OPINION ENTERED: June 28, 2013

CLAIM NO. 200985693

KRISTIE DUNGAN PETITIONER

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

H.T. HACKNEY CO., INC.
DR. AMR EL-NAGGAR
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Kristie Dungan ("Dungan") appeals from the January 28, 2013, opinion and order and the March 5, 2013, order denying her petition for reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). In the January 28, 2013, opinion and order, the ALJ dismissed Dungan's claims for failure to prove an

injury as defined by KRS 342.0011(1). On appeal, Dungan asserts the ALJ's decision dismissing her claim is not supported by substantial evidence and "must be reversed as a matter of law." We affirm in part, vacate in part, and remand.

The Form 101, filed February 18, 2010, alleges two separate injuries and two separate claims. Claim No. 2008-95701 relates to an injury occurring on February 12, 2008, while Dungan was in the employ of H.T. Hackney Co., Inc. (“H.T. Hackney”). On that date, Dungan "was unloading some groceries from the truck and slipped on ice and twisted her back and right shoulder." Dungan injured her lower back, lower left extremity, right shoulder, and right upper extremity. Claim No. 2009-85693 relates to an injury occurring on March 18, 2009. On that date, "Plaintiff was driving a van and struck a large bull, totaling the vehicle" and injured her neck, both shoulders, back, and left leg. The Form 101 indicates both claims are "to be consolidated." By order dated March 18, 2010, Hon. James L. Kerr, Administrative Law Judge ("ALJ Kerr") consolidated both claims.

The record indicates Dungan underwent cervical fusion surgery on February 9, 2011, and a left ulnar decompression of the elbow on August 13, 2011.

On February 18, 2011, H.T. Hackney filed a Form 112 Medical Fee Dispute. The nature of the dispute is as follows:

> The plaintiff has filed a second status report, in which she reports that Dr. El-Naggar has performed a C3-4 ACDF surgical procedure on February 9, 2011. This procedure is non-compensable because the plaintiff and Dr. El-Naggar failed to adhere to the requirements of 803 KAR 25:096§5(1)(c), which requires that a treatment plan be prepared and submitted to the workers' compensation carrier for an elective surgical procedure. As a result of the failure of Dr. El-Naggar and the plaintiff to adhere to this regulation, the defendant has been denied its due process rights of utilization review, medical fee dispute litigation, and the right to a fully adjudicated hearing prior to the incurrence of this medical expense. The defendant also continues to deny the compensability of the plaintiff's alleged cervical condition, and any treatment of that condition, based upon the conclusions of Dr. Travis, as well as the other evidence, which shows that the condition is not related to any work injury.

On June 29, 2011, H.T. Hackney filed another Form 112 Medical Fee Dispute. The nature of the dispute is as follows:

> This medical fee dispute is filed out of an abundance of caution. The plaintiff recently produced treatment notes concerning her May 12, 2011 evaluation with Dr. El-Naggar. At that time, Dr. El-Naggar diagnosed a lesion of the ulnar nerve. An EMG/NCV study

> was completed on June 3, 2011, and seemed to suggest that there were findings compatible with an ulnar nerve compression neuropathy over the left elbow. Pursuant to 803 KAR 25:096§5(1)(c), the defendant is denying the compensability of this injury in good faith, as there is no evidence to indicate that an ulnar neuropathy can be causally connected to either injury allegation.

Again, on August 11, 2011, H.T. Hackney filed a Form 112 Medical Fee Dispute. The nature of the dispute is as follows:

> On May 12, 2011 Dr. El-Naggar opined that the plaintiff demonstrated a lesion of the left ulnar nerve. An EMG/NCV study was completed on June 3, 2011, and seemed to suggest that there were findings compatible with an ulnar nerve compression neuropathy over the left elbow. Pursuant to 803 KAR 25:096§5(1)(c), the defendant is denying that compensability of this injury in good faith, as there is no evidence to indicate that the left ulnar neuropathy is causally connected to either injury allegation. Dr. El-Naggar has apparently proceeded with a surgical remedy of this condition, without requesting a preauthorization as required by 803 KAR 25:190§5, and the procedure is not compensable by reason of his failure to meet the requirements of these regulations, which denied the Defendant its due process right to a pre-authorization utilization review.

