

OPINION ENTERED: May 21, 2012

CLAIM NO. 201187484

MARK A. CONLEY

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

VARBLE MASONRY CO., INC.
and JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Mark Conley ("Conley") seeks review of the opinion and order rendered February 3, 2011, by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"), dismissing his claim for benefits against Varble Masonry Company ("Varble Masonry"). The ALJ determined Conley failed to prove the work accident on September 20, 2010 caused his alleged left knee and ankle injuries.

On appeal, Conley argues the ALJ erred in finding lack of causation since it is undisputed he suffered an injury at work on September 20, 2010. Conley argues medical evidence from June 2011 establishes a left knee injury. Varble Masonry argues Conley committed fatal errors by identifying the wrong claim number in his notice of appeal and the wrong respondent in his brief to this Board. No petition for reconsideration was filed.

Conley filed a Form 101 on July 28, 2011, alleging he sustained left knee and ankle injuries on September 20, 2010, when the scaffolding he was standing on fell, causing him to fall to the ground. The claim was bifurcated on the issues of notice, work-relatedness, average weekly wage, temporary total disability and safety violation.

Conley testified by deposition on September 27, 2011 and at the final hearing held December 19, 2011. Conley, a resident of Grand Rivers, Kentucky, was born April 20, 1969, and completed the eleventh grade. Conley later obtained his GED and has no specialized or vocational training. Conley testified he has worked as a masonry laborer on and off for Varble Masonry since he was 18 years old. Conley testified he worked for Varble Masonry in 2006, and again from August 2010 to October 2010. As a laborer, Conley packed brick, block, made mortar and assisted

bricklayers. Following the September 20, 2010 fall, Conley continued to work for Varble Masonry for two or three more weeks. He then worked as a laborer for another masonry company for a month beginning February 2011. Conley has not worked anywhere else since that time. He testified he can no longer work due to his left knee and ankle injuries.

Conley testified that on September 20, 2010, Jimmy Poole ("Poole"), a Varble Masonry co-worker, picked him up from his residence and drove them to a job site at Aspen Dental. Conley worked at the jobsite for an hour, and was then sent to a residential home located in Whispering Oaks. Conley testified Poole stayed behind at Aspen Dental. Conley was working on scaffolding approximately fifteen feet high, although he was on the first level, only five feet off the ground. A worker on the ground was feeding Conley materials, which he transferred to the bricklayer located at the ten foot level scaffold. Conley testified the scaffold gave way and fell over, causing him to fall and land on his left side, jamming his left knee and ankle. Conley thought the scaffold was set too close to a trench and fell over when the bank of the trench gave way. He experienced immediate pain and limped over to a shade tree to lie down. Conley told his supervisor/foreman, Jerry Fires, about his injury. Conley sat by the tree until the rest of the crew

was finished, and then he was driven back to the Aspen Dental job site.

Conley testified he notified Jimmy Varble ("Varble") of the accident upon returning to Aspen Dental. He asked Varble what hospital he could go to and Varble said "do not go to the hospital." Conley testified did not have any other conversations with Varble about his injuries until April 2011, but later stated he told Varble he was hurt every day after the accident. Conley never asked Varble again to go to the doctor because he hoped he was not hurt. Conley stated he had no other injuries after September 20, 2010. Following the accident, Conley testified he worked for Varble Masonry performing labor work at Dicks Sporting Goods. There, he assisted in setting up scaffolding and was never above six feet off the ground. At the hearing, a Facebook posting by Conley was entered into evidence as an exhibit. The posting, dated September 21, 2010 at 3:44 a.m., read:

fell yesterday at work, 15feet (sic) of scaffolding gave way and fell side ways, i was only 5 foot in the air but it jammed by left ankle and left knee pretty good. Hurts like hell n can't sleep! GOODMORNIN EVERYONE!!!

Conley testified he first sought medical treatment on April 1, 2011 at Western Baptist Hospital, and again in

May 2011. He then went to Lourdes Hospital in June 2011, where an MRI was performed. He was then referred to Dr. Hunt. Conley testified he has seen Dr. Hunt once. Conley also saw Dr. Harry Byrne, a podiatrist, for his left knee and ankle. Dr. Byrne currently prescribes him anti-inflammatory or pain medications on an as needed basis.

