OPINION ENTERED: December 21, 2012

CLAIM NO. 201200195

MELISSA CRUTCHER PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

NEW DIRECTION
CATHY MILLER
UNINSURED EMPLOYERS FUND
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Melissa A. Crutcher ("Crutcher") seeks review of the opinion and order on the bifurcated issue of work-relatedness rendered August 21, 2012, by Edward D. Hays, Administrative Law Judge ("ALJ"), dismissing her claim against New Direction-Cathy Miller ("New Direction")

and the Uninsured Employers' Fund ("UEF"). Crutcher also appeals from the order denying her petition for reconsideration issued on September 20, 2012.

On appeal, Crutcher argues the evidence compels a finding that she was the innocent victim of an assault, and even if she merely intervened in a dispute, her injuries are compensable. We disagree and affirm.

Crutcher testified at the hearing held June 27, 2012. She is a resident of Louisville, Kentucky who was born on July 6, 1973. In the Form 101 filed on February 14, 2012, Crutcher alleged injuries to her "head, hair, neck, shoulders, arms, back and knees from an assault at work". She alleged she was assaulted by a patron at the bar where she worked on December 10, 2011.

At the time of the assault, Crutcher was employed by New Direction as a server and cook. On Friday evenings she worked as a server, and at all other times she was a cook. At the time of the incident, two female patrons were arguing regarding relationships with a male. She knew no one involved in the incident, except for the male. As Crutcher was walking away from the table where the argument was taking place, she was allegedly grabbed from behind by her hair and slammed to the ground. She stated she then received several body punches, and was unable to get up

from the floor. Prior to being slammed to the ground, she claimed she was jerked around by her hair. She denied using derogatory language or name-calling directed toward either patron. She further testified she had been instructed to advise management if an altercation occurred between patrons.

After the incident, Crutcher completed her shift because she stated her employer would not let her leave. She later went to the hospital. The following evening she attended the employee Christmas party, but left early due to an alleged concussion. She continued to work for New Direction until January 31, 2012. Crutcher stated she has received Medicare and Medicaid since she was young.

Crutcher filed a bill from the Norton Brownsboro Hospital with the Form 101, in the amount of $4,905.00 for treatment administered December 10, 2011. She later filed the records of Dr. Mark Barrett. In a record dated March 12, 2012, Crutcher provided a history of having her hair grabbed from behind by a patron on December 10, 2011. She stated she was then thrown to the floor, punched and beaten. She stated she was struck in the head and shoulders, possibly by a beer bottle, and lost consciousness at the scene. On March 23, 2012, Dr. Barrett noted Crutcher complained of neck pain radiating into her

right shoulder and arm, which had worsened with physical therapy.

The UEF filed records from the Norton Brownsboro Hospital. Those records reflect Crutcher provided a history of being hit in the head multiple times with fists and a beer bottle. Those records further reflect Crutcher underwent neck and clavicle decompression surgery in 2009. A CT-scan dated December 10, 2011, detected no abnormality of the cervical spine, and a CT-scan of the head taken at the same time identified no acute abnormality.

Alicia King ("King"), a bar patron at the time of the incident, testified by deposition on April 19, 2012. She was involved in an altercation with Crutcher on December 10, 2011. King advised she was engaged in an argument with Stacie Hope ("Hope"), when the altercation occurred. King specifically testified as follows:

> She (Crutcher) jumped into the argument and had called me a name, and then after that she come[sic] around to the table where I was at, and then both of her - - me and her had grabbed each other's hair. We had another man in between us, and that's what had happened. We were just - - we had ahold of each other's hair.

King later testified as follows:

> Q. Would you characterize Melissa as trying to break up the fight?

> A. Trying to break up a fight?
>
> Q. Yes.
>
> A. The altercation between me and the other girl?
>
> Q. Yes.
>
> A. No, because she called me a bitch. She was jumping into it to argue.
>
> Q. So she wasn't trying to break the two of you up?
>
> A. No, we were just having, like a verbal altercation. I mean, it wasn't physical. I told this woman to go home to her husband.

