OPINION ENTERED: January 11, 2013

CLAIM NO. 201179859

PASCHALL TRUCK LINES, INC. PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

JOEY HILL
ANESTHESIA OF HRMC, ET AL
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Paschall Truck Lines, Inc. (“Paschall”) seeks review of the September 4, 2012, opinion, award, and order rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") finding Joey Hill (“Hill”) sustained a work-related back injury while in the course of his employment with Paschall. The CALJ awarded

temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. Paschall also appeals from the October 15, 2012, order overruling its petition for reconsideration.

The facts in this case are undisputed. At the time of the injury, Hill was working as a long-haul truck driver for Paschall driving a tractor trailer. On July 25, 2011, the day before his accident, Hill "shut down" the truck because he thought he was catching the flu and spent the night in a Des Moines, Iowa, rest area. The next morning, because he was feeling better, Hill undertook to deliver his load. Hill had driven approximately three hours when the accident occurred on Interstate 35 in Missouri. Hill provided the following account of what occurred on July 26, 2011:

> A: What happened?
>
> Q: Yes.
>
> A: I thought I was catching the flu, catching a cold on the road which happens all the time. You catch a fever and you sit down, shut down, sweat the fever out and get up and keep on booking. And I shut down, sweat it out, woke up feeling good, was driving down the road to deliver my load because I was on the dispatch. I was under a load. Woke up. I felt better. Went down the road. First my eyes went out --

> Q: What do you mean your eyes went out?
>
> A: I went blind. I couldn't see.
>
> Q: I didn't want to put words in your mouth.
>
> A: Okay. I went blind. I couldn't see. My first reaction was to slow the truck down and pull it over and that's the last thing I remember doing was slowing down and pulling over.
>
> . . .
>
> Q: So would that have been the day before July 25th, 2011?
>
> A: Yes. I shut down, yes. I shut down. I didn't think I was a couple hundred miles from where I had to deliver my load to. I shut it down, got me some fluids, got me some drugs. Started headed down the road and, like I say, my eyes went and when my eyes went it was slow down, pull over. The next thing I was pulling over and I pulled right into –- went into the field.
>
> Q: Were you an interstate, four-lane interstate?
>
> A: I was on the interstate. I was on I-35.
>
> Q: Were you – do you remember if you were going northbound or southbound?
>
> A: I was headed south towards Kansas City.

Hill associated all of his pre-accident symptoms to the flu.

A July 26, 2011, medical record of Heartland Regional Medical Center dictated by Dr. George Mulder provides the following account of Hill's accident:

> The patient is a 46-year-old, male patient who is an over-the-road truck driver. He lives originally in Texas. He was driving an 18-wheel truck down Interstate 35 on his way to Kansas City when he passed out and ran off the road. He believes that he did pass out. He does not remember the accident very well, but he feels like he was beginning to pass out before he actually had the accident. He was subsequently brought to the emergency room in Bethany. He was confused at that time, but he was awake and alert and would answer questions. He subsequently was transferred to Heartland Regional Medical Center.

Dr. Mulder provided the following as to the cause of the accident:

> I believe that he has had bad dentition and may have an abscess in the facial bones and is having a great deal of pain. He has been on ibuprofen. I also believe he has had an upper gastrointestinal bleed, probably peptic ulcer disease, and then passed out, and had his truck accident. I do not believe that he has any major injuries from the truck accident but probably does have a congenital problem with his cervical spine. We will repeat films of the cervical spine as well as of the facial bones to make sure he does not have any osteomyelitis or infection or abscesses in his jaw. We will begin him on IV antibiotics. We will admit to the intensive care unit. We will consult

> gastroenterology and begin treating him for his gastrointestinal bleed. We will monitor him also from a neurologic point of view.

