OPINION ENTERED: March 1, 2013

CLAIM NO. 201171809

PEGGY GAY PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

WALGREENS
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Peggy Gay ("Gay") seeks review of the Opinion and Order rendered November 20, 2012 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), finding her injury not to be work-related and dismissing her claim against Walgreens. Gay also seeks review of the Order

rendered December 18, 2012 denying her petition for reconsideration.

On appeal Gay argues Dr. Daniel Wolens' April 4, 2012 letter does not constitute objective medical findings as defined in KRS 342.0011(33), nor does it constitute substantial evidence, citing to Cepero v. Fabricated Metal Corp., 132 S.W.3d 839 (2004). Gay argues the ALJ misinterpreted Dr. Corbett's medical report and any decision based upon it is clearly erroneous. Finally, Gay argues the ALJ abused his discretion by permitting Walgreens to file medical reports from more than two physicians in violation of KRS 342.033. We affirm, finding the ALJ did not abuse his discretion, substantial evidence exists in the record to support his decision, and a contrary result is not compelled.

Gay filed a Form 101 on April 11, 2012 alleging she injured her right knee on October 6, 2011 when she tripped on a mat while working at Walgreens as a pharmacy technician. In support of the Form 101, Gay attached several medical records from Dr. Gregory D'Angelo of Bluegrass Orthopedics and Hand Care. On October 6, 2011, Dr. D'Angelo noted Gay "has been having pain in her right knee for a couple of weeks." Gay reported her pain was related to stepping off a mat and twisting her knee. Dr.

D'Angelo noted her knee symptoms had progressively worsened. A right knee MRI dated October 10, 2011 revealed 1) diffuse medial meniscal degeneration with a tear of the posterior root and probable tear of the anterior horn; 2) small osteochondral lesion medial tibial plateau; and 3) severe chondromalacia of the trochlea. In a November 30, 2011 operative note, Dr. Angelo stated he performed a right knee arthroscopy, medial meniscectomy, femoral trochlear chondroplasty, and medial plica excision. He further noted the following post-operative diagnoses: right knee grade 4 chondromalacia of the femoral trochlea, tear posterior horn medial meniscus, and symptomatic medial plica.

The August 10, 2012 Benefit Review Conference ("BRC") order indicated the following contested issues were preserved: Benefits per KRS 342.730, work-relatedness/ causation, unpaid or contested medical expenses, injury as defined by the Act, exclusion for pre-existing disability/ impairment, temporary total disability, average weekly wage, date Gay returned to work and her ability to return to the type of work performed at the time of injury.

Gay testified by deposition on June 6, 2012 and at the hearing held September 25, 2012. Gay, a resident of Lexington, Kentucky, was born in December 1954, completed the eleventh grade and received a GED. She has received

specialized training in medical transcription and as a licensed pharmacy technician. Her work history includes work as a machine operator and pharmacy technician. Gay began working as a pharmacy technician for Walgreens in February 2002, which required extensive walking and standing. Following the October 6, 2011 work incident, Gay returned to Walgreens as a pharmacy technician from March 21, 2012 through June 6, 2012 earning the same or greater wage. She has not worked since June 6, 2012 due to knee pain.

Gay testified on October 6, 2011, she was stocking prescription medication in the bay area of the pharmacy. As she was returning to the counter, she tripped on the edge of a thick rubber mat with her right foot. Gay stated "I tripped and my knee just gave way and I almost fell. . . ." Gay experienced immediate right knee pain and was unable to walk. She sought treatment the same day with her family physician, Dr. Little from Baptist Internal Medicine Group, who then referred her to Dr. D'Angelo. Dr. D'Angelo prescribed pain medication, ordered an MRI, performed right knee surgery on November 31, 2011, recommended physical therapy and administered three cortisone injections.

Gay testified the surgery initially provided relief and Dr. D'Angelo released her to work. Her symptoms

recurred after she returned to work. Gay stated the cortisone injection provided no relief. She continues to experience right knee pain and swelling, is unable to stand or walk for prolonged periods, and has difficulty sleeping and performing household chores. Gay testified the restrictions placed upon her by Dr. McEldowney would preclude her from being able to perform her job as a pharmacy technician.

Gay testified she had a workers' compensation claim twenty years ago for a back injury. Prior to October 6, 2011, Gay testified she had received treatment for chest pains, and in 2011, she had a "heart cath" and a colonoscopy. When asked if she experienced any prior leg or knee problems, Gay testified "My legs, not my knees" explaining she had previously seen Dr. Little for left leg inflammation. Gay repeatedly denied ever having right knee problems prior to October 6, 2011.