Subsequent to being called a derogatory name by Crutcher, King could not remember whose hair was pulled first. She recalled no one had been knocked down, or had fallen to the floor. She was wearing a knee brace at the time and indicated she would have recalled falling. When the police officer broke up the fight, she and Crutcher were still pulling each other's hair. King was arrested because she did not release Crutcher's hair when instructed to do so.

Sean Pate, an officer with the Louisville Metropolitan Police Department, testified by deposition on June 5, 2012. On December 10, 2011, he was working off-duty security at New Directions. He knew Crutcher as an

employee at the establishment. At the time of the altercation between Crutcher and King, he was already in the bar due to another altercation. He saw King holding Crutcher's hair. He arrested King because she would not release Crutcher's hair after being told to do so. He observed no fist fighting, no one hit with a bottle, and no one on the floor.

Kevin Hedges ("Hedges") testified by deposition on June 5, 2012. He has been a patron of New Directions for several years. On December 10, 2011, King accompanied him to the bar. He observed King arguing with Hope. He stated Crutcher interrupted and instigated the fight with King. He stated he saw Crutcher grab King's hair. King then grabbed Crutcher's hair, and they both fell to the floor. No one was hit with a beer bottle. Crutcher and King had returned to their feet by the time the police officer arrived.

Brittany Powell, a bartender at New Directions, testified by deposition on June 5, 2012. She was working at the bar on December 10, 2011. She observed King pulling Crutcher's hair, but did not know what precipitated the incident. She did not observe what started the fight or how it was broken up.

Carlos Moore testified by deposition on June 5, 2012. He works as a cook, and performs maintenance duties for New Direction. He was working there on December 10, 2011. He knew Crutcher had gotten into a fight, but he did not observe it, and he knew no details of the incident.

Catherine Miller ("Miller"), the owner of New Direction, testified by deposition on June 5, 2012. She stated Crutcher was employed as a cook and server at the bar on December 10, 2011. Miller testified she had seen Crutcher conversing with Hope on numerous occasions prior to the incident. She also stated Crutcher knew Hope was involved with Hedges. Miller did not observe the altercation, but noted Crutcher alleged King grabbed her hair. She stated Crutcher had been advised not to become involved in fights. She stated Crutcher completed her shift after the altercation and returned to work the next evening. She stated Crutcher had additional employment at a hotel in Louisville at the time of the incident. Crutcher at no time presented any medical bills to Miller for payment. Miller first learned Crutcher was claiming a work-related injury when she was served with the claim on January 31, 2012.

In his decision issued August 21, 2012, the ALJ found as follows:

Based upon a review of all of the lay testimony contained within the file, the ALJ does hereby make the following findings of fact and conclusions of law with reference to the sole issue as to whether or not the alleged injuries sustained by the plaintiff, Melissa A. Crutcher, occurred within the course and scope of her employment. The gist of the issue now before the ALJ is whether the physical altercation between Melissa Crutcher and Alicia King was related to the work of Ms. Crutcher or arose out of some personal relationship or some origin other than the work activities. The Defendant, Uninsured Employers' Fund, argues the altercation had no relation to the work which plaintiff was doing. Alternatively, the plaintiff argues the positional risk theory, Corken v. Corken Steel Products, Ky., 385 S.W.2d 949 (1965), claiming that Ms. Crutcher's job placed her in the presence of what turned out to be a place of danger; thus, the injuries would be compensable. The Plaintiff describes herself as an "innocent victim."

The Uninsured Employers' Fund has cited Carnes v. Tremco Manufacturing Co., 30 S.W.3d 172 (Ky. 2000) for the proposition that a compensable injury must arise both "out of" and "in the course" of employment. The court in Carnes stated "the Compensation Act does not afford compensation for injuries or misfortunes which are merely contemporaneous or coincident with the employment or collateral to it. There must be a direct causal connection between the employment and the injury," citing January-Wood Co. v. Schumacher, 231 Ky. 705, 22 S.W.2d 117 (Ky. 1929).