Dr. Gregory P. Bedynek with the Neurosurgery Department of the Heartland Regional Medical Center diagnosed an L1 compression burst fracture. His July 27, 2011, consultation report reflects, in part, as follows:

> The patient is a 46-year-old male who was involved in a motor vehicle accident. Reportedly he was transferred to Bethany Hospital where they diagnosed the L1 fracture, but also a possible GI bleed. He was sent to Heartland Hospital where he had an apneic event during the scope for the GI bleed and thus was intubated. He was found to have a very high temperature at that time and a large tooth abscess.
>
> . . .
>
> CT scan of the lumbar spine was reviewed which demonstrates a comminuted compression fracture at L1 with minimal involvement of the posterior cortex. There is no significant canal compromise.
>
> ASSESSMENT: A 46-year-old male status post motor vehicle accident with L1 compression fracture/burst fracture that does not demonstrate any canal compromise.
>
> RECOMMENDATIONS: The patient will need some stabilization of the L1 fracture. I feel the best approach would be a percutaneous pedicle screw placement for an internal brace as well as an external TLSO brace. However with the patient’s history of abscess of the

> tooth with a possible infectious process, I do not feel that placing hardware in the lumbar spine would be of benefit for the risk of infection. Thus we will order a TLSO brace and obtain serial x-rays with him up in the brace once he is able and if there is any progressive deformity, then we may contemplate again surgical intervention.

Hill also fractured multiple teeth in the accident. Because of the fractured teeth and the infection in Hill's gums, surgery was performed by Dr. Robert C. Paolillo on July 29, 2011. The operative report reflects the following procedures were performed:

> 1. Surgical removal of teeth 2 through 12 inclusively.
>
> 2. Removal of teeth numbers, 19, 20, 29, 30 and 31.
>
> 3. Maxillary and mandibular alveoloplasty.
>
> 4. An I&D of the upper right canine space infection.

The "Final Diagnoses" was:

> Multiple fractured maxillary mandibular teeth, possibly secondary to the accident with an associated upper right canine space cellulitis of the face.

Hill was seen by Dr. Roger E. Maalouf on August 1, 2011, who provided the following history:

> On July 29th, the oral and maxillofacial surgery [sic] take [sic] the patient to the operating room and he underwent an

> extensive surgical procedure; the patient had surgical removal of teeth 2 through 12 as well as removal of teeth numbers 19, 20, 29, 30, and 31. He also had maxillary and mandibular alveolopasty. The patient had drainage of the upper right canine space infection was also undertaken. Postoperatively, he had been improving slowly and had been afebrile. The leukocytosis has resolved today. Infectious disease consultation was requested in anticipation of his spinal effusion later this week.

Dr. Maalouf's assessment and plan was as follows:

> **ASSESSMENT:**
>
> 1. Severe periodontal disease with canine abscess and probable right-sided facial cellulitis status post incision and drainage of canine abscess and extraction of multiple decayed teeth on July 29th. The patient has been on vancomycin and meropenem since admission. He is currently afebrile and his leukocytosis was resolved. A facial CT from admission did not reveal any evidence of underlying osteomyelitis.
>
> 2. Motor vehicle accident with L1 fracture. Surgical effusion is spine related.
>
> 3. Acute blood loss anemia presumed secondary to upper gastrointestinal bleed.
>
> 4. Acute respiratory failure requiring intubation for period of time. The patient has been extubated and his respiratory status has been more than adequate.
>
> 5. Hypertension.

6. Acute renal failure. Renal function has returned to baseline.

7. Elevated liver enzymes likely secondary to liver ischemia. His levels have returned to normal at this point.

PLAN:

1. I think that his oral infection has improved quite a bit after the surgical intervention of drainage and extraction of the teeth. The antibiotic therapy has certainly helped quite a bit.

2. At this point, we would deescalate the antibiotic therapy to Unasyn 3 g IV q.6h., which I will order.

3. I will certainly recommend to continue the antibiotics show [sic] out the following 2 weeks and certainly try his surgery.

4. The risk of spinal surgical infection at this point is as minimal as the focus of infection of [sic] has been contained. The patient has not proven to be bacteriemic as evidenced by negative blood cultures from admission.

5. We will continue to follow this patient and make further recommendations as warranted.

Dr. Bedynek's August 5, 2011, operative report reflects the following procedures were performed:

1. Transthoracic approach to lumbar 1 burst fracture with corpectomy of lumbar 1.

> 2. Interbody fusion thoracic 12-lumbar 2, with lateral plate and screws, thoracic 12-lumbar 2.

