

OPINION ENTERED: June 12, 2013

CLAIM NO. 201293877

LOUIS CARMAN

PETITIONER

VS.

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

JACKSON PURCHASE ENERGY CORP.
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Louis Carman ("Carman") appeals from the December 17, 2012, opinion and order and the January 24, 2013, order ruling on the petition for reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). In the December 17, 2012, opinion and order, the ALJ determined Carman "did not suffer a harmful change to the human organism and that his current condition is not

causally work related," and dismissed his claim against Jackson Purchase Energy Corp. ("Jackson Purchase").

On appeal, Carman asserts the ALJ "failed to enforce KRS 342.270(2)'s mandate that a Form 111 establishes early in the process what issues are contested and focuses litigation on those issues." Carman asserts that had Jackson Purchase wanted to contest the work-relatedness of Carman's lumbar spine condition, it should have moved to amend its Form 111.

Next, Carman asserts Jackson Purchase's Form 111 "failed to deny liability for anything other than the contested surgery," leading him to "assume that no formal adversary action was necessary to protect his rights." Noting Jackson Purchase paid temporary total disability benefits and all medical benefits throughout the course of the litigation, Carman argues as follows:

Combining the failure to deny liability, along with the actual payment of benefits during the pendency of the claim, with the filing of essentially all proof, including the video surveillance, after the BRC, without motion for extension of proof time, led Mr. Carman to assume that no formal adversary action was necessary to protect his rights.

As both issues on appeal are variations of the same argument, we will dispense with both simultaneously.

The Form 101 alleges Carman sustained injuries to his low back on February 23, 2010, and December 29, 2011, in the following manner:

2/23/10- I was down on my knees pulling on an anchor rod.
12/29/11- I was driving Unit 10 digger truck, jarred around for 10-15 miles.

The June 15, 2012, scheduling order set a standard proof schedule.

Jackson Purchase's Form 111, filed July 30, 2012, states as follows: "This claim is accepted as compensable, but there is a dispute concerning the amount of compensation owed to the Plaintiff." Additionally, the Form 111 indicates the claim is denied for the following reasons: "Plaintiff's request for surgery has been denied."

On September 10, 2012, Jackson Purchase filed Dr. Thomas J. O'Brien's September 5, 2012, independent medical examination ("IME") report. Dr. O'Brien diagnosed "longstanding chronic discogenic back pain secondary to multi-level lumbar degenerative disc disease" and attributed this condition to Carman's age and prior heavy use of tobacco. Based on the 5TH Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"), Dr. O'Brien assessed a 0% impairment rating.

The October 2, 2012, benefit review conference ("BRC") order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation [handwritten "back and stroke symptoms"], unpaid or contested medical expenses, injury as defined by the ACT, exclusion for pre-existing disability/impairment, and vocational rehabilitation. Additionally, "proposed surgery by Dr. Clint Hill" was handwritten as a contested issue.

On October 12, 2012, the deposition of Don Fitch ("Fitch"), a private investigator, was filed in the record. Fitch performed surveillance of Carman on February 29 and March 1, 2, and 15, 2012. The videotapes were made exhibits to Fitch's deposition. Counsel for Carman cross-examined Fitch and objected to the introduction of the surveillance videotapes because no reports or bills were produced to Carman pursuant to his "Request for Production" filed May 21, 2012.

On November 16, 2012, Jackson Purchase filed the deposition of Billy Ray Coursey ("Coursey"), a private investigator. Coursey performed surveillance of Carman on March 6 and 7, 2012, and his videotapes were introduced as Exhibit 1. Significantly, Carman objected to the introduction of surveillance videotapes on the sole basis

they were produced to counsel the Monday before the deposition and because of Coursey's narration.

In the December 17, 2012, opinion and order, the ALJ made the following findings of fact and conclusions of law:

22. 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).