At the time of his fall, Conley had been treating with Dr. Bryne for an unrelated right ankle injury since 2008. Conley did not dispute medical records showing he made no mention of his left ankle or knee injury on six separate visits to Dr. Bryne following September 20, 2010. He also did not dispute records from Western Baptist Hospital emergency room dated November 19, 2010 when he sought treatment for chest pains, which likewise contained no notation of the alleged September 20, 2010 injuries. Conley testified he made various visits over the years to the emergency room at Livingston County Hospital and Western Baptist Hospital. Conley testified he had a prior left ankle injury in the 1980s requiring surgery and an arthroscopic procedure was performed on his left knee in the 1990s, from which he had a full recovery. Conley testified he currently has constant pain, has trouble walking on his left knee and his left ankle is very stiff.

When asked why he waited until April 1, 2011 to seek medical treatment, Conley testified:

Because after the accident date I didn't know anything about workmen's comp. I didn't know if it would cover me, so I didn't follow up with any of that.

When asked the same question at the hearing, Conley testified:

I was hoping there was nothing wrong with me. I mean I was hoping I wasn't injured. I just got to the point that I could not walk, so I ended up going to the emergency room

Because I didn't have insurance, and I didn't know that workman's comp would pay after the fact of the injury. I didn't have any knowledge of workman's comp.

The depositions of several co-workers were taken on December 2, 2011. John Wilson ("Wilson"), a brick mason for Varble Masonry, testified he was laying brick at the Whispering Oaks location on September 20, 2010. Wilson testified the scaffolding at that location was no more than ten feet high. On September 20, 2010, he asked Conley to get more brick. Conley got about 300 bricks, set it on the scaffold and then attempted to climb the back brace of the scaffold. Wilson testified the weight of the brick and Conley, not the trench, caused the scaffold to fall over. Conley was two to three feet off the ground when he fell.

Wilson testified Conley did not say anything about being injured, other than his arm was scratched up. The next time Wilson worked with Conley was at Dicks Sporting Goods setting up scaffold, where he testified Conley worked at least forty feet off the ground. Conley did not appear to be injured and did not say anything about his condition to Wilson.

Patrick Caldwell ("Caldwell"), a brick layer for Varble Masonry, testified he was loading a truck at the Whispering Oaks site on September 20, 2010. He saw Conley put brick on the scaffold and then try to climb up. The scaffold never fell over, but just tilted, causing Conley to fall. Caldwell testified the scaffold totaled five feet in height, but did not remember how high Conley was off the ground when he fell. Caldwell's next recollection of Conley was at the Dicks Sporting Goods site at least two months later. There, he did not notice Conley having any physical problems and did not talk to him about his condition.

Jimmy Poole ("Poole"), a bricklayer, operator and laborer for Varble Masonry, testified by deposition on December 2, 2011 and again at the hearing December 19, 2011. On September 20, 2010, he picked up Conley from his home and then proceeded directly to the Whispering Oaks site. He did not remember going to the Aspen Dental job site that day.

Poole testified they were working on five foot level scaffolding. Poole remembered Conley had stacked bricks on the scaffolding and then stepped onto the bracing approximately two feet off the ground. The weight of Conley and the bricks caused the scaffold to tip a bit, causing Conley to roll off onto the ground. Conley sat down in either the garage or under a shade tree for about forty-five minutes, and then returned to work. Conley did not say whether he was injured, and he did not appear to have any trouble working the remainder of the day. At the end of the day, Poole drove Conley back to his home. Poole testified he also worked with Conley at the Dicks Sporting Goods site, setting up scaffold approximately 30 to 35 feet in the air. He did not notice Conley having trouble climbing the scaffold and did not remember Conley complaining about any problems.

Jimmy Varble, an employee of Varble Masonry, testified at the hearing held on December 19, 2011. He testified Varble Masonry is owned by his wife, and had been in the business since 1972. He testified he was not present when Conley alleged he was injured, but came to the job site shortly thereafter. Conley told Varble he had slipped and fallen off the scaffold. Varble testified Conley rested a few minutes, then got up and worked the rest of the day.