At the deposition, Walgreens attached as exhibits three medical records from Baptist Internal Medicine Group. In August 2009, Gay received treatment for hypertension, restless leg syndrome and right knee pain. It was noted her knee pain and restless leg keeps her up at night, and she was diagnosed, in part, with right knee arthritis. Three days before the October 3, 2011 work incident, Gay

complained she had experienced right leg pain for two weeks, consisting of knee and calf pain, and calf/leg swelling. She was diagnosed, in part, with right knee osteoarthritis and was ordered to follow up two weeks later for her knee pain. On October 6, 2011, Gay complained of knee pain and it was noted "pain X3 weeks can't walk on [it] this morning took anti-inflammatory was OK for a while, 'gave out on her this morning.'"

Regarding the October 3, 2011 medical record, Gay admitted receiving treatment that day, but denied she complained of knee pain. At the hearing, Gay testified she complained of right calf pain for which Dr. Little ruled out a blood clot and prescribed anti-inflammatories. Gay stated her calf pain resolved in a couple of days and Dr. Little did not recommend any restrictions.

Regarding the August 2009 medical record, Gay acknowledged she received treatment for restless leg syndrome, but denied she was informed of right knee arthritis or complaining of right knee pain keeping her up at night. At the hearing, Gay testified she only experienced knee pain at night with her restless leg syndrome. However, it resolved once Dr. Little prescribed medication and she only sought treatment on one occasion.

Gay submitted the June 5, 2012 medical report prepared by Dr. Anthony McEldowney, of Kentucky Medical Rehabilitation Clinics. Dr. McEldowney diagnosed right knee sprain with medial meniscal tear and stated the subjective complaints and objective findings are the direct result of the October 6, 2011 work-related right knee injury. Dr. McEldowney assigned an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He also found there was no prior active impairment noting Gay was performing full work activities with no restrictions. Dr. McEldowney noted Gay had reached medical maximum improvement on February 30, 2012 and opined she does not retain the physical capacity to return as a pharmacy technician. He recommended permanent restrictions of no prolonged standing or walking greater than fifteen minutes without a sitting break, and no squatting or stooping. He also recommended a right knee brace, a TENS unit and vocational rehabilitation for modified sit down work. The report does not reflect the review of any surveillance video depicting Gay's work incident, or medical records for treatment prior to October 6, 2011.

Walgreens submitted Dr. Daniel Wolens' April 4, 2012 letter indicating he reviewed video from Walgreens on

the day of the work incident depicting Gay's giving-away episode. Immediately prior to the episode, he noted Gay had pivoted leftward on her right foot. She then took one step forward with her left leg, and then with her right leg, placing both feet on a floor mat.

Dr. Wolens noted Gay was subsequently diagnosed with a medial meniscal tear of the right knee, and stated as follows regarding causation:

> When meniscal tears occur acutely as a result of trauma, the mechanism associated with such pathology is a load and twist. Given that Ms. Gay's right knee pain began during normal ambulation, and in the absence of load and twist, there would be no reason to believe that this individual's work activities had any casual association with her medial meniscal tear. Degenerative meniscal tears on the other hand, can occur in the absence of any particular traumatic incident. These will often develop spontaneously during what would otherwise be considered normal activities. What is again of particular importance in this situation is that Ms. Gay's knee pain developed following a normal stride forward with the right lower extremity.

Dr. Wolens concluded Gay's giving away episode occurred during the act of a normal stride forward with the right leg. In the absence of any particular load and twist, "workplace activities would not be considered causal for her condition."

Walgreens also submitted two reports prepared by Dr. Phillip Corbett, of Commonwealth Orthopedic Surgeons, dated July 11, 2012. He diagnosed status post right knee partial medial meniscectomy with evidence of degenerative joint disease of the medial compartment. After reviewing Gay's deposition testimony, as well as medical records prior to and following the October 6, 2011 incident, he found her "impairment rating attributable to the symptoms aroused in her injury of 10/6/11 involved performance of a partial medial meniscectomy." Pursuant to the AMA Guides, he assigned a 1% impairment rating and opined the surgery was causally related to October 6, 2011 incident. Dr. Corbett stated Gay is able to return to her previous employment and did not feel permanent restrictions are required for her October 6, 2011 injury.