Hill was subsequently discharged and seen by Dr. Mark Kuper in Ft. Worth, Texas where he resided. Hill has not worked since the date of the accident.

Before the CALJ, Paschall argued as follows:

> Joey Hill did not sustain an 'injury' as defined by the Act. Instead, Mr. Hill became gravely ill from ongoing personal illnesses (gastrointestinal bleed and periodontal infection/disease) unrelated to the work he performed at Paschall Truck Lines, Inc. The lumbar injury in question (L1 fracture) was not caused by, and did not arise out of, the employment performed for Paschall Truck Lines, Inc. The L1 fracture was caused by a syncopal episode from hypotension secondary to gastrointestinal bleeding and dental abscess/maxillofacial infection. The work Mr. Hill performed for Paschal Truck Lines, Inc. did not place him in a position of increased risk.
>
> Mr. Hill has not sustained his burden of proof with respect to this claim, including causation, 'injury' as defined by the Act and whether the injury arose out of employment. Respectfully, Paschall Truck Lines, Inc. submits the plaintiff's claim for workers' compensation income and medical benefits should be dismissed.

Rejecting Paschall's contention, the CALJ concluded as follows:

DISCUSSION

I found both Plaintiff and Ms. Wells to be very credible witnesses. As stated in the introduction, the facts surrounding this truck wreck and Plaintiff's injuries are not in substantial dispute. The question is whether or not the Plaintiff suffered a work-related injury. I am convinced that Plaintiff suffered a work-related injury to his lumbar spine. I am further convinced that Plaintiff's other medical maladies, including his internal bleeding, and his abscessed teeth and infection, are not work-related.

Plaintiff, without question, was operating within the course and scope of his employment as he drove Defendant Employer's truck along I-35 in Missouri. Plaintiff lost consciousness because of a non-work-related medical condition. That loss of consciousness resulted in him wrecking Defendant Employer's truck which he was operating within the course and scope of his employment with Defendant Employer. Plaintiff's employment with Defendant Employer placed him in a position wherein there was a risk otherwise not associated with his loss of consciousness and which resulted in a very serious injury.

Defendant Employer has argued that Plaintiff's employment did not put him at risk and sites numerous unreported decisions in support of its position. However, the CALJ finds the Supreme Court's decision in *Stasel v. Am. Radiator and Standard Sanitary Corp.*, *278 S.W. 2d 721 (Ky. 1955)* and the unreported Court of Appeals decision in *Ryder Integrated Logistics v. Gargala*, *2007 WL 2812609*, to be controlling. In

Stasel, the claimant had suffered an epileptic seizure while standing next to a hot stove and either struck the stove or scraped his arm in hot sand causing serious abrasions. The Supreme Court held the injury was compensable because there was a causal connection between the conditions of the employment and the injury. The Supreme Court discussed work-relatedness and made the following pronouncement:

> Accidents arising out of the employment are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee.
>
> The accident must be one resulting from a risk reasonably incident to the employment. It arises out of the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

In *Ryder Integrated Logistics*, a truck driver suffered a heart attack while driving his employer's truck down the Mountain Parkway. The heart attack caused him to run into the guard rail, travel an unusually long distance scraping the guardrail and then overturn on its side in the median. The

> claimant was killed as a result of the truck wreck, not the precipitating heart attack. The Court of Appeals cited *Stasel* in affirming a finding by the ALJ to whom the claim was assigned that the death was work-related. Based on the reasoning cited in these two appellate decisions, I conclude that the spinal injuries Plaintiff suffered in the case *sub judice* are work-related.