23. The Plaintiff has argued that he suffered injuries on February 23, 2010 and again on December 29, 2011. The Defendant has offered the IME performed by Dr. O'Brien to counter this argument. Dr. O'Brien concluded that the Plaintiff did not suffer an injury at all and that his symptoms, neurologic examination results and before and after MRI scans suggest that his work as a lineman did not contribute to his current condition. Additionally, Dr. O'Brien concluded that the Plaintiff is not a surgical candidate due to his lack of radiculopathy, tobacco use and years of prescription medication.

24. The findings of Dr. O'Brien appear to be consistent with the Plaintiff's presentation on the surveillance video wherein he ambulates with a cane and back brace when going to a doctor's appointment but seems not to need or use either when climbing the stairs to enter his apartment.

25. The opinion of Dr. O'Brien particularly regarding the before and after MRI scans along with the Plaintiff's presentation on the surveillance video has convinced the ALJ that the Plaintiff did not suffer a harmful change to the human organism and that his current condition is not causally work related.

26. All other issues are thereby rendered moot.

In his petition for reconsideration, Carman requested additional findings of fact as to whether the Form 111 is binding upon Jackson Purchase and if not, why. The January 24, 2013, Order Denying Plaintiff's Petition for Reconsideration, prepared by Jackson Purchase and signed by the ALJ, states as follows:

Upon review of the Plaintiff's Petition for Reconsideration and upon review of the Employer's Objection and Response it is hereby ORDERED that the Plaintiff's Petition for Reconsideration is DENIED. The Administrative Law Judge has reviewed this file including the Benefit Review Conference Memorandum in this case and notes that the contested issues included the work relatedness and causation of back and stroke symptoms, whether there was an injury as defined by the Act (meaning the Kentucky Workers' Compensation Act, KRS Chapter 342), the exclusion for pre-existing disability and impairment, and whether the Plaintiff was entitled to benefits under KRS 342.730. These were the issues that were listed by the Parties without objection at the Benefit Review Conference, and listed by the Parties

without objection at the Hearing. The Administrative Law Judge find [sic] that the Employer did appropriately state that there was a dispute concerning the amount of compensation owed to the Plaintiff initially in the Employer's form 111. That does not preclude the Employer listing as to whether there was an injury as defined by the Act as an issue at the Hearing or at the Benefit Review Conference.

Based on the evidence that I reviewed, I found that the Plaintiff did not suffer a permanent harmful change to the human organism and that his current condition is not causally work related. These issues were placed before the Court with express or implied consent of the Parties. Therefore I DENY the Plaintiff's Petition for Reconsideration.

The Plaintiff's claim remains DISMISSED consistent with [sic] Opinion and Order of December 17, 2012. The medical fee disputes are resolved in the Employer's favor.

The Plaintiff's reference to another case, an unreported case, involving Dr. O'Brien, is hereby ignored and is stricken from the record.

Clearly, Jackson Purchase failed to amend its Form 111 to include causation as a contested issue. Further, despite Jackson Purchase's arguments to the contrary, the Form 111 does not indicate it was contesting causation. However, a review of the record reveals causation and whether Carman sustained an injury as defined by the Act were tried by consent. See Nucor Corp. v.

General Electric Co., 812 S.W.2d 136 (Ky. 1991). Jackson Purchase timely filed Dr. O'Brien's September 5, 2012, IME report. No objection was filed to the introduction of this report. The ALJ relied upon Dr. O'Brien's opinions in dismissing Carman's claim. Upon the filing of Dr. O'Brien's report, Carman was put on notice Jackson Purchase was contesting causation and whether he sustained an injury as defined by the Act. At that time, Carman should have objected to the report and filed a Motion to Strike all or portions of Dr. O'Brien's report.¹ Significantly, no objection or motion was filed.