On May 7, 2012, Dungan filed a "Motion to Amend Form 101" to include a psychological condition. By order

dated May 25, 2012, the ALJ sustained Dungan's motion. There is also another order in the record, dated June 18, 2012, which also sustains Dungan's motion.

The benefit review conference was held immediately before the November 27, 2012, hearing. At the hearing, the following contested issues were summarized by the ALJ:

> As for contested issues, we have benefits per KRS 342.730, work-relatedness and causation, unpaid or contested medical expenses, injury as defined by the act, TTD, PTD, and notice as for the psych. claim only.

Concerning whether Dungan sustained an injury as defined by KRS 342.0011(1), the ALJ determined as follows:

> 18. Injury is defined as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." KRS 342.0011(1).
>
> 19. The ALJ finds that the most convincing objective medical evidence in this matter is provided by Dr. Knetsche who examined the Plaintiff at the request of the Plaintiff's counsel.
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> 20. Dr. Knetsche stated with regard to the slip and fall on February 8, 2008, that it resulted in minor myofascial injuries that are typically limited to 4-6 weeks of pain with spontaneous resolution. Dr. Knetsche added, "I

> find no evidence of a long term injury attributable to this slip and fall injury."
>
> 21. Dr. Knetsche stated with regard to the motor vehicle accident of March 18, 2009 that it resulted in minor myofascial injuries that are typically limited to 4-6 weeks with spontaneous resolution. Dr. Knetsche again added, "I find no evidence of a long term injury attributable to this motor vehicle accident."
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> 22. The ALJ therefore finds that the Plaintiff did not suffer an "injury" as that term is defined in the Worker's Compensation Act.
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> 23. All other issues are rendered moot by the foregoing findings.

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, evidence sufficient to convince reasonable people, 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 when the party with the burden of proof before the ALJ was 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). As 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). As the court in Special Fund v. Francis, supra, articulated, this is a great hurdle to overcome:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Id. at 643.

The ALJ, in utilizing the discretion afforded to him under the law, relied upon the opinions of Dr. Knetsche

contained in his October 22, 2010, report. After examining Dungan, Dr. Knetsche reached the following conclusions:

> 1. The lumbar back pain and left lower extremity pain Ms. Dungan ascribes to the slip and fall on ice on February 12, 2008 resulted in what I would class as minor myofascial injuries that are typically self limited to 4-6 weeks of pain with spontaneous resolution. I can find no evidence of a long term injury attributable to this slip and fall injury. Her physical examination is non-specific and there are no definitive physical findings suggestive of lumbar pathology other than natural and mild degenerative changes to her L5-S1 level disc. This MRI finding is found in up to 40% of asymptomatic adults aged [sic] 35-45 years of age. There is no evidence of lumbar neural compression, trauma associated fracture, ligamentous injury, segmental instability, or any other pathologic entity that would explain her subjective complaints. I would rate her lumbar injuries by the *AMA Guides to the Evaluation of Permanent Impairment Fifth edition* as having 0% permanent disability. I would rate her as fully employable for moderate labor duties from a lumbar spine standpoint. She is currently at Maximum Medical Improvement for this condition.
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> 2. The cervical neck pain, left shoulder pain, and left arm pain Ms. Dungan ascribes to the motor vehicle versus cow accident on 3-18-2009 resulted in what I would class again as minor myofascial injuries that are typically self limited to 4-6 weeks with spontaneous resolution. I can find no evidence of a long term injury attributable to this motor vehicle accident. The cervical MRI finding of a