The Plaintiff claims to have overheard Ms. King stating that she had grabbed the wrong girl, presumably meaning that King had intended to grab Stacey, who had been taunting her all night about her relationship with Hedges. The Plaintiff has maintained from the beginning that she was just doing her job as a waitress on that particular night and that for no reason and without warning, she was grabbed by the hair of her head and slammed to the floor. As Officer Pate testified "Melissa (Crutcher) acted like it was an assault out of the blue." In analyzing the circumstances surrounding this incident, the ALJ has compared the testimony of the various witnesses and participants and has attempted to find inconsistencies upon which reliable inferences can be drawn.

The most critical evidence in the opinion of the ALJ is the inconsistency in testimony given as to whether or not Ms. Crutcher knew Stacey Hope prior to this incident. Ms. Crutcher testified that she did not know Stacey and did not know anything about her, that she had never met her or had any relationship with her whatsoever prior to this night. Ms. Cathy Miller, the owner of the bar/restaurant, testified otherwise (see page 15 of Miller deposition). Ms. Miller stated that she remembered having seen Ms. Crutcher speak to Stacey on a number of occasions. She testified she had even observed Ms. Crutcher sitting at the bar with Stacey on her (Crutcher's) days off and "acquainted (sic) with her." Ms. Miller was positive that the plaintiff knew Stacey, at least as a customer, and she also knew that Stacey was involved with Kevin Hedges. Although Ms. Miller stopped short of characterizing Ms. Crutcher and Stacey

as “friends”, she was certain that they enjoyed a relationship of being “acquaintances.”

The other major area of inconsistency focuses on the testimony regarding the origin of the altercation. The Plaintiff has steadfastly maintained that she was suddenly and without warning grabbed by the hair of her head from the back and pulled or slammed to the floor. She testified that at first she thought she was a robbery victim. Others described the incident quite differently. Mr. Hedges testified that he was sitting with or standing by Ms. King when Ms. Crutcher approached and grabbed Ms. King by the arm. The two women then engaged each other by pulling each other’s hair and the scuffle or altercation was underway. Ms. King testified that Ms. Crutcher was beside Stacey and was supportive of Stacey’s taunting and making fun of Ms. King because of the prior relationship between Stacey and Mr. Hedges. Ms. King testified that Melissa called her a “bitch” and interjected herself into the argument between Stacey and Ms. King.

When Office Pate was called to the scene, he stated that Ms. King had a grip on the plaintiff’s hair and would not let go. When questioned why he had arrested Ms. King, and not Ms. Crutcher, he indicated that he would not have arrested Ms. King, but for the fact that she refused to let go of the hair. Officer Pate also emphasized that the assault warrant was pursued by Ms. Crutcher and not on the basis of his observations. Ultimately, Ms. Crutcher failed to attend a court proceeding and did not fully follow

through with the criminal prosecution of Ms. King.

The inconsistency and the statements of the claimant and the witnesses to the event have created a difficult decision. However, it is the plaintiff's burden of proof to prove every essential element of his or her claim. The claimant bears the burden of proof and the risk of non-persuasion. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). In the case at hand, the ALJ has serious doubts as to the accuracy of the claimant's version of the events of the night in question. It is difficult to accept the fact that Ms. King would have confused the claimant with the woman (Stacey) who had been her tormentor for much of the evening. Although the ALJ is not impressed with the credibility of either Ms. King or Mr. Hedges, the ALJ has no reason to doubt the testimony of Cathy Miller, the owner of the business. Ms. Miller was positive that she had seen the plaintiff talking to Stacey on numerous occasions prior to that night. The ALJ finds Ms. Miller's testimony to be more believable and deserving of credibility. The reason that the question of whether or not Ms. Crutcher and Stacey knew each other prior to this night is that if so, such fact lends credibility to the version given by Ms. King and Mr. Hedges. It makes it much more believable that Ms. Crutcher intervened or meddled in the argument between Stacey and Ms. King. It also creates the question of why Ms. Crutcher would have denied her acquaintanceship with Stacey if she was in fact an innocent victim as she claimed.

> The Plaintiff having failed to sustain her burden of proof that the altercation arose out of and in the course of her employment, and having failed to prove a direct causal connection between the employment and the altercation (injury) of which plaintiff complains, the ALJ must dismiss the plaintiff's claim in its entirety. This is not a situation of an innocent victim being the target of a mistaken assault. This is not a case of an increase in risk due to the employment. It is a situation in which personal relationships were placed above the interests and objectives of the employment.