Despite successful surgery, Dr. Corbett noted Gay's ongoing knee problems reflect a pre-existent and progressive condition associated with unknown prior trauma or the natural aging process. He noted an impairment rating attributable to the arthritic involvement of the right knee is not causally related to the October 6, 2011 incident. He recommended viscosupplementation to treat her osteoarthritis.

Walgreens also submitted a letter prepared by Dr. D'Angelo in response to a February 29, 2012 inquiry. In the letter, he opined Gay's knee surgery was related to the work incident since it occurred at her workplace. He also noted it was difficult to determine from the video whether the "rubber mat at work was sloped, or defective, or in any other way, started the cascade of events that led to [Gay's] injury."

In the November 20, 2012 opinion, the ALJ dismissed Gay's claim, stating as follows:

> **Pre-existing Active Disability/ Impairment/Work-Relatedness-Causation**
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> 10. In order to be characterized as an active disability, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. *Finley v. DBM Technologies*, 217 SW3d 261 (2007).
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> 11. The Defendant, maintains the burden of proving the existence of a pre-existing condition. *Wolf Creek Collieries v. Crum*, 673 SW2d 735 (Ky.App. 1984).
>
> 12. Plaintiff, when asked, has repeatedly denied any prior knee injury or treatment with the exception of experiencing some knee pain as a result of Restless Leg Syndrome in 2009. This is despite references to her complaints of knee pain in medical records from a doctor visit three days prior to the work injury at issue and despite

specific references in the medical records from 2009 along with her apparent complaints about Restless Leg Syndrome.

13. Dr. Corbett, after reviewing all of the Plaintiff's relevant medical records, credibly opined that the meniscal tear and attendant surgery were primarily due to a degenerative condition. Dr. Corbett's review of the Plaintiff's right knee x-rays also showed evidence of chronic arthritis of the tibial plateau and severe chondromalacia of the patellofemoral joint. Dr. Corbett concluded that the Plaintiff's ongoing problems are the result of unknown prior trauma or of the natural aging process.

14. This conclusion is bolstered by the opinion of Dr. Wolens, who after viewing the surveillance video of the Plaintiff's injury, noted that it occurred during a straight-forward step rather than a twisting motion which in his opinion is not consistent with a trauma-induced meniscal tear. Dr. Wolens continued to opine and conclude that degenerative meniscal tears can occur in the absence of any particular traumatic event and that in the absence of any particular load and twist, which is not present in the surveillance video, workplace activities would not be considered causal for the Plaintiff's condition.

15. The ALJ therefore finds that the conclusion of Dr. Wolens is most persuasive in light of the conflicting evidence regarding prior complaints of knee pain that otherwise exists in the record. As such, the ALJ finds that the Defendant's injury is not causally work-related.

> 16. All other issues are thereby rendered moot.
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> **ORDER**
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> **IT IS HEREBY ORDERED AND ADJUDGED** as follows:
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> 1. For the foregoing reasons, it is hereby ordered that Plaintiff's claim shall be and hereby is **DISMISSED**.

In her petition for reconsideration, Gay noted the ALJ incorrectly referred to Dr. Wolens' April 4, 2012 letter as an "independent medical examination" and as "medical records." Gay requested the ALJ amend the language since Dr. Wolens did not examine her and Walgreens identified the letter only as a "record" in its notice of filing. Likewise, Gay requested the ALJ find Dr. Wolens did not examine her, and did not make reference to an impairment rating or pre-existing active condition. For the same reasons, Gay requested the ALJ find Dr. Wolens' letter does not constitute an objective medical finding. Gay also argued the ALJ misinterpreted Dr. Corbett's opinion by completely dismissing the fact he assigned a 1% impairment rating for Gay's knee surgery and attributed it to the work incident. Finally, Gay argued Dr. Wolens' letter is not substantial evidence since it does constitute objective medical findings and Drs. Corbett, D'Angelo and McEldowney

all attributed some portion of her injury to the work incident. On December 18, 2012, the ALJ summarily denied Gay's petition for reconsideration.

On appeal, Gay argues Dr. Wolens' April 4, 2012 letter does not constitute objective medical findings as defined in KRS 342.0011(33), nor does it constitute substantial evidence. Gay asserts if the claimant must prove the existence of a work-related harmful change through objective medical findings as defined herein, the ALJ cannot rely upon a letter which "does not come close to meeting this standard, when other evidence in the record does, to determine the issue of causation."

