He had submitted to the drug test of February 11, 2014, prior to the alleged injury.

Ms. Owens testified by deposition on June 11, 2014, and confirmed Atkinson called her on February 13, 2014 to request a claim number. She instructed him to visit OPS. Ms. Owens later learned Atkinson had not presented for a follow up visit at OPS scheduled for February 20, 2015 and, additionally, had requested a bill from Synergy Rehab be sent to Vendome's workers' compensation insurance carrier even though he had never been referred to Synergy Rehab.

Mr. Whitenack testified by deposition on June 11, 2014 and stated Atkinson came to him on the morning of

February 13, 2014 complaining of shoulder pain. Atkinson did not indicate his symptoms were work-related. He asked permission to leave work early to visit a doctor, which Mr. Whitenack granted. He further indicated it was Vendome's policy to permit employees to take time off work for physician visits, even if not work-related.

Mr. Whitenack also testified he read the accident report filled out by Atkinson on February 14, 2014. On the form, Atkinson stated he was injured while loading a rack. Mr. Whitenack testified Atkinson was not performing that job on February 13, 2014. Rather, he was moving pipe with a crane.

Atkinson testified at the final hearing held on October 27, 2014. He stated that, after he left Vendome on February 13, 2014 to seek medical treatment, he went to Dr. Buecker's office but was told he needed a claim number. He then visited another doctor's office chosen at random, and was similarly informed he needed a claim number. Atkinson was also questioned about his deposition testimony that he was pushing metal onto racks with no mechanical assistance. At the final hearing, Atkinson indicated he was lifting with the aid of a crane.

OPS' medical records were introduced, which document Atkinson's February 14, 2014 visit. He provided a

history of pushing and pulling metal when he injured his shoulder. No objective findings or symptoms were noted. X-rays were normal, with no evidence of acute fracture or dislocation. He was diagnosed with right shoulder strain, prescribed medication and released to work with lifting restrictions. OPS performed a drug screen at the time of the appointment, which was negative. A follow-up visit was scheduled for February 20, 2014, but Atkinson returned on February 19, 2014. A muscoskeletal examination was made and Atkinson was released to return to work with no restrictions.

Dr. Warren Bilkey conducted an independent medical examination ("IME") on August 11, 2014 and diagnosed right shoulder strain, internal derangement; right lateral epicondylitis; and right ulnar neuropathy. Dr. Bilkey attributed these conditions to the February 13, 2014 work incident, though he was not made aware that Atkinson had received treatment for his shoulder pain six months prior to the alleged work incident.

Dr. Robert Jacob conducted an IME on September 17, 2014. Dr. Jacob reviewed medical records and conducted a physical examination. He concluded Atkinson did not suffer a harmful change to the human organism as a result of any alleged incident on February 13, 2014. Dr. Jacob opined, if

any injury occurred, it was at most a minor shoulder strain which completely resolved within a month.

After a thorough recitation of the evidence, the ALJ concluded Atkinson failed to establish he suffered an injury as defined by KRS Chapter 342. The ALJ noted Atkinson was treated for right shoulder pain for about a year prior to the alleged work incident. He also noted Atkinson did not properly inform Mr. Whitenack of the alleged injury, though he was aware of the reporting requirements, and provided conflicting testimony as to the task he was performing at the time of the alleged injury. For these reasons, he did not find Atkinson's testimony "either credible or persuasive." Additionally, the ALJ found the medical proof establishing a work injury insufficient. Though Dr. Bilkey concluded a work-related injury occurred, he was unaware of Atkinson's prior shoulder condition. OPS diagnosed a shoulder strain, but based on "only subjective complaints of shoulder pain, the same symptoms from which he had been actively suffering for almost [a year and a half]." Instead, the ALJ found Dr. Jacob's opinion the most persuasive.

It was Vendome's position before the ALJ that Atkinson manufactured an injury claim because of his failed drug test. In response to this argument, the ALJ stated:

> I don't know if he was attempting to fake an injury in order to avoid the consequences of a failed drug test. That is the employer's theory. Nevertheless, by his failure to report a work related injury on February 13, 2014, the alleged date of injury, he denied the employer the opportunity to immediately investigate the scene and circumstances of the alleged injury. Granted, the employer found out later that day that he had such a claim, but the circumstances were unclear and were not discovered until the following day.

Atkinson petitioned for reconsideration, raising the same arguments he now makes on appeal. The ALJ denied the petition by Order dated February 3, 2015. Atkinson now appeals to this Board.

He first argues the evidence compels a finding of at least a temporary injury. According to Atkinson, the ALJ failed to adequately articulate his finding of no injury whatsoever. We disagree.

As the claimant in a workers' compensation proceeding, Atkinson 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). Because 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 they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The evidence in this case as to whether Atkinson sustained an injury as defined by KRS 342.0011(1) was conflicting. Drs. Bilkey and Jacob disagreed as to whether Atkinson suffered any injury. Atkinson's deposition and final hearing testimony regarding the circumstances of the alleged injury and his treatment on February 13, 2014 differed, and was controverted by Ms. Owens and Mr. Whitenack.

Atkinson has pointed to evidence from which the ALJ might conclude he suffered a temporary injury. However, given the conflicting nature of the proof, such a conclusion is not compelled. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The ALJ acted well within his discretion in relying on Dr. Jacob's medical opinion, and in disbelieving Atkinson's testimony. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Dr. Jacob's medical opinion,

alone, constitutes the requisite substantial evidence upon which to base the ALJ's decision, and this Board is not at liberty to re-weigh the proof. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Furthermore, the ALJ fully articulated his reasoning and the evidence upon which he relied in reaching his decision. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991).

We also reject Atkinson's contention that the ALJ determined he did not provide due and timely notice of the alleged injury. The ALJ's comments, cited above, regarding notice do not constitute a finding that Atkinson failed to provide notice as required by KRS 342.185. When read in the context of the overall opinion, it is clear the ALJ's comments were relevant to his analysis of Atkinson's credibility. The ALJ did not enter any findings with respect to statutory notice requirements, and none were required given his ultimate conclusion no injury occurred.

Accordingly, the December 29, 2014 Opinion, Award and Order and the February 3, 2015 Order denying reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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