Crutcher filed a petition for reconsideration on August 29, 2012, arguing the ALJ failed to consider that King was intoxicated at the time of the altercation. Crutcher also argues the ALJ's statement he had no reason to doubt Miller's testimony, is incorrect, because Miller as an uninsured employer "would be required to reimburse the UEF for any payments made in a compensable claim". Finally, Crutcher asserted the ALJ misconstrued the holding in Corken v. Corken Steel Products, 385 S.W.2d 949 (Ky. 1965), and should have found the claim compensable.

The ALJ denied the petition for reconsideration in an order issued September 20, 2012 stating Crutcher was merely attempting to re-argue her position, and not attempting to correct errors pursuant to KRS 342.281.

On appeal, Crutcher argues the evidence compels a finding that she was an innocent victim of an assault in the course and scope of her employment, and therefore her injuries are compensable.

A claimant in a workers' compensation claim bears the burden of proving each of the essential elements of the cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). The question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in Crutcher's 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). As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995).

The ALJ, as fact-finder, may 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. Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to compel reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In this instance, we conclude a contrary result is not compelled.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that 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, *supra*.

We acknowledge the existence of conflicting evidence. However, the ALJ, as fact-finder, is free to pick and choose whom and what to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003). For that reason,

we cannot say the ALJ's conclusions were unreasonable based upon the evidence. Speedway/Super America v. Elias, 285 S.W.3d 722, 730 (Ky. 2009); Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003).

Crutcher's testimony that she was an innocent victim is contradicted by evidence to the contrary. As noted by the ALJ, both King and Hedges testified Crutcher deviated from her employment and initiated the assault. This supports the ALJ's determination.

KRS 342.0011(1) defines "injury" as meaning "any work-related traumatic event . . . arising out of and in the course of employment…" The test for whether an injury arises out of the workers' employment is whether the cause had its origin in a risk connected with the employment and the injury flowed from that source as a natural and rational consequence. City of Prestonsburg v. Gray, 341 S.W.2d 257, (Ky. 1960). A workplace assault is not compensable if it is related to a personal grievance between the parties. However, it is compensable if the conditions and circumstances of the employment facilitated the assault. Carnes v. Tremco Manufacturing Co., 30 S.W.3d 172 (Ky. 1999). Crutcher had the burden of proving a direct causal connection between her employment and the altercation.

In January-Wood Company v. Schumacher, 22 S.W.2d 117(Ky. 1929), Ben Schumacher was the sole night watchman at his employers' cotton mill. On December 9, 1919, Schumacher was shot and killed by Henry L. Eddings while making the rounds in a remote part of the building. The evidence established there had been intimate relations existing between Eddings and Schumacher's wife. On that date, Eddings traveled from Lexington, killed Schumacher, and then returned to Lexington.

The Court stated: "The Compensation Act does not afford compensation for injuries or misfortunes which are merely contemporaneous or coincident with the employment or collateral to it." *Id.* at 120. The Court determined the injury must have flowed from a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of exposure occasioned by the nature of the employment in order to arise out of the employment. The Court stated "In the instant case the personal animosity of Eddings was the direct cause of the employee's death. He did not kill Schumacher because he was the company's watchman on duty, but because he was the husband of his paramour." *Id.* The Court stated the fact his employment placed him in a place which provided the murderer an opportunity to carry out his

plans did not mean the injury arose out of the employment. The Court held Schumacher's death could not be traced to any cause set in motion by his employment. The Court held that his murder on company premises for reasons wholly unconnected with his employment and entirely unassociated with the relation existing between his employer and himself did not justify an award of compensation. *Id.*

In Bluegrass Pasture Land Dairies v. Meeker, 105 S.W.2d 611 (Ky. App. 1937), a milkman was killed by a jealous husband who believed an intimate relationship had developed between the milkman and his wife. The milkman had been making deliveries of milk to the residence for quite a while before he met his death. In the course of time, the husband became convinced that an intimacy had grown up between the milkman and his wife. On the day prior to the milkman's death, the husband went to the milk company's office and paid his bill. The husband then alleged he informed the officers in charge of the milk company office he was withdrawing himself as a customer because of the milkman's undue intimacy with his wife. The husband stated he told the officers to not allow the milkman to come about his residence any more. The officers at the company stated the husband made no statement concerning any reason why he was withdrawing his patronage,

but he said he was going to obtain milk from a different vendor. Conflicting testimony was provided regarding the events that led to the murder. However, the Court was not concerned whether there was actually an intimate relationship between the milkman and the wife, but rather what the husband believed.