Gay again emphasizes Dr. Wolens neither directly observed or examined her, performed any tests nor reviewed any medical records. He simply viewed a tape and made generalized observations. Gay asserts Drs. McEldowney, D'Angelo and Corbett submitted medical records or reports containing objective medical findings, and therefore the ALJ could not rely upon Dr. Wolens' letter to determine causation. For the same reasons, Gay asserts the reports of Drs. McEldowney, D'Angelo and Corbett, all of whom opined some portion of her injury is related to the work incident, constitute substantial evidence. Gay cites to Cepero,

supra, in arguing Dr. Wolens' letter does not constitute substantial evidence.

On appeal, Gay again argues the ALJ misinterpreted Dr. Corbett's medical report. Gay states while Dr. Corbett's report is largely unfavorable to her, he does not completely dismiss the causation issue, noting he attributed the knee surgery to the October 6, 2011 incident and assigned a 1% impairment rating. Gay asserts the ALJ's characterization of the report "would lead the reader to believe no such finding as to causation was made by Dr. Corbett. Therefore, any portion of the Opinion and Order based upon this misinterpretation of the evidence by the [ALJ] constitutes reversible error."

Finally, Gay argues the ALJ abused his discretion by permitting Walgreens to file medical reports from more than two physicians in violation of KRS 342.033.

As the claimant in a workers' compensation proceeding, Gay had the burden of proving each of the essential elements of her cause of action, including causation/work-relatedness. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Gay was unsuccessful in her burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The 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). 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).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We find the evidence does not compel a finding Gay's knee injury is causally work-related. In determining Gay's injury is not work-related, the ALJ relied upon her testimony and the opinions of Drs. Wolens and Corbett. The ALJ clearly discounted Gay's testimony regarding the existence of prior knee injury or treatment as not credible. He noted she repeatedly denied prior right knee problems, despite medical records dated three days prior to the work incident documenting those complaints, and had previously exhibited the same complaints in August 2009 when seen for restless leg syndrome.

In addition, the ALJ noted Dr. Corbett opined the meniscal tear and surgery were “primarily” due to a degenerative condition and concluded her ongoing problems are the result of unknown prior trauma or of the natural aging process. We find no merit in Gay’s argument the ALJ misinterpreted Dr. Corbett’s opinion. In his summary of the evidence, the ALJ specifically acknowledged Dr. Corbett found the surgery causally related to the October 6, 2011 incident and assigned a 1% impairment rating. However, Dr. Corbett also noted evidence of degenerative joint disease of the medial compartment and found her ongoing problems are caused by a pre-existing and progressive condition.

Finally, the ALJ relied upon Dr. Wolens’ opinion in finding a lack of causation. Dr. Wolens stated he reviewed the video of the October 6, 2011 work incident and, based upon the footage and Gay’s diagnosis of a meniscal tear, he opined the tear is not causally related to her work activities. Rather, he found it more likely a degenerative tear.

We find no merit in Gay’s argument Dr. Wolens’ letter does not constitute an objective medical finding. The Act defines “injury” as “any work-related traumatic event . . . arising out of and in the course of employment which is the proximate cause producing a harmful change in

the human organism evidenced by objective medical findings." KRS 342.0011(1). Dr. Wolens does not dispute the injury, but rather sets forth his opinion on its cause. Dr. Wolens issued an opinion solely on the issue of causation, upon which the ALJ was free to rely. Dravo Lime Co., supra; Magic Coal Co., supra. The fact Dr. Wolens did not examine Gay or issue opinions on impairment goes to the weight of the evidence, and does not automatically disqualify it from consideration.

We also find Cepero, supra, has no application to the case *sub judice*. Cepero, supra, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related

injury two and a half years previous. There are no similarities between this claim and Cepero, supra.

Therefore, we conclude it was reasonable for the ALJ to find Gay did not sustain a work-related injury based upon the opinions of Drs. Wolens and Corbett and on his appraisal of Gay's testimony in light of conflicting medical records. A contrary result is not compelled.

Finally, Gay's argument the ALJ abused his discretion by permitting Walgreens to file more than two medical reports in violation of KRS 342.033 was not properly preserved. 803 KAR 25:010 § 13(14) provides only those issues preserved at the BRC for determination by the ALJ "shall be the subject of further proceedings." In the case *sub judice*, the applicability, or possible violation of KRS 342.033 was not an issue raised at the BRC. Also, at no time did Gay object to the introduction of Dr. Wolens' letter during proof time or at the hearing. Likewise, she did not raise this argument in her brief to the ALJ or in her petition for reconsideration.

Accordingly, the November 20, 2012 Opinion and Order and the December 18, 2012 Order denying Gay's petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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