Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 27, 2015

CLAIM NO. 201374192

MILLER PIPELINE PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

LARRY PRICE
HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Miller Pipeline ("Miller") seeks review of a decision rendered October 21, 2014 by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), awarding Larry Price ("Price") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for a left knee injury he sustained at

work on June 14, 2013. Miller also appeals from the order denying its petition for reconsideration issued on October 21, 2014.

On appeal, Miller argues the ALJ abused his discretion in finding Price's injury is work-related. Miller also argues the 7% impairment rating assessed by Dr. Warren Bilkey does not comply with the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides"). Because the ALJ's decision is supported by substantial evidence, and he did not err in relying upon the impairment rating assessed by Dr. Bilkey, we affirm.

Price filed a Form 101 on October 17, 2013 alleging he sustained a left knee injury while digging at work on June 20, 2013. Price subsequently amended the Form 101 to reflect the correct injury date is June 14, 2013.

Price, a resident of Louisville, Kentucky, testified by deposition on January 23, 2014, and again at the hearing held August 26, 2014. Price completed the eleventh grade, obtained a GED, and subsequently attended Jefferson Community and Technical College where he earned a certification in industrial maintenance after completing nine months of coursework. Price has a varied employment experience including working as a press operator, cooperage

production worker, technical operator at a gasoline supply facility, laboratory air monitor, food production operator, pipeline worker and hazardous waste disposal worker.

Price was digging a hole at work on the afternoon of Friday, June 14, 2013 when his shovel hit a rock causing his left knee to twist. He immediately experienced a burning pain in the left knee, but completed his shift. He did not initially believe he had sustained a serious injury. He rested over the weekend, but the left knee continued to bother him. He worked the next week, then was off for a week for vacation. He stated he discussed the left knee injury with his supervisor both on the date of the accident, and during the following week. He did not complete an accident report because he was hopeful the problem would resolve, and he did not want to be ridiculed by the area manager at a safety meeting.

He returned to work on July 1, 2013, and worked part of a shift. He left early and saw Dr. Bridgette Hittepole, his family physician. He stated Dr. Hittepole took him off work, prescribed pain medication, ordered crutches, and referred him to Dr. Raymond Shea, an orthopedic surgeon. He returned to the worksite to update his supervisors. He has not worked since that date.

Dr. Shea performed arthroscopic surgery on August 7, 2013. Price stated the surgery was not very beneficial. He continues to have left knee pain and swelling. Subsequent to the surgery, Price has had multiple Cortisone injections and fluid drained from the knee. He stated he uses a cane recommended by Dr. Shea. He also takes anti-inflammatory and pain medication. Price can only stand for approximately half an hour before he experiences pain. He stated he could not return to the job he performed at Miller, which he stated involved occasional lifting of seventy to one hundred pounds, and frequent shoveling. Likewise, he stated he could not perform most of the jobs he had performed in the past.

Jess Woodruff ("Woodruff"), Miller's area manager for Kentucky and Southern Indiana, testified by deposition on March 10, 2014. Woodruff is the primary custodian for all Miller records at the Louisville location. He stated Price no longer works there, and has made no contact since July 1, 2013. He stated Price worked there for five or six years. He additionally stated all employees are instructed on the proper procedure for reporting an accident through periodic training and weekly safety briefings. Woodruff first learned of Price's alleged left knee injury at the end of the day on July 1, 2013. According to Woodruff,

Price did not exhibit a limp until he returned from vacation. On July 1, 2013 Price left work to have his knee "checked out" and never returned. Woodruff stated he has had no contact with Price since that time.

Samuel Joseph Hoehn ("Hoehn"), the superintendent for Miller at the Louisville location, testified by deposition on February 28, 2014. Only Woodruff is senior to Hoehn at the Louisville location. Hoehn ensures crews are staffed, equipped and safely perform their job duties. He stated Price was one of 110 laborers at the Louisville location. Hoehn could not definitely state he saw Price between June 14, 2013 and July 1, 2013. He stated he received no report of an injury from Price. On July 1, 2013, Price actually went to work at a jobsite.

