OPINION ENTERED: AUGUST 27, 2012

CLAIM NO. 200871698

PHILLIP SMITH PETITIONER

VS. **APPEAL FROM HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE**

HALTON INDUSTRIES
and JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

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

SMITH, Member. Phillip Smith ("Smith") appeals from the October 20, 2011 Opinion and Order rendered by Hon. James L. Kerr, Administrative Law Judge ("ALJ"), and from the November 16, 2011 Order denying his petition for reconsideration. The ALJ dismissed the claim finding the conditions were not caused by his work for Halton Industries ("Halton") and further concluding that the claim was fraudulent. The ALJ ordered Smith to reimburse Halton and

its insurer for temporary total disability ("TTD") benefits and medical benefits previously paid and assessed costs pursuant to KRS 342.310. On appeal, Smith argues the ALJ's finding that the claim was fraudulent was clearly erroneous on the basis of the reliable, probative and material evidence and is characterized by a clearly unwarranted exercise of discretion.

Smith testified by deposition taken May 18, 2011 and at the hearing held August 25, 2011. Smith has worked as a mechanic, machine operator, service truck driver, welder, dock worker and lift driver. He did not work from 1990 until 2007 and received Social Security disability. Smith began employment with the Halton in May of 2007 through a temporary agency and he was placed on Halton's payroll seven months later. Smith was a "floater" performing various jobs including welding and bending material. He also operated a brake and used various hand tools including buffers, cutting torches, grinders, impact wrenches, drills and screw drivers.

Smith's medical history includes right ankle and left hand crush injuries in the 1970s. He also had a back injury in 1990 resulting in surgery by Dr. Goodwin and treatment by Dr. Long. Smith was taking Naproxen and Hydrocodone at the

time of his alleged injury at Halton. Smith testified he had no prior problems with his hands or neck.

Smith testified he first noticed neck problems and hand numbness in September, 2008. He stated his hands would not straighten out and would cramp, symptoms he had never had in the past. Smith stated he had never had these symptoms in the past. He saw Dr. Patterson, his family physician, on November 5, 2008, and was later referred to Dr. Morrison who performed surgery on Smith's left wrist and two surgeries on his right wrist. He last saw Dr. Morrison on July 18, 2011. Smith takes Hydrocodone and a muscle relaxer for pain symptoms in his index, ring and little fingers in both hands. He does not believe he could return to work for Halton.

At the hearing, Smith was questioned regarding discrepancies between his deposition testimony and his medical history. He insisted he answered the deposition questions truthfully. Even faced with medical records showing otherwise, he did not recall seeing Dr. Patterson in April 2007 for problems with his hands. He also did not remember getting wrist braces on April 19, 2007. He did not remember having problems with his hands from July of 2007 through July of 2008. He maintained it was his belief in 2007 that he had arthritis in his hands. He also testified

he failed to advise his IME doctors of prior hand problems in 2007 because he did not remember having them.

Smith submitted medical records of Dr. Keith D. Morrison. In a letter dated March 14, 2010, Dr. Morrison stated Smith had bilateral carpal tunnel syndrome and cervical degenerative changes in his neck. Dr. Morrison assessed a 6% whole person impairment due to carpal tunnel syndrome pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Halton filed Dr. Morrison's treatment records. He first saw Smith on December 10, 2008 for complaints of hand numbness and pain. Dr. Morrison ordered EMG/NCV studies which showed moderate bilateral carpal tunnel syndrome and mild left ulnar nerve compression. He believed Smith also had cervical pathology.

On January 1, 2009, Dr. Morrison diagnosed bilateral carpal tunnel syndrome, left cubital tunnel syndrome and cervical disc degeneration. He ordered an MRI of Smith's neck which showed degenerative disc changes and a slight protrusion at C5-6 with no significant compression. Smith underwent a left carpal tunnel release in January 2009.

On February 23, 2009, Dr. Morrison noted the numbness and tingling in the carpal tunnel area on the left had

resolved but Smith continued to complain of numbness and tingling around the ulnar nerve area. Dr. Morrison's records of March 16, 2009 indicate Smith had done well clinically on the left. He underwent right carpal tunnel release in March of 2009 and as of April 9, 2009 had normal sensation with good strength and tone and full movement of the fingers. Dr. Morrison believed Smith had good results from both surgeries. Dr. Morrison saw Smith on May 8, 2009 and noted Smith reported burning in his arm. Dr. Morrison expressed concern about Smith's compliance and attitude about getting better.

Dr. Morrison continued to treat Smith throughout 2009. He performed surgery to release scar tissue thereafter and Smith was improved although he continued to complain of small and ring finger numbness on the right. Dr. Morrison found Smith to be at maximum medical improvement as of January 6, 2010 and restricted him to no lifting over 50 pounds as his only work restriction. He continued to treat Smith through 2011 who was doing well from his carpal tunnel syndrome and ulnar nerve syndrome.

Halton submitted records of the Patterson Medical and Diagnostic Center. Smith was initially seen on March 28, 2007 for back pain and numbness in his hands, degenerative disc disease and carpal tunnel syndrome. Dr. Patterson

prescribed wrist braces on April 19, 2007 and referred Smith to Western Kentucky Orthopedics on July 5, 2007 due to his right carpal tunnel syndrome.

