Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 8, 2013

CLAIM NO. 201000820

LOUISVILLE PAVING COMPANY PETITIONER

VS. **APPEAL FROM HON. THOMAS POLITES, ADMINISTRATIVE LAW JUDGE**

MICHAEL JACKSON,
R. ELSWICK TRUCKING,
JAMES LYNN d/b/a J. LYNN TRUCKING,
and HON. THOMAS POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

JAMES LYNN d/b/a J. LYNN TRUCKING PETITIONER

VS.

LOUISVILLE PAVING COMPANY,
MICHAEL JACKSON,
R. ELSWICK TRUCKING,
and HON. THOMAS POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Louisville Paving Company ("Louisville Paving"), and James Lynn d/b/a J. Lynn Trucking ("J. Lynn") seek review of the decision rendered March 25, 2013 by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ"), finding Michael Jackson ("Jackson") sustained a work-related low back injury while working for R. Elswick Trucking ("Elswick") in Kentucky, and awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. Louisville Paving and J. Lynn also appeal from the order denying their petitions for reconsideration issued May 17, 2013.

On appeal, Louisville Paving and J. Lynn argue the ALJ erred in finding Kentucky has jurisdiction of this claim, and in finding Kentucky has extraterritorial jurisdiction. Because the ALJ did not err in determining Kentucky has jurisdiction of this claim, we affirm.

Hon. Richard M. Joiner, Administrative Law Judge ("ALJ Joiner"), was originally assigned to this claim on August 12, 2010. In an order issued July 21, 2011, ALJ Joiner dismissed this claim stating, "The plaintiff's claim for benefits is hereby DISMISSED since the alleged work

related injury occurred in Indiana." Jackson appealed. In an opinion entered January 9, 2012, this Board vacated ALJ Joiner's decision, and remanded for further proceedings. Specifically, this Board stated as follows:

> In the case *sub judice*, the ALJ provided no analysis supporting his decision. He merely provided a determination without explanation. The facts appear to be disputed. Jackson testified he shoveled asphalt from the bed of his truck numerous times throughout the day in Kentucky. Elswick and Brown challenged that assertion. We do not believe in dismissing this claim the ALJ provided an adequate analysis to support his ultimate conclusion.
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> KRS 342.285(2)(c) provides generally the Board may determine on appeal whether an order, decision or award is in conformity to the provisions of Chapter 342. KRS 342.285(3) provides the Board may "in its discretion" remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." When read in conjunction, we interpret these provisions to signify that should we so choose, the Board may *sua sponte* reach issues even if unpreserved in order to warrant a proper application of the law. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288, 295 (Ky. 2004).
>
> As stated above, the ALJ's decision and subsequent orders on reconsideration dismissing this claim without providing an explanation is wholly inadequate. While we are not attempting to substitute our judgment for that of the ALJ, the analysis

> provided falls well short of adequate findings of fact. After reviewing the evidence, and providing an adequate analysis, the ALJ very well may be justified in dismissing this claim on jurisdictional grounds. However, the parties are entitled to findings based on the evidence so that both sides may be dealt with fairly and be properly apprised of the basis for the decision.

Jackson filed a Form 101 on July 13, 2010, alleging he injured his low back while shoveling asphalt from a dump truck on June 29, 2010. He testified by deposition September 20, 2010, and June 22, 2011. He also testified at the hearing held January 24, 2013. Jackson, born on August 1, 1973, is a resident of Louisville, Kentucky and is a high school graduate. He has worked as a package handler, machine operator, assembly line worker, and as a truck driver. He has also operated a carpet cleaning business. He began driving a dump truck for Elswick in January 2010. He testified he began each day at Robert Elswick's home in New Albany, Indiana, where the truck was kept. He would drive throughout the day, and return the truck to New Albany at the end of the work day. While working for Elswick he hauled sand, salt, rock, millings and asphalt.

On June 29, 2010, he began hauling rock from Jefferson County, Kentucky to Bullitt County, Kentucky.