James Phillip Linton ("Linton") testified by deposition on March 13, 2014. He is a supervisor for Miller. He first learned Price was alleging a work-related left knee injury on July 1, 2013. Linton stated the reporting policy is discussed fairly often in safety meetings. He stated the proper procedure is to report the injury to a supervisor and then call a company hotline. Herb Yarborough ("Yarborough"), Price's direct supervisor, never reported the injury to him. On July 1, 2013, he asked Price about the knee. Price advised he was seeking

medical treatment, but did not report he was alleging the left knee injury was work-related. Linton completed a first report of injury on July 1, 2013. When Price returned from the doctor's visit on July 1, 2013, he had a prescription bag, and stated his injury was work-related.

Yarborough, Price's direct supervisor, testified by deposition on February 28, 2014. He is now Miller's safety compliance and quality coordinator in Louisville. He stated he was unaware of Price sustaining a left knee injury on June 14, 2013 while digging a hole. Price provided no notice of a left knee problem before he left for vacation. He stated Price's job involved shoveling, bending, twisting, stooping and walking.

Robert Sweatt ("Sweatt") testified by deposition on February 28, 2014. He is a crew leader for Miller. On June 14, 2013, he and Price worked on the same crew. Yarborough was the crew leader at that time. He stated the job requires digging but no heavy lifting. He worked with Price on June 14, 2013, although he could not remember which jobsite they were at on that date. Sweatt stated he did not notice Price lifting or complaining of a problem with any body part. When Price returned from vacation, he had a problem with the left knee. Sweatt stated Price left the jobsite on July 1, 2013 and never returned.

Price filed the July 1, 2013 office note of Dr. Hittepole. She noted Price complained of left anterior and medial knee pain, starting approximately ten days prior. She noted Price thought he stepped in a pothole and twisted his knee at that time. He initially took Aleve to help with his problem, but when it no longer worked, he sought medical treatment. Dr. Hittepole diagnosed a left knee injury with an acute meniscal tear of the left knee. She ordered an MRI of the left knee which revealed a tear in the posterior horn of the medial meniscus, slightly discoid lateral meniscus, and degenerative joint disease. She referred Price to Dr. Shea.

Price filed numerous records from Dr. Shea who first saw him on July 31, 2013. In his first office note, Dr. Shea referred to the right rather than the left knee. He recited the history of a twisting injury at work on June 14, 2013. Surgery was scheduled. The operative note of August 7, 2013 indicates Dr. Shea performed an arthroscopic medical meniscectomy, and chondroplasty of the patellofemoral joint and medial foraminal condyle. On August 12, 2013, the sutures were removed and Price was scheduled for a Synvisc injection. Follow-up records from August 28, 2013 and October 7, 2013 stated he was doing well after the surgery.

On December 9, 2013, Dr. Shea noted Price had fluid in his left knee, which he aspirated. He stated the left knee surgery was necessitated by the work injury. On January 9, 2014, Dr. Shea noted continued complaints of left knee pain. He again aspirated the left knee, prescribed a Medrol dose pack and ordered a knee brace. On January 14, 2014, the left knee was swollen, which he again aspirated and administered a Cortisone shot. He again stated the injury was work-related, and Price would have a permanent impairment rating. On February 27, 2014, Dr. Shea stated Price has inflammatory arthritis in the left knee, and has been fighting fluid since the surgery. He noted ongoing swelling and complaints of pain. He stated Price may require a partial knee replacement.

Dr. Warren Bilkey examined Price on December 11, 2013. He noted the history of a June 14, 2013 twisting injury of the left knee. He diagnosed a left knee strain, medial meniscus tear, and aggravation of degenerative joint disease. He stated Price had undergone a surgical meniscectomy and chondroplasty of diseased cartilage. Dr. Bilkey stated Price had reached maximum medical improvement ("MMI") and may be a candidate for a knee brace. Price could return to regular duty, but should avoid lifting over fifty pounds occasionally, climbing more than six feet by

ladder, repetitive squatting, and limit walking on irregular terrain. He assessed a 7% impairment rating pursuant to the AMA Guides.

In a May 14, 2014 response to comments by Dr. Martin Schiller who evaluated Price at Miller's request, Dr. Bilkey explained why Table 17-5 of the AMA Guides, upon which he relied, was appropriate. He explained Dr. Schiller misinterpreted, and did not fully recite the criteria for that table. He reiterated the 7% impairment rating he previously assessed was appropriate. He further noted Price may have had a pre-existing dormant, but not active arthritis.