We also note Carman failed to file any motions or objections regarding the numerous contested issues listed in the BRC order which include benefits per KRS 342.730, work-relatedness/causation with respect to Carman's back and stroke symptoms, unpaid or contested medical expenses, injury as defined by the ACT, exclusion for pre-existing disability/impairment, vocational rehabilitation, and the proposed surgery by Dr. Clint Hill. The contested issues were again reiterated at the beginning of the October 16, 2012, hearing, and Carman failed to raise an objection to any of the contested issues identified in the BRC order. In

¹ On September 17, 2012, Carman filed a Motion to Strike which did not pertain to Dr. O'Brien's report.

fact, Carman confirmed the contested issues were as stated in the BRC order. The following exchange took place at the hearing:

ALJ: As for contested issues we have benefits per KRS 342.730; work-relatedness and causation with respect to the back and stroke symptoms; we have unpaid or contested medical expenses; injury as defined by the Act; exclusion for pre-existing active disability; vocational rehabilitation; and a proposed surgery by Dr. Hill. Does that adequately summarize the stipulations and issues?

Counsel for Jackson Purchase: Yes sir.

Counsel for Carman: *Yes sir.* (emphasis added).

Additionally, the record reveals Carman failed to object to Jackson Purchase's witness list, filed September 24, 2012, in which it listed Dr. O'Brien's testimony and the following contested issues:

1. Existence of a permanent injury as defined by the Kentucky Workers' Compensation Act.
2. Causation of stroke like symptoms and compensability of Western Baptist Hospital Emergency Room visit from January 8, 2012 due to stroke symptoms instead of low back problems.
3. Causation
4. Pre-existing active disability.
5. Entitlement to three level fusion.
6. Vocational retraining and rehabilitation.
7. Extent and duration.
8. Medical fee disputes

9. Credit for LTD

Jackson Purchase's witness list also reflects it was only stipulating to an employment relationship and notice. Further, we note Carman's witness list, filed October 1, 2012, lists "benefits per 342.730" as a contested issue.

In light of Dr. O'Brien's report, the BRC order, the above-cited discussion at the hearing regarding the contested issues, and both parties' witness lists, we conclude Carman's argument he was led to believe "no formal adversary action was necessary to protect his rights" has no merit.

Similarly, Carman's argument Jackson Purchase led him to believe no formal adversary action was necessary because Jackson Purchase voluntarily paid benefits lacks merit. Payment of voluntary benefits is not an admission of liability, and to hold otherwise would result in discouraging voluntary payments by an employer which would be detrimental to an injured employee in the long run. Triangle Insulation and Sheet Metal Co., Div. of Triangle Enter., Inc. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990).

Concerning Jackson Purchase's filing of surveillance evidence after the BRC, it is well established that an ALJ, as trier of fact, is the gatekeeper and arbiter of the record both procedurally and substantively.

Dravo Lime Co., Inc. v. Eakins, 156 S.W. 3d 283 (Ky. 2003).

In that capacity, the ALJ has broad discretion in supervising the introduction of evidence and in making rulings affecting the competency, relevancy, materiality, and admissibility of the evidence. See KRS 342.230. Just as a trial court judge bears responsibility for directing the flow of litigation through the judicial process, an ALJ has the authority to control the progression of a workers' compensation claim. In the case *sub judice*, the ALJ permitted the introduction of this evidence, and this Board will not disturb the ALJ's ruling. Additionally, we note that while Carman objected to the introduction of the surveillance videotapes during Coursey's and Fitch's depositions, no motions to strike were filed. More importantly, Carman's objections were not based on the content of Jackson Purchase's Form 111. Finally, Carman participated in the depositions of both Coursey and Fitch and cross-examined Fitch. The ALJ's discretion to admit the evidence and subsequently rely upon it will not be disturbed.

In summary, the record contains no objections or motions by Carman objecting to Jackson Purchase's introduction of certain evidence on the basis that it contradicts the Form 111. In addition, on two occasions

Carman agreed to the contested issues to be resolved by the ALJ. The first time Carman raised any issue regarding Jackson Purchase's Form 111 is in his brief to the ALJ. As such, causation and injury as defined by the Act were tried by consent. See Nucor Corp. v. General Electric Co., supra.

Accordingly, the December 17, 2012, opinion and order and the January 24, 2013, order on petition for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

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