Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 23, 2015

CLAIM NO. 201400118

OSMARO MONTOYA PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

JCIM
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Osmaro Montoya ("Montoya") appeals from the August 11, 2014, Opinion, Order, and Award and the September 5, 2014, Order on Petition for Reconsideration of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). In the August 11, 2014, Opinion and Order, the ALJ dismissed

Montoya's claim for permanent income and medical benefits with prejudice.

On appeal, Montoya asserts the ALJ failed to provide an adequate analysis explaining why Dr. Thomas Loeb's opinions are more credible than Dr. Rodrigo Moreno's, the treating specialist.

The Form 101 alleges Montoya sustained work-related injuries to his right elbow, right hip, and low back on August 30, 2012, while in the employ of JCIM. The Form 101 asserts Montoya sustained his injuries in the following manner: "Large totes fell from a forklift onto him and knocked him down."

The June 10, 2014, Benefit Review Conference ("BRC") Order lists the following contested issues: benefits per KRS 342.730/multipliers; work-relatedness/causation.

Dr. Loeb's April 8, 2014, Independent Medical Examination ("IME") report was introduced by JCIM. After reviewing Montoya’s medical records, Dr. Loeb opined as follows:

> On Utilization Review, it was found that he had contusions of the right low back and right elbow, particularly over the lateral epicondyle and soft tissue contusions without any evidence of underlying structural anatomic changes, which should have resolved within a

> very short period of time. His ongoing complaints of pain subjectively cannot be related to his actual physical findings. In essence, there was no correlation between subjective complaints and actual physical findings, and he appeared to have magnification of symptoms at both the low back and the right elbow on my examination today. MRI findings of the lumbar spine showed that there were degenerative changes at L5/S1 to the left, which is the opposite side of his symptoms, with facet hypertrophy and moderate left foraminal narrowing. Therefore, there is no correlation between MRI findings and his subjective complaints and actual physical findings, and he appeared to have magnification of symptoms at both the low back and the right elbow on my examination today. MRI findings of the lumbar spine showed that there were degenerative changes at L5/S1 to the left, which is the opposite side of his symptoms, with facet hypertrophy and moderate left foraminal narrowing. Therefore, there is no correlation between MRI findings and his subjective complaints or objective findings. The remainder of his medical record is consistent with transient soft tissue contusion to the right elbow laterally over the lateral epicondyle with no significant injury to the medial epicondyle and contusion of the right lower lumbar spine, both of which would have resolved within a matter of a few weeks to, at the most, three months.

Based upon a physical examination, Dr. Loeb expressed the following opinions pertaining to causation:

> 1. Your assessment, stated within reasonable medical probability, as to whether the plaintiff's current

> complaints including the right elbow and low back are causally related to his work injury of August 30, 2012?
>
> He has persistent complaints of medial epicondylitis and right low back pain. He has no evidence of any sacroiliac dysfunction in my opinion at this time. If he does have medial epicondylitis, it is mild to moderate and, in my opinion, totally unrelated to the work injury as there is no correlation to [sic] between the mechanism of injury and the persistence of medical [sic] epicondylitis or lateral epicondylitis for that matter. The soft tissue from any contusion to the elbow would have long since resolved. Any contusion to the right low back would have long since resolved.

Regarding the need for physical restrictions, Dr. Loeb opined as follows:

> I do not believe there are any restrictions associated with the work injury itself. He has some degenerative changes in the lumbar spine as demonstrated on MRI, but these are totally unrelated to the work injury. He might have restrictions from his underlying preexisting disease process but not due to the work injury itself. This also applies to the right elbow. Any complaints he has at this point in time, in my opinion, have no bearing or relationship whatsoever to the original complaints at the time of his work injury.

Concerning a treatment plan, Dr. Loeb further opined as follows:

> There is absolutely no indication for the use of a TENS unit or a sacroiliac joint belt at this time. As stated, I do not believe he has any sacroiliac joint dysfunction. I think he has degenerative changes in the lumbar spine, which were preexisting and unrelated to his work injury. This gentleman basically sustained a contusion to the right lateral elbow and right low back. There is no evidence that he sustained any injury to the medial epicondyle where he now has complaints of pain, and he has no complaints of pain over the right lateral elbow. With regards to the back, whatever soft tissue injury he incurred has long since resolved as well as that around his right lateral elbow. Correspondingly, I cannot find any evidence of permanent partial impairment rating in either his right elbow or right low back under any circumstance, whether work-related or not.

In his August 11, 2014, decision, the ALJ provided the following: "Analysis, Findings of Fact, and Conclusions of Law":

> The first issue to be determined is whether plaintiff suffered any permanent, work-related injuries to his right elbow/upper extremity and/or to his lower back as a result of the box falling on him at work on August 30, 2012. For his part, plaintiff points out he sought treatment for these same complaints beginning the day of the accident; that he worked with restrictions until light duty was no longer offered; and that he has not worked for almost a year because of the effects of his injuries. Plaintiff

also relies upon the restrictions assigned by Dr. Waters and Dr. Moreno, who each assigned restrictions for plaintiff's lower back and right elbow, respectively. He also relies upon the opinions of his expert, Dr. Bilkey, who diagnosed lower back pain and chronic medial epicondylitis related to the work injury.

Conversely, the defendant relies upon the opinions of its expert, Dr. Loeb, who concluded plaintiff's elbow and back complaints were not due to the August 30, 2012 work injury. He pointed out that plaintiff was struck in the lateral aspect of the elbow, but his complaints now are about the medial epicondyle, which is not consistent. He found no evidence of a permanent injury to either body part, work-related or not.