In his report dated February 20, 2014, Dr. Schiller noted Price exhibited no signs of symptom magnification. He stated Dr. Bilkey utilized the wrong table when assessing Price's impairment rating. Dr. Schiller noted Price had no cane or crutches with him on the date of his examination. Price advised he injured his left knee while digging at home on June 4, 2013.[1] He stated Price had discomfort in the left knee prior to that date due to squatting. He noted the August 2013 surgery, and although Price was better afterward, he still had some

[1] This may have been a typographical error.

complaints. Dr. Schiller assessed a 9% impairment rating of which 1% was due to the meniscal tear, and 8% was due to the pre-existing arthritis. He stated Price probably could not return to a job requiring squatting, lifting or crawling, and should also avoid climbing. In response to a specific question regarding causation, Dr. Schiller stated as follows:

> Q. 2. Is the fact that he delayed actual treatment from the injury event of June 14, 2013 to July 1, 2013 consistent with an injury?
>
> A. Yes. This is quite possible especially since the patient had symptoms in his knee from arthritis for a long time prior to this particular injury. There is no judgment that I can make regarding the timing of the surgery. It was only necessary because Dr. Shea concluded that he had a torn medial meniscus which was not improving.

A Benefit Review Conference ("BRC") was held on June 19, 2014. The BRC order and memorandum reflects the issues preserved for determination included whether Price retains the capacity to perform the work performed on the date of injury; benefits per KRS 342.730; correct calculation of the average weekly wage; work-relatedness/ causation; notice; unpaid medical expenses; entitlement to TTD benefits; and medical benefits.

In his opinion rendered October 21, 2014, the ALJ concluded Price sustained a work-related left knee injury on June 14, 2013, for which he provided due and timely notice. The ALJ awarded TTD benefits, PPD benefits based upon the 7% impairment rating assessed by Dr. Bilkey which he enhanced by 3.4 pursuant to KRS 342.730(1)(c)1 & 3 based upon the inability to perform his previous job and his age. He also awarded medical benefits.

Miller filed a petition for reconsideration on November 3, 2014 arguing it was patent error for the ALJ to find a seventeen day delay constituted adequate notice. Miller additionally argued the ALJ erred in not relying upon the testimony of the supervisors and co-workers. Miller next argued the ALJ erred in relying upon the impairment rating assessed by Dr. Bilkey because it was incorrect. The petition for reconsideration was denied by order entered November 26, 2014 as being nothing more than an attempt to reargue the merits of the claim.

On appeal, Miller argues the ALJ abused his discretion in finding Price's injury was work-related, and in relying upon the impairment rating assessed by Dr. Miller. We find the ALJ properly exercised his discretion, and find no error. He provided an adequate explanation of why he found the claim compensable. We also note on pages

17 through 19 of his opinion the ALJ explained why notice was due and timely. He specifically noted Price did not want to be ridiculed over what he believed was not a permanent injury. It was only after the problem did not resolve with rest that he sought medical treatment. We find no error with either the ALJ's finding or explanation.

We also note the ALJ outlined why he relied upon the impairment rating assessed by Dr. Bilkey. He stated Dr. Bilkey successfully refuted the criticism levied against his use of Table 17-5. We likewise note Dr. Bilkey's explanation why he relied upon the particular table, and why Dr. Schiller's opinion was incorrect. Significantly, no evidence was introduced to refute this explanation. Again, we find the ALJ did not err in relying upon Dr. Bilkey's assessment of impairment.

As the claimant in a workers' compensation proceeding, Price had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Price was successful in that burden, the question on appeal is whether there was substantial evidence of record to support 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). 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). In that regard, the ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that 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). 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 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, 998 S.W.2d 479 (Ky. 1999).

With that standard in mind, we find no error concerning the ALJ's determination Price sustained a work-related injury, provided due and timely notice, and was entitled to TTD, PPD and medical benefits. We believe ample substantial evidence exists to support the ALJ's determination and he did not abuse his discretion.

Accordingly, the decision rendered October 21, 2014 by Hon. Robert L. Swisher, Administrative Law Judge, and the order on reconsideration issued November 26, 2014 are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON WALTER A WARD
HON DONALD J NIEHAUS
333 WEST VINE ST, STE 1100
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON ALLISON ZOELLER
429 W MUHAMMAD ALI BLVD, STE 1102
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON ROBERT L SWISHER
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601