Since Dr. Henry Tutt and Dr. Van Woeltz assessed 20% functional impairment ratings, the CALJ concluded Hill has a 20% functional impairment due to the accident.[1]

Concerning the applicability of KRS 342.730(1)(c)1,the CALJ concluded as follows:

> Based on Plaintiff's testimony and the opinions of Dr. Bedynek and Dr. Woeltz, I find that Plaintiff does not retain the physical capacity to return to the type of work he was performing for Defendant Employer at the time of his work-related injury. Plaintiff has testified, and I found his testimony to be credible, that due to his low back pain from the injury, he can no longer sit for extended periods of time (certainly a requisite for an over the road trucker), and can no longer lift as required to load a truck. Dr. Bedynek and Dr. Woeltz both recommended restrictions that would not allow

[1] Paschall introduced Dr. Tutt's independent medical examination ("IME") report in which he assessed a 20% impairment rating for the burst fracture which he believed to be unrelated to Hill's work activities. Hill introduced Dr. Woeltz's undated letter generated after a review of the medical records which assessed a 13% impairment based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Hill also introduced Dr. Woeltz's May 29, 2012, letter stating he concurred with Dr. Tutt's 20% impairment rating.

> Plaintiff to perform the duties he was performing at the time of the injury. Therefore, his permanent partial disability benefits awarded herein shall be multiplied by three (3) times the amount otherwise determined pursuant to KRS 342.730(1)(b).

With respect to entitlement to medical benefits, the CALJ determined as follows:

> Without question, some of the treatment provided to Plaintiff at Heartland Regional Medical Center was required by his internal bleeding and infection, neither of which was work-related. However, treatment of those non-work-related conditions was necessary prior to the surgical treatment required for the cure and relief from the effects of the work-related spinal injury were. Therefore, the entirety of the contested medical expense benefits is compensable pursuant to KRS 342.020.

Paschall filed a petition for reconsideration raising the same issues it asserts on appeal and requesting reconsideration of the decision.

In his October 15, 2012, order overruling Paschall's petition for reconsideration, the CALJ stated as follows:

> Defendant Employer argues that the CALJ could not find Plaintiff's maladies relating to a gastrointestinal bleeding and severe infection due to abscessed teeth non-work-related and then require Defendant Employer to pay the expenses for the treatment pursuant to KRS 342.020. KRS 342.020 requires payment of medical expenses "as may be

reasonably required at the time of injury and thereafter during disability" which are "for the cure and relief from the effects" of the work-related injury. The CALJ found, based on medical evidence submitted by Plaintiff, that the treatment for the pre-existing and non-work-related conditions (gastrointestinal bleeding and severe infection due to abscessed teeth) was required prior to the surgery performed to correct a spinal fracture caused by the truck wreck. Based on that evidence, the CALJ found, and continues to believe, that the treatment for the pre-existing conditions was reasonably necessary in order to render the treatment for the cure and relief of a spinal fracture.

Defendant Employer argues, as in [sic] argued in its brief, that the facts of this claim do not support a finding that Plaintiff's truck wreck was work-related under the positional risk doctrine. The CALJ believes the opinion adequately explains the evidence upon which the finding of work-relatedness was based. The CALJ continues to believe that if placing a worker in the cab of a diesel tractor hauling a trailer down an interstate highway does not place that worker in a position of risk, then **NOTHING** does.

Finally, Defendant Employer argues that there is no medical evidence to support a finding that Plaintiff did not retain the physical capacity to return to the type of work he was performing at the time of his injury. This argument must fail for two reasons. First, as the CALJ pointed out in his opinion, he was (and remains) convinced by the medical evidence submitted from Plaintiff's physicians that the restrictions on

> Plaintiff's physical activities required as [sic] result of the work-related injury prohibit his return to the type of work he was performing at the time of injury. In addition, it has long been recognized in Kentucky workers compensation that a claimant's own testimony that he/she was unable to perform the work he performed at the time of his/her injury is competent evidence of his/her physical capabilities and of his/her inability to return to the type of work performed at time of injury. Plaintiff, in this workers compensation claim, testified that he could not return to the work he was performing for Defendant Employer at the time of injury. The CALJ found that testimony credible and supports the application of the enhancement of Plaintiff's permanent partial disability benefits pursuant to KRS 342.730(1)(c)1. ...

(emphasis in original).

On appeal, Paschall challenges the CALJ's decision on three grounds. First, it contends the CALJ's decision Hill's injury arose out of his employment is erroneous as a matter of law and the CALJ misapplied the law concerning the positional risk doctrine. Second, the CALJ misapplied the law when he awarded income and medical benefits for Hill's personal health maladies. Third, substantial evidence does not support the determination the three multiplier set forth in KRS 342.730(1)(c)1 was applicable.