The Court stated:

> Here, as in the January-Wood Company Case, and as in the Scholtzhauer Case, the cause of injury to and death of the servant was something wholly independent of, and by no means incident to the employment of the servant; nor did it result from or grow out of the performance of any duty that he owed to or was discharging for the master. Whether Poulter was correctly informed about the alleged intimacy between the deceased and his wife, or whether he had been given false information concerning that matter and entertained an erroneous impression relating thereto, can make no difference in this case, since the fact is that he, according to the undisputed proof, was then laboring under the impression that his domestic peace and happiness had been invaded by Meeker, the deceased servant. Such belief had engendered in his breast hostility toward the servant, and the killing resulted solely from that fact, and from no fact incidental to, issuing from, or growing out of the servant's employment; the latter serving only to make an occasion for Poulter's wreaking vengeance and inflicting the injuries complained of. Another domestic case supporting the same view is that of Scott Tobacco Company v. Cooper, 258

> Ky. 795, 81 S.W.2d 588. Duly regardful of the interpretations to which we have referred, we see no escape from the conclusion that this case should be governed by the principles announced in the January-Wood Company Case, which is the one more directly in point than any of the others, and which we conclude is conclusive of the question herein involved.

More recently, in Carnes v. Tremco Mfg. Co., *supra*, the Supreme Court reaffirmed that reasoning. Carnes was murdered by a co-worker after she broke off her relationship with him. The ALJ determined the murder did not arise out of the employment and dismissed the claim. The ALJ reasoned no work-related events gave rise to the murder, which resulted from the purely personal relationship of Carnes with the co-worker. The ALJ was not persuaded the employment had exacerbated or facilitated Carnes' death simply because she was working on a Sunday or because the employment provided the co-worker with an opportunity to carry out the murder. The ALJ noted no Kentucky authority was precisely on point, and concluded the mere fact the murder occurred in the workplace was not a sufficient causal nexus from which to conclude it arose out of the employment. The Board, the Court of Appeals, and the Supreme Court all agreed the evidence did not

compel a finding Carnes' injury arose out of the employment.

Although Crutcher was involved in an altercation at work, she had the burden to establish the injury occurred due to her employment. Stapleton v. Fork Junction Coal Co., 247 S.W.2d 372 (Ky. 1952). This was confirmed in Williams v. White Castle Systems, Inc., 173 S.W.3d 231 (Ky. 2005), where the Kentucky Supreme Court stated although a worker's injuries occur on the employer's premises, the burden is on the one seeking compensation to establish it was connected to the individual's work in order for it to be compensable. *Id*. at 235. The cause of the injury must have its origin in a risk connected with the employment, and the injury must flow from that source as a rational consequence. Harlan Collieries Co. v. Shell, 239 S.W.2d 923 (Ky. App. 1951). The purpose of the Workers' Compensation Act is to cover occupational injuries and, therefore, the injuries must have some causative connection with something peculiar to the employment. *See* Warfield Natural Gas Co. v. Muncy, 244 Ky. 213, 50 S.W.2d 543 (1932).

The case *sub judice*, while not involving the tragedies noted in the cases cited above, is similar to those cases in many other respects. Here, as in those cases, the ALJ

determined Crutcher's altercation did not stem from her employment. The ALJ clearly reviewed all evidence of record, and determined the altercation was due to reasons other than Cutcher's employment. He therefore found her claim to be non-compensable. The ALJ's conclusions are supported by the record, and a contrary result is not compelled.

Accordingly, the Opinion and Order on Bifurcated Issue rendered August 21, 2012 by Hon. Edward D. Hays Administrative Law Judge, and the order on reconsideration issued September 20, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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