After hauling three loads, he was switched to hauling asphalt from Jefferson County to Oldham County, Kentucky. Jackson testified he hauled several loads of asphalt, and had to shovel residue from the truck bed after each load. Prior to loading the asphalt, he pulled under a spray system which was supposed to spray a soapy solution into the truck to allow it to dump more efficiently. He stated the sprayer did not always work, and despite the solution, some shoveling was always required. After the last load, he drove to Robert Elswick's home in New Albany, and shoveled the remaining asphalt onto the driveway. He stated asphalt is harder to shovel after it cools.

He experienced tightness in his back when he took a shower after returning home. He stated the next morning he was unable to get out of bed. He went to Jewish Southwest Hospital where x-rays were taken, medication prescribed and he was taken off work. Jackson followed up with a family physician, and was eventually referred to Dr. Ellen Ballard, a physical medicine physician. Dr. Ballard referred him to Dr. Jonathan Hodes, a neurosurgeon, who performed surgery on October 25, 2010. Dr. Ballard eventually released him from care after a functional capacity evaluation was performed.

Robert Lee Elswick ("Robert Elswick"), testified by deposition on November 11, 2010. He resides in New Albany, Indiana, where he operates his business which consists of hauling material with tri-axle dump trucks. He stated Jackson worked for Elswick from January 12, 2010 through June 29, 2010, and has not worked since. On the day of the accident, Elswick hauled materials for Louisville Paving, as a subcontractor for J. Lynn. Robert Elswick did not work directly with Jackson on the day of the injury. Jackson did not complain of low back pain on June 29, 2010. At the end of the day, Jackson did not wait for a chemical solution to be applied to the asphalt residue before he began shoveling. Robert Elswick admitted if Jackson's back injury was due to shoveling, it was more likely it occurred in Kentucky, unless it was found specifically due to shoveling at his residence in New Albany. He later testified Jackson injured his back in New Albany.

Corey Brown ("Brown"), Fleet Superintendent for Louisville Paving, testified by deposition on April 22, 2011. His job entails scheduling dump trucks for paving crews and tracking equipment. On June 29, 2010, he contacted J. Lynn and requested a certain number of trucks. J. Lynn then called subcontractors, one of whom was

Elswick, to complete the order. Elswick provided two trucks, and hauled stock which consisted of sand or rock in the morning, then switched over to asphalt in the afternoon. Jackson hauled four loads of asphalt from Jefferson County to Oldham County.

According to Brown, prior to loading, drivers pull into a spray system, which sprays soap to prevent asphalt from sticking to the truck bed. After dumping each load, drivers return to the spray system prior to loading again. Drivers are asked to not get out of their trucks, and shoveling is not allowed. If there is a buildup, a backhoe is available to remove it. After the last load is delivered, drivers return to their home station to clean their trucks.

We will not review the medical evidence as it is not relevant to the issues on appeal.

In a decision rendered March 25, 2013, the ALJ determined as follows:

> The above medical testimony is unrebutted and compels a finding that plaintiff did in fact suffer a work injury as a result of shoveling asphalt in the course and scope of his employment with R. Elswick Trucking as all of the medical experts attribute the development of plaintiff's back pain to shoveling asphalt.

LOCATION OF INJURY/JURISDICTION

Given that it has been determined that plaintiff suffered an injury to his back shoveling asphalt, the more contested question is where did the injury occur, more specifically, where did plaintiff shovel asphalt. Having reviewed and considered the entirety of the testimony in this claim, both lay and medical, the ALJ is persuaded that the plaintiff's work injury occurred in both Kentucky and Indiana as the ALJ is convinced by the testimony of the plaintiff that he shoveled asphalt in Kentucky and Indiana on June 29, 2010.