Hill, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action including causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Hill was successful in that burden, the question on appeal is whether there is substantial evidence supporting 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). An ALJ 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 Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an 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).

We find no merit in Paschall's first argument Hill's injury did not arise out of his employment, and the CALJ misapplied the positional risk doctrine in determining Hill sustained a compensable work-related lumbar spine injury. In Stasel v. American Radiator & Standard Sanitary Corp., 278 S.W.2d 721 (Ky. 1955) the claimant was injured while at work when he fell against a hot stove or upon hot sand due to a fainting spell which was subsequently diagnosed as an epileptic seizure. The medical evidence revealed Stasel suffered from a congenital epileptoid condition. In reversing the circuit court's decision affirming the Workers' Compensation Board's holding Stasel's injury was not compensable, the former Court of Appeals, now Supreme Court, stated, in relevant, part, as follows:

> The place of employment may be structurally sound and in good condition and yet constitute a source of danger to one hired to work there and if the place may be fairly said to be the efficient and operative cause of the injury, then the employee is entitled to compensation, even though some infirmity or disability not traceable to the employment may be remotely connected with the injury.
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> . . .
>
> The appellant was hired to work in appellee's plant after passing a pre-employment physical examination; he was

> required to wear a special face mask to protect his respiratory system; there were unusual hazards and risks in the physical conditions of his place of work; and he became unconscious while performing his duties and fell into a hot stove or hot sand and suffered severe burns. Therefore, under these facts the only fair and reasonable finding that could be made was that the peculiar hazards of his employment were a contributing factor to his accident and injury. We think there affirmatively appears a clear causal connection between the conditions under which the appellant was working and the occurrence of the injury.

Id. at 723, 724.

In Indian Leasing Co. v. Turbyfill, 577 S.W.2d 24 (Ky. App. 1978), the Court of Appeals now Supreme Court dealt with liability under the positional risk theory for idiopathic falls. Prior to his accident, Turbyfill suffered from advanced artherosclerosis, however his condition did not interfere with his ability to work as a truck driver for Indian Leasing Co. On the date of his injury, Turbyfill suffered a coronary occlusion resulting in a myocardial infarction. He lost consciousness and fell twelve feet onto concrete where he sustained "crushing injuries to his skull and lacerations of the brain." Id. at 25. The medical evidence established the coronary occlusion and myocardial infarction were the result of Turbyfill's work exertion acting upon his pre-existing

artherosclerosis. The medical evidence also indicated the cause of his death was the fall which crushed his skull. The Workers' Compensation Board determined Turbyfill sustained a work-related injury and apportioned 95% of the liability to his employer and 5% to the Special Fund. In affirming the award, the Court of Appeals stated, in relevant part, as follows:

> The basic rule, for which there is now general agreement, is that the effects of such a fall are compensable if the employment placed the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle.
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> . . .
>
> Liability under the positional risk theory for idiopathic falls is limited to those cases in which the employment placed the employee in a position increasing the dangerous effects of the idiopathic fall. The Stasel case was treated as having been decided under the positional risk theory. Id., 462 S.W.2d at 904, footnote 4. In level fall cases involving no increased danger attributable to the employment, liability may be imposed on the employer only if the work was a substantial factor in causing the injury.
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> . . .
>
> Turbyfill's employment placed him atop the loaded trailer where the risk of injury from any fall was greatly

> magnified. There was substantial evidence that he did not die from the myocardial infarction which caused the fall. Rather, the evidence supports a finding that he died from the results of the fall, namely the crushing skull injuries and brain laceration received when his head struck the concrete. The board could find that Turbyfill would have survived had he not suffered the myocardial infarction at work.
>
> . . .
>
> Had Turbyfill not been working atop the loaded trailer, it is likely that he would have survived the myocardial infarction. When the employment places the employee in a position of danger increasing the effects of a fall, the Special Fund should not be required to relieve the employer of liability for the results of the fall alone. It was the function of the board to apportion the percentages of disability, and the circuit court did not err in refusing to disturb the board's award. [citation omitted]

Id. at 26, 27, 28.