Halton submitted the medical report of Dr. Harold Rutledge who performed an evaluation on January 21, 2011. Smith gave a history of gradually developing increasing numbness and pain in both hands after working approximately fourteen months for Halton. Dr. Rutledge reviewed Smith's medical records, performed a physical examination and concluded Smith's cervical symptoms were not work-related.

Halton submitted the medical records of Dr. Bart Goldman who evaluated Smith on December 9, 2009. Dr. Goldman took a patient history and reviewed Smith's medical records. He noted Smith reported the development of numbness and drawing in both hands in September, 2008. Smith denied any previous medical problems with his hands. Dr. Goldman performed a physical examination and concluded Smith had no findings in his left upper extremity other than a congenital problem in his elbow. Overall, Dr. Goldman assessed a 0% impairment and determined Smith could return to his previous regular duty, only restricting the use of vibratory tools. Dr. Goldman also found Smith's cervical complaints were not related to his work.

Halton submitted the medical report of Dr. Richard DuBou who evaluated Smith on June 14, 2011. Smith indicated he first became symptomatic when his hands began feeling numb in approximately September, 2008. Dr. DuBou performed a physical examination and diagnosed status post carpal tunnel release on the left and on the right times two with marked symptom exaggeration. He could not relate Smith's bilateral carpal tunnel syndrome to his work for Halton. When questioned regarding Dr. Patterson's records, Smith maintained he had no memory of the treatment. Dr. DuBou found no permanent impairment and assigned no work restrictions and stated no diagnosis had a causal relationship to Smith's employment.

Dr. DuBou testified by deposition on August 4, 2011 and re-affirmed Smith was unable to recall having seen Dr. Patterson. Dr. DuBou stated Smith would have had a 6 to 7% whole person impairment for carpal tunnel syndrome prior to beginning work for Halton. Dr. DuBou reiterated Smith's work for Halton could not be the cause of his carpal tunnel syndrome because he had it before starting employment there. Dr. DuBou also stated Smith's diagnosis of cubital tunnel syndrome was not related to his work. Dr. DuBou conceded Smith would have a 3% impairment for his right carpal tunnel syndrome regardless of causation and a 0% rating for the

left carpal tunnel syndrome regardless of causation. Dr. DuBou also described the reasons why he believed Smith was exaggerating his symptoms. He noted Smith complained of his fingers “locking up”, which would have nothing to do with carpal tunnel syndrome. He further noted Smith complained of a totally anesthetic fifth finger, but there was no evidence of trauma one would expect to result with that condition. Finally, he noted Smith complained of numbness on both sides of the ring finger. Dr. DuBou explained the ring finger has a double innervation and it would be “basically impossible” to have both sides “equally messed up.”

Halton submitted the medical report of Dr. Dennis O’Keefe who saw Smith for complaints of bilateral upper extremity pain and numbness upon referral from Dr. Morrison on September 11, 2009. Smith reported he was in his usual state of health until September, 2008. Smith stated he began to have problems with pain and numbness in his hands at that time. Dr. O’Keefe noted Smith had undergone bilateral carpal releases and had distal latencies post operatively but none were dramatically prolonged. Dr. O’Keefe saw no evidence of cervical radiculopathy. He deferred to Dr. Morrison for treatment options.

By Opinion and Order dated October 20, 2011, the ALJ made the following findings relevant to this appeal:

> 10. In his Form 101, the plaintiff has alleged conditions related to his neck and hands/wrists. As to plaintiff's cervical spine, there has been no testimony by any physician, including plaintiff's own IME physician, Dr. Rutledge, that plaintiff's cervical condition is work-related. Wherefore, plaintiff's claim for his neck shall be dismissed. As to bilateral carpal tunnel syndrome, it is apparent from the medical records of Dr. Patterson that plaintiff was diagnosed with bilateral carpal tunnel syndrome a year before the alleged injury and prior to plaintiff's employment with the defendant-employer. The Administrative Law Judge considers Dr. DuBou to be the most qualified and credible physician testifying in this matter. Dr. DuBou has provided a correct medical history for the plaintiff and he concluded that the plaintiff's bilateral carpal tunnel condition is a pre-existing active condition which was idiopathic in nature and unrelated to plaintiff's employment with the defendant-employer. He further testified that plaintiff's employment did not aggravate that prior active condition. Given the extensive nature of plaintiff's treatment by Dr. Patterson, and the credible medical testimony by Dr. DuBou, the Administrative Law Judge concludes that the plaintiff's bilateral carpal tunnel condition was a pre-existing active condition and that the plaintiff's employment is not the proximate cause of a harmful change in him evidenced by objective medical findings. Wherefore, plaintiff's claim for bilateral carpal tunnel syndrome is also dismissed.

11. Having so concluded, the Administrative Law Judge concludes that the plaintiff is not entitled to benefits per KRS 342.730.

12. The remaining issue involves an allegation of fraud. KRS 342.335 (1) provides:

> "No person shall knowingly