While the employer has argued that plaintiff did not shovel asphalt throughout the day in Kentucky, but injured his back at the end of the work day when he shoveled dried asphalt out of the truck bed in Mr. Elswick's driveway in Indiana, the ALJ does not find the testimony that plaintiff did not shovel asphalt in Kentucky to be persuasive. The plaintiff has maintained throughout that “when you raise the bed up, some of the asphalt would come out, but the majority of the time it would leave asphalt in it, so just about every load I’d have to get in the back of that truck and shovel and clean it out.” While Mr. Elswick disputed plaintiff's testimony in this regard, he acknowledged that asphalt does build up in the truck bed. Further, Mr. Elswick made it a point to say that no shoveling whatsoever was required when plaintiff was hauling sand, which he did in the morning on the day of injury before he switched over to asphalt in the afternoon. He stated “he did that the first half of the day, and I know there's no shoveling involved." (Elswick depo. p. 19) Mr. Elswick was adamant that there

was no shoveling involved in hauling sand, but his implied distinction between sand and asphalt in regard to shoveling leads the ALJ to infer that it is likely that hauling asphalt requires periodic shoveling in cleaning the truck bed. Had Elswick simply given a blanket denial of any shoveling by his drivers, regardless of the type of product being hauled, he may have been more credible. The ALJ believes that by failing to state that his drivers never shovel at all, it is an acknowledgment by Mr. Elswick that occasionally asphalt must be shoveled out of the bed of the truck. This is consistent with the fact that there was unquestioned asphalt build up at the end of the day as admitted by Mr. Elswick, that Louisville Paving applied a solution to inhibit asphalt sticking for every load which implies that asphalt build up is a problem that occurs, and Mr. Elswick acknowledged that the job requires shoveling, when he stated, in relating a conversation the day after the injury that he had with plaintiff "Look, dude, I'm working every day. My back is hurting too. You know, I shovel and beat trucks too." (Elswick depo. p. 38) Also, Elswick stated plaintiff was complaining about having to haul asphalt, that it was a hassle for him and he didn't want to do it anymore, and he stated "you know, asphalt is easy to do, but you have to stay on top of it. You do have to work a little bit, but normally it's easy to do." (Elswick depo. p.34). The ALJ is convinced that limited shoveling of asphalt in order to keep the truck bed cleaned is part of the job and while the ALJ does not believe that plaintiff did an inordinate amount of asphalt shoveling on the day of injury, the ALJ is convinced that plaintiff did in fact have to shovel asphalt during the

afternoon of the day of injury in Kentucky, as well as in Indiana at the end of the day.

The employer has argued throughout this litigation that it is significant that plaintiff was asymptomatic prior to shoveling the truck bed at the end of day in Indiana and hence this is proof that plaintiff's injury must have been caused by the shoveling and banging on the asphalt in Elswick's driveway at the end of the day. However, plaintiff's testimony throughout has been that he did not become symptomatic until he woke up the next morning in severe pain. As such, not only was he asymptomatic prior to the shoveling incident at the end of the day in Indiana, he was asymptomatic after it as well. The medical testimony is consistent that plaintiff developed a gradual onset of symptoms overnight and given that this testimony is unrebutted, the fact that plaintiff was asymptomatic prior to the shoveling incident at the end of the day in Indiana is of no consequence.

Furthermore, while Elswick was adamant that plaintiff could not have beaten the asphalt with the shovel at the end of the day in Indiana had he previously injured it during the afternoon while in Kentucky, his opinion in this regard was primarily based upon the plaintiff’s lack of symptoms prior to the end of the day shoveling incident. But as has previously been noted, the testimony is clear that plaintiff had a gradual onset of symptoms overnight which undercuts the basis for Elswick's opinion.

While the ALJ believes the testimony of Corey Brown was credible

that Louisville Paving discourages drivers from cleaning out their truck beds for a variety of reasons, the fact that Louisville Paving had this policy is not conclusive on the issue. Given that Mr. Brown had no personal knowledge of plaintiff's actual work duties that day, his testimony was insufficient to overcome the testimony of the plaintiff. Further, his testimony that occasionally a backhoe would have to be utilized to scrape out dried asphalt is proof that buildup of asphalt in the truck bed necessitating its removal occurs regularly in hauling asphalt.