Ryder Integrated Logistics v. Gargala, 2007-CA-001298-WC, rendered September 28, 2007, Designated Not To Be Published, involves a factual situation similar to the case *sub judice*. Gargala was operating a tractor trailer on the Mountain Parkway. The police believed Gargala lost consciousness resulting in loss of control of the truck. The medical examiner ruled the cause of death was

positional asphyxiation as a result of trauma from the severe accident but also determined Gargala suffered a massive heart attack. Hon. Sheila Lowther, Chief Administrative Law Judge ("CALJ Lowther") found the heart attack which incapacitated Gargala prior to the accident was not work-related. However, because the cause of death was positional asphyxiation, CALJ Lowther concluded as follows:

> Mr. Gargala's death was caused by physical aspects and hazards of his employment... thereby rendering this a compensable event pursuant to Kentucky Revised Statutes (KRS) Chapter 342.020.

The Board affirmed and in affirming the Board, the Court of Appeals stated as follows:

> The claimant bears the burden on appeal to show some evidence that would permit the fact-finder to reasonably find as it did, and we conclude that Yolanda has successfully met her burden. The medical evidence supported the ALJ's finding that Gargala's employment caused him to be placed in the position that caused his death. We find no error in the determination of the ALJ or of the Board.

Slip op at 2.

Based on the facts in this case we believe the heretofore cited cases are controlling and support the CALJ's determination the positional risk doctrine is applicable and Hill's lumbar injury resulting from the

accident is compensable. Irrespective of Paschall's contention Dr. Tutt's unrebutted opinion establishes the L1 fracture was caused by a "syncopal episode attributed to the ongoing personal pathological processes and health issues," the fact remains Hill's lumbar injury was caused by the position in which his employment placed him. Because he was driving a tractor trailer, Hill was placed in a position which increased the dangerous effects of his idiopathic loss of consciousness. We agree with the CALJ that Hill was placed in a position of risk by operating a multiple ton tractor trailer at a high rate of speed on an interstate highway. It stands to reason that due to Hill's occupation, upon blacking out, there was a much greater likelihood Hill would sustain a substantial injury. As noted in Ryder Integrated Logistics v. Gargala, supra, the evidence supports the conclusion that but for his employment, Hill would not have been in the position which resulted in his injury. As the evidence supports the CALJ's decision the positional risk doctrine is applicable and Hill's lumbar injury is compensable, we are without authority to disturb his decision. Special Fund v. Francis, supra.

Further, we find Paschall's reliance upon Hampton v. Intech Contracting, LLC, 2011-CA-001195-WC, rendered

November 18, 2011, Designated Not To Be Published, to be misplaced. Hampton had been working resurfacing a bridge deck and was told by his foreman to stop working and sit in the truck. For unexplained reasons, Hampton left that area, climbed over the guardrail, and fell from the bridge. Hampton had already been told to stop working and his work did not place him in a position of risk. Rather, Hampton voluntarily left a safe area and placed himself in a position of risk when he climbed over the guardrail and fell. As pointed out by the Court of Appeals in Hampton, supra, his "injuries did not originate from a risk connected with his employment and did not flow from his employment as a 'rational consequence. Stasel, 278 S.W.2d 723.'" Slip Op 5.

We find Paschall's second argument the CALJ erred in awarding income and medical benefits for his personal health maladies somewhat confusing. Clearly, the CALJ awarded income benefits based upon the impairment ratings offered by both parties' physicians. Based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Drs. Tutt and Woeltz assessed 20% impairment ratings for the lumbar injury. The CALJ did not award income benefits as a result of Hill's dental or gastrointestinal problems.

Therefore, we find no merit in Paschall's argument income benefits were awarded for Hill's personal health maladies.