C3-4 cervical disc/osteophyte complex is a primarily degenerative process and does not correlate with her physical examination findings. These disc/osteophyte complexes typically develop over a timeframe of years and this C3-4 disc/osteophyte complex MRI finding on 7-22-2009 is 4 months removed from her MVA versus cow injury on 3-18-2009. The time interval elapsed is inconsistent with the formation of such an osteophyte/disc complex. The subjective left arm radicular type symptoms could not result from the C3-4 level and could only result from C5-6, C6-7, or C7-T1 level cervical disc pathology. Therefore the ascribed cervical symptoms are not concordant with her examination and radiologic studies. This is likely a pre-existing or de noveau condition that may have been aggravated by her MVA, but I cannot specifically correlate this MRI finding with her MVA on 3-18-2009. I would rate her cervical injuries by the *AMA Guides to the Evaluation of Permanent Impairment Fifth edition* as having 0% permanent disability. She is currently at Maximum Medical Improvement for this condition unless she has a surgery.

3. The left shoulder pain she describes was not present in the initial description of injuries by Tim Poynter ARNP on 3-19-2009. She described right shoulder pain at that time and subsequent MRI studies dated 1-12-2010 of the right shoulder have demonstrated mild degenerative changes of the supraspinatus tendon and acromioclavicular joint. These studies are not present for my evaluation, but are present as a report only. Her examination is not consistent with any debilitating pathology and is consistent with her shoulder MRI report

> of mild degenerative changes consistent with her age. I would rate her shoulder injuries by the AMA Guides to the Evaluation of Permanent Impairment edition as having 0% permanent disability. She is currently at Maximum Medical Improvement for this condition.

We affirm the ALJ's decision not to award permanent partial disability benefits since Dr. Knetsche's opinions constitute substantial evidence which supports the determination Dungan did not sustain permanent injuries.

That said, pursuant to KRS 342.0011(1), an "injury" does not require a *permanent* "harmful change in the human organism." "Injury" is defined as follows:

> [A]ny work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(1).

Again, the above definition does not require a *permanent* injury. Temporary disabling conditions, as defined in KRS 342.0011(11)(a), are still injuries pursuant to KRS 342.0011(1). In Robertson v. United Parcel Service, 64 S.W.3d 284, 286 (Ky. 2001), the Kentucky Supreme Court stated as follows:

> In other words, the ALJ concluded that the claimant suffered a work-related injury but that its effect was only transient. It resulted in no permanent

> disability or change in the claimant's pre-existing spondylolisthesis. 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.

Since the rendition of Robertson, this Board has consistently held it is possible for an injured worker to establish a temporary injury for which only temporary total disability ("TTD") benefits and temporary medical benefits may be awarded, but not meet his or her burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized.

It is clear from the opinions of Dr. Knetsche that he believes Dungan suffered from "minor myofascial injuries that are typically self limited to 4-6 weeks." In other words, Dungan suffered *temporary* injuries and is entitled to medical benefits and possibly TTD benefits. The ALJ erroneously characterized Dr. Knetsche's opinions as standing for the proposition Dungan did not sustain an injury as defined by the Act on both dates. We vacate the ALJ's determination Dungan did not sustain injuries on February 12, 2008, and March 18, 2009, as defined by the Act and remand for the ALJ to determine the extent to which

Dungan is entitled to medical benefits and possibly TTD benefits for each injury.

Further, pursuant to FEI Installation Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the ALJ may award future medical benefits despite the lack of a permanent impairment rating after providing sufficient reasons for the award. Therefore, on remand the ALJ must also determine whether Dungan is entitled to future medical benefits for her injuries based on the evidence. The ALJ must also resolve the pending medical fee disputes as outlined herein.

Accordingly, the January 28, 2013, opinion and order and the March 5, 2013, order denying Dungan's petition for reconsideration are **AFFIRMED** in part, and **VACATED** in part. This claim is **REMANDED** for entry of an opinion and award consistent with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

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