The defendants have also argued that it was only after the original order of dismissal in this claim that plaintiff began to emphasize, or in their opinion, exaggerate, the shoveling plaintiff allegedly performed in Kentucky. However, the ALJ would point out that in the plaintiff's original deposition on September 20, 2010, he testified that after just about every load of asphalt he would have to take a shovel and clean out the truck bed. As such, his testimony has been consistent from the outset.

Having thoroughly and repeatedly reviewed the testimony of the plaintiff and Elswick and Brown, the ALJ simply cannot conclude that plaintiff did not perform the routine task of periodically cleaning out dried asphalt from his truck bed with a shovel as he testified which was, by all accounts, a necessary part of the job. This is especially so in light of the fact that the medical testimony is unrebutted that plaintiff's injury was caused merely by shoveling asphalt, rather than by the more aggressive

> beating and shoveling activity by the plaintiff at the end of the day.
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> Given the finding that plaintiff shoveled asphalt in Kentucky on the date of injury, when viewed in light of the unrebutted medical testimony that plaintiff's injury was caused by shoveling asphalt, it is hereby determined that plaintiff has suffered an injury that is compensable under the Kentucky Workers' Compensation Act given that it occurred in Kentucky.

Jackson filed a petition for reconsideration requesting the ALJ to correct the decision to reflect he sustained a low back injury, not a knee injury. The Uninsured Employers' Fund filed a petition for reconsideration requesting it be dismissed as a party. J. Lynn filed a petition for reconsideration requesting the claim be dismissed because the ALJ erred in finding Kentucky had jurisdiction. Louisville Paving filed a petition for reconsideration alleging the ALJ erred in finding the injury occurred in Kentucky, or in the alternative had extraterritorial jurisdiction. In an order issued on May 17, 2013, the ALJ amended his decision to reflect medical benefits were awarded for Jackson's low back injury, not a knee injury, and he also dismissed the UEF as a party. The ALJ then denied the petitions for reconsideration filed by J. Lynn and Louisville Paving.

On appeal, both Louisville Paving and J. Lynn argue the ALJ erred in determining the injury occurred in Kentucky, and in the alternative Kentucky has extraterritorial jurisdiction.

Jackson, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including whether his injury occurred in Kentucky. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson

v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such 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 decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made 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 Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In this instance, the ALJ determined Jackson's injury was due to shoveling which occurred in both Kentucky and Indiana. Both Louisville Paving and J. Lynn argue

Jackson did not shovel asphalt in Kentucky because Brown testified there was a prohibition against doing so. The ALJ clearly set forth the basis for his determination to the contrary. Both Louisville Paving and J. Lynn request this Board to substitute its judgment for the factual determination of the ALJ which we are not permitted to do. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb his decision on appeal. *See* KRS 342.285; Special Fund v. Francis, supra.

We cannot say the outcome arrived at by the ALJ finding Jackson sustained an injury in Kentucky is so unreasonable under the evidence the decision must be reversed. Because we determine the ALJ did not err in finding Jackson's injury occurred in Kentucky, which therefore has jurisdiction, the discussion regarding extraterritorial jurisdiction is irrelevant and will not be discussed further.

Finally, we note while Elswick had workers' compensation insurance coverage in Indiana, it did not in Kentucky. In other words, Elswick was uninsured for the injury which the ALJ determined occurred in Kentucky. Therefore, J. Lynn and Louisville Paving are subject to liability pursuant to KRS 342.610(2).

Accordingly, the decision rendered March 25, 2013 and the order on reconsideration issued May 17, 2013 by Hon. Tomas G. Polites, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER LOUISVILLE PAVING:

HON DOUGLAS A U'SELLIS
600 E MAIN ST, STE 100
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT MICHAEL JACKSON:

HON JOY L BUCHENBERGER
1450 STARKS BUILDING
455 SOUTH FOURTH AVENUE
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT R ELSWICK TRUCKING:

HON JUDSON F DEVLIN
1315 HERR LN, STE 210
LOUISVILLE, KY 40222

COUNSEL FOR REPSONDENT JAMES LYNN d/b/a J LYNN TRUCKING:

HON JAMES R WAGONER
333 GUTHRIE GREEN, STE 203
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON THOMAS G POLITES
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511