Likewise, we find no merit in Paschall's assertion the CALJ erroneously awarded medical benefits for Hill's personal health maladies. The medical evidence recited herein and as noted by the CALJ in his October 15, 2012, order establishes that the infection in Hill's gums and teeth had to be treated first in order to avoid surgical complications. The medical records also establish Hill had multiple fractured teeth as a result of the accident. Thus, dental surgery was required to extract the fractured teeth and to cure the infection in Hill's mouth. We believe the medical evidence also supports the premise the treatment of Hill's gastrointestinal problems had to be controlled or alleviated before spinal fusion surgery could be performed. Heartland Regional Medical Center's medical records, specifically those generated by Drs. Maalouf and Bedynek, unequivocally state all other conditions had to be addressed before the fusion surgery could be undertaken. Heartland Regional Medical Center's records constitute substantial evidence which supports the CALJ's determination that treatment of Hills' pre-existing conditions was reasonable and necessary treatment for the cure and relief of the spinal fracture. *See* KRS

342.020(1). Since the evidence supports the CALJ's finding that in order to treat the L1 fracture the physicians had to first treat Hill's dental and gastrointestinal problems, we find no error in the CALJ's award of medical benefits.

Finally, we find no merit in Paschall's assertion substantial evidence does not support enhancement of Hill's benefits by the three multiplier. Although Dr. Bedynek's November 16, 2011, letter does not provide permanent restrictions, Dr. Woeltz, in an undated letter, states that as a result of surgery, Hill "will undoubtedly be forever limited in the amount of time he can sit, stand, or walk based on the injuries he sustained." He also restricted Hill to light duty work indefinitely because any heavy lifting would aggravate the fusion. Paschall cites to the fact the job description it introduced reflects Hill is not required to load and unload his trucks. That fact aside, we believe Hill's testimony establishes he does not retain the physical capacity to return to the type of work he was performing at the time of the injury. Even though Hill testified he has applied for numerous truck driving positions and hoped he would not have any problems driving a truck, Hill also testified he was concerned because he develops stiffness and pain when he sits for long periods

of time. The CALJ obviously concluded that problem alone would prohibit a return to long-haul truck driving.

When the issue to be decided is the claimant's ability to labor as it relates to the application of the three multiplier, it is within the province of the ALJ to rely on the claimant's self-assessment of his ability to perform his prior work. *See* Ira A. Watson Department Store v. Hamilton, supra; Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). We have consistently held that it remains within the ALJ's province to rely on a claimant's self-assessment of his ability to labor based on his physical condition. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The CALJ's decision to apply the three multiplier pursuant to KRS 342.730(1)(c)1 was based, in part or in whole, on Hill's testimony that he cannot sit for long periods of time without developing pain and stiffness. Hill's testimony alone is substantial evidence of his incapacity to return to the type of work performed at the time of injury. Further, even though Dr. Woeltz's opinions were based on a medical records review, his opinions in combination with Hill's testimony constitute substantial evidence supporting the CALJ's determination KRS 342.730(1)(c)1 is applicable. Given the nature of the surgery performed, the CALJ was free to conclude Dr.

Woeltz's opinion Hill would be forever limited in the amount of time he sits, stands, or walks is reasonable. Hill sustained a significant injury which merited a 20% impairment rating. The CALJ's reliance upon Dr. Woeltz's opinion is not unreasonable given the nature of Hill's injury.

Hill argues on appeal that pursuant to KRS 342.310 he is entitled to sanctions against Paschall asserting his claim never should have been denied. Hill concedes Paschall "may have an argument as to gastrointestinal and orthodontic issues," but argues there is no argument as to the work-relatedness of his burst fracture. He maintains he has been financially and medically harmed because of Paschall's refusal to acknowledge the compensability of his claim. Hill made this same argument in his brief to the ALJ. Significantly, that issue was not preserved at the benefit review conference ("BRC") as a contested issue. Further, the ALJ did not address the issue in the opinion, award, and order and Hill did not file a petition for reconsideration asking the CALJ to address the issue. Since Hill did not file a cross-appeal, we assume he is requesting the Board to impose sanctions due to Paschall prosecuting this appeal. This we decline to do.

Although we sympathize with Hill's predicament, we do not find Paschall prosecuted this appeal without reasonable grounds. Clearly, this case involves unusual facts. There is no dispute Hill passed out while driving his truck due to personal maladies. Given the facts of this case, we decline to impose sanctions pursuant to KRS 342.310.

Accordingly, the September 4, 2012, opinion, award, and order and the October 15, 2012, order ruling on Paschall's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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