Having reviewed the evidence of record, the Administrative Law Judge is ultimately not persuaded plaintiff has carried his burden of proving he suffered any work-related, permanent injuries. In reaching this conclusion, the opinions of Dr. Loeb are found most persuasive in this instance. He pointed out that plaintiff's initial elbow complaints and diagnosis involved the lateral aspect of the epicondyle and involved only a contusion, which would have resolved very soon thereafter, but that plaintiff's current complaints involve the medial epicondyle. The Administrative Law Judge further notes that Dr. Moreno's records seem to indicate that plaintiff's elbow symptoms did resolve and that they only began again in July, 2013 when plaintiff began performing the plastic injection machine job. This tends to corroborate Dr. Loeb's opinion that plaintiff's initial elbow

> injury was a contusion which resolved and that plaintiff's current medial epicondylitis is not causally related to the work injury alleged herein. Based on this evidence, the opinions of Dr. Loeb are considered most credible and plaintiff's elbow condition is dismissed as not work-related.
>
> Similarly, the opinions of Dr. Loeb also found most persuasive relative to plaintiff's lower back claim. Dr. Loeb pointed out no identifiable injury that could be causally related to the work accident. Even Dr. Bilkey was less than clear as to what plaintiff's actual lower back diagnosis was other than pain. Again, given the lack of evidence of a permanent injury by any diagnostic test and given Dr. Loeb's findings, it is determined plaintiff did not suffer a permanent lumbar injury as a result of the August 30, 2012 work accident. Accordingly, plaintiff's claim for permanent benefits is dismissed.

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88

(Ky. 2000). Additionally, if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

When the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). In Wolf Creek Collieries v. Crum, the Court of Appeals stated:

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Id. at 735.

Compelling evidence is defined as evidence that is 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 long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful claimant, this is a great hurdle to overcome. As pointed out in Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986):

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

The ALJ is afforded the discretion to choose the medical opinions in the record upon which he will rely. Here the ALJ relied upon the medical opinions of Dr. Loeb instead of Dr. Moreno's opinions. Dr. Loeb's opinions comprise substantial evidence which support the ALJ's

determination Montoya did not sustain permanent work-related injuries to his elbow and low back. Given the ALJ's explanation for relying upon Dr. Loeb's opinion, there is no merit in Montoya's assertion he is entitled to more analysis detailing why the ALJ relied upon Dr. Loeb's opinions instead of Dr. Moreno's. An ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). Here, the ALJ fully detailed why he relied upon the opinions of Dr. Loeb. Additionally, the ALJ set forth sufficient comparative analysis of Dr. Loeb's and Dr. Moreno's opinions, stating, in part, as follows:

> The Administrative Law Judge further notes that Dr. Moreno's records seem to indicate that plaintiff's elbow symptoms did resolve and that they only began again in July, [sic] 2013 when plaintiff began performing the plastic injection machine job. This tends to corroborate Dr. Loeb's opinion that plaintiff's initial elbow injury was a contusion which resolved and that plaintiff's current medical epicondylitis is not causally related to the work injury alleged herein.

The ALJ has adequately explained the basis for his reliance upon Dr. Loeb's opinions. Since Dr. Loeb's opinions comprise substantial evidence in support of the ALJ’s determination Montoya did not sustain permanent work injuries meriting an award of permanent income and medical benefits the ALJ's decision concerning this issue may not be disturbed.

That said, we reverse the ALJ's dismissal with prejudice of Montoya's claim and remand to the ALJ for entry of an amended opinion, order, and award finding Montoya sustained work-related injuries, albeit temporary, in accordance with Dr. Loeb’s opinions. The ALJ shall also make a determination as to what extent, if any, Montoya is entitled to temporary total disability ("TTD") benefits. In his April 8, 2014, IME report, Dr. Loeb clearly opined Montoya sustained transient contusions to both his right elbow and right lower lumbar spine. Dr. Loeb opined as follows:

> The remainder of his medical record is consistent with transient soft tissue contusion to the right elbow laterally over the lateral epicondyle with no significant injury to the medial epicondyle and contusion of the right lower lumbar spine, both of which would have resolved within a matter of a few weeks to, at the most, three months.

As the ALJ relied upon the opinions of Dr. Loeb, the ALJ, on remand, must determine if Montoya is entitled to TTD benefits for the transient work injuries to his elbow and lumbar spine.

Accordingly, the dismissal of Montoya’s claim for permanent income and medical benefits as set forth in the August 11, 2014, Opinion, Order, and Award and the September 5, 2014, Order on Petition for Reconsideration is **AFFIRMED**. The ALJ's dismissal with prejudice of Montoya's claim is **REVERSED**. The claim is **REMANDED** to the ALJ for entry of an amended opinion, order, and award finding Montoya sustained temporary work-related injuries to his right elbow and lumbar spine and making a determination as to Montoya's entitlement to TTD benefits for the transient injuries he sustained to his elbow and lumbar spine per Dr. Loeb’s opinions. In addition, since the ALJ determined JCIM is responsible for Montoya’s medical expenses up to November 14, 2012, the date he attained maximum medical improvement, the appropriate award of medical benefits is required.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS IN RESULT ONLY.

COUNSEL FOR PETITIONER:

HON JOY BUCHENBERGER
455 S 4TH ST STE 1450
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON DENISE KIRK ASH
P O BOX 34125
LEXINGTON KY 40588

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
410 WEST CHESTNUT ST
SEVENTH FLOOR
LOUISVILLE KY 40202