Conley complained he was sore, but did not mention his knee or ankle, nor did he tell Varble he needed to go to the hospital. Varble denied telling Conley he could not go to the hospital and denied the scaffolding was fifteen feet tall. Varble testified he first learned Conley was filing a claim nine months after the incident. Varble also testified about the Dicks Sporting Goods job which ended October 31, 2010. Conley worked on the job the last few days by helping set up forty feet scaffolds. Conley never complained about being hurt.

Gerald Kaufman ("Kaufman"), a landlord, testified at the hearing held on December 19, 2011. He has known Conley since the 1980s and rented a house to him from August 2010 through January 2011. They had an agreement allowing Conley to stay in the house if he repaired and maintained it. Kaufman testified Conley had stopped working on the house. He asked Conley why he stopped and he stated he had gotten hurt on the job when the scaffold he was standing on fell. Kaufman testified Conley had injured his leg but he could not remember which one. He noticed Conley was "limping a little bit."

Conley submitted the medical records from Western Baptist Hospital dated April 1, 2011 and May 19, 2011 and Lourdes Hospital dated June 1, 2011. On April 1, 2011,

Conley presented at Western Baptist complaining of back, left knee and left ankle pain. Conley stated he had problems with back pain for the past twenty years and had left knee and left ankle problems since falling at work in September 2010. A left ankle x-ray demonstrated an old, healed fibular fracture and plantar calcaneal spurring. A left knee x-ray demonstrated some clothing artifact over the distal thigh, but no acute bone or soft tissue pathology. A low back x-ray demonstrated degenerative changes. Conley was diagnosed with acute-on-chronic back and knee strain, given a knee immobilizer and told to follow-up with his primary care provider.

On May 19, 2011, Conley presented at Western Baptist complaining of left ankle and left knee pain stemming from the September 2010 work accident. He was diagnosed with exacerbation of chronic left ankle and knee pain. Apparently, Conley had a dispute with the ER physician about the appropriateness of pain medication. It is unclear whether Conley left the emergency room before receiving a pain shot.

On June 1, 2011, Conley presented at Lourdes Hospital complaining of left knee pain starting when he fell at work from scaffolding five feet in height. A left knee MRI revealed 1) diffuse soft tissue edema, 2) anterior horn

lateral meniscus tear, 3) evidence of old PCL injury, and 4) evidence of MCL and retinacular strain. Conley was diagnosed with left lateral meniscus tear, recommended to use crutches, prescribe pain medication, restricted from work for seven days and told to follow up with Dr. Hunt.

Conley submitted the June 23, 2011 medical record of Dr. Philip Hunt, an orthopedic surgeon. Conley provided a history to Dr. Hunt of injuring his knee in September 2010 at work when he fell from a scaffold and was told not to go to the hospital. Conley stated his knee pain worsened and he eventually went to the emergency room. Dr. Hunt diagnosed left knee torn lateral meniscus per the June 1, 2011 MRI and discussed with Conley the possibility of arthroscopic surgery. Dr. Hunt restricted Conley from work until after the surgery, and he prescribed pain medication.

Varble Masonry submitted medical records from Western Baptist dated March 15, 2010, October 7, 2010 and November 19, 2010. On March 15, 2010, Conley presented at Western Baptist with abrasions to his face, loose teeth and right knee pain after he fell down his front porch steps. He was diagnosed with alcohol intoxication, dental avulsion/subluxation and multiple facial abrasions. On October 7, 2010, approximately two weeks following the alleged work accident, Conley presented with right ankle pain. On

November 19, 2010, Conley presented with headaches and chest pain. He was released after diagnostic studies were read as normal.

Varble Masonry submitted the medical records of Dr. Harry Byrne, a podiatrist, who began treating Conley for an unrelated right ankle injury in 2008. Dr. Byrne's records indicate Conley treated on a monthly basis. Conley treated with Dr. Byrne on October 12, 2010 and November 30, 2010 for his right ankle and records reveal no complaints regarding his left ankle or left knee. On January 17, 2011, Conley presented with a "left ankle sprain 3 weeks ago" and was prescribed pain medication. On March 7, 2011 and May 5, 2011, Dr. Byrne treated Conley for his continuing right ankle problems, and made no notation of left knee or ankle complaints. Beginning on June 7, 2011, Dr. Byrne noted complaints of left knee pain and ankle pain which Conley attributed to the work accident.

In an opinion and order dated February 3, 2012, the ALJ found Conley gave reasonable notice to Varble Masonry of the work injury. The ALJ found Varble's testimony amounted to an admission of due and timely notice of Conley's work accident. However, the ALJ dismissed Conley's claim based upon lack of work-relatedness/causation, stating as follows:

3. Work-relatedness/causation.

An employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his workers' compensation claim. Snawder vs. Stice, 576 SW2d 276 (Ky.App., 1979). While it is apparent to the undersigned that Plaintiff had some type of work accident on September 20, 2010, I find there is not sufficient evidence to link that accident to any of Plaintiff's proffered physical maladies from which he now suffers. The review of the chronology of events convinces the undersigned that Plaintiff did not suffer a trauma on September 20, 2010 for which he sought medical treatment. A review of the medical evidence indicates that the first mention in any medical record of any left lower extremity problem after September 20, 2010, was on January 17, 2011. However, that record mentions a left ankle sprain that occurred just three weeks prior to his medical treatment - and does not mention the September work incident. Thereafter, it isn't until April 1, 2011 that he gives a medical provider a history of his September 2010 work incident and relates it to his presenting complaint.

In short, I find that the Plaintiff has not met his legal burden in proving that his work accident resulted in any injury for which he is entitled to workers' compensation benefits. I have carefully reviewed the deposition testimony of the Plaintiff's co-workers. I have also considered the testimony of the witnesses appearing at the hearing in this matter and have given that testimony its proper weight. Plaintiff avers that Mr. Varble directed him to

not seek medical attention the day of the accident. However, the record confirms that Plaintiff was a fairly regular consumer of medical care and prescription pain medications. I do not find his testimony credible that he simply did not want to go to the hospital because Mr. Varble instructed him not to go. I also did not find credible Plaintiff's testimony that his left leg and back symptoms began September 20, 2010 and simply progressed to the point where he finally sought medical treatment in April of 2011.

This is a bifurcated claim and because I have found that Plaintiff has not sustained a work related injury for which he is entitled to benefits, the remaining contested issues are moot. I find that the Plaintiff, Mark A. Conley has not met his burden of proving a work-related injury for which he is entitled to workers' compensation benefits pursuant to KRS 342.730 and his claim shall be dismissed.

On appeal Conley argues the ALJ erred in determining a lack of work-relatedness/causation. Conley argues the undisputed medical evidence, mainly the June 1, 2011 left knee MRI and Dr. Hunt's June 23, 2011 record, show a left knee injury. Conley asserts Dr. Hunt's record links his left knee injury to the September 20, 2010 accident and is unrebutted. Conley explains why he did not seek medical treatment for his left knee and ankle until April 1, 2011 and points out the lack of evidence on causation submitted by Varble Masonry. On appeal, Varble Masonry argues Conley

committed fatal errors by identifying the wrong claim number in his notice of appeal and wrong respondent in his brief to this Board.

As the claimant in a workers' compensation proceeding, Conley had the burden of proving each of the essential elements of his cause of action including causation/work-relatedness of the alleged injuries. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Conley was unsuccessful before the ALJ regarding work-relatedness/causation, the question on appeal is whether the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence 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).

In the case *sub judice*, no petition for reconsideration was filed. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate

conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 200). 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 reasonable

inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

That said, we find the evidence does not compel a finding of causation linking the September 20, 2010 accident to Conley's current left knee and ankle complaints. The ALJ relied upon the chronological events, the deposition testimony of several co-workers, and the hearing testimony. As noted by the ALJ, Conley made no mention of left ankle or left knee problems to any medical provider until April 1, 2011, approximately eight months following the work accident, despite receiving medical treatment for other maladies following September 20, 2010. The ALJ acted within her discretion in finding not credible Conley's testimony regarding his statement Varble told him not to go to the hospital as his reason for not seeking treatment until April 2011. Conley points out Varble Masonry did not provide any evidence of lack of causation; however, that is not its burden.

We believe the ALJ's decision finding a lack of causation between Conley's alleged left knee and ankle conditions and the September 20, 2010 work accident is supported by substantial evidence, and no contrary result is compelled. Accordingly, the ALJ's decision rendered February 3, 2011 is hereby **AFFIRMED**.

ALL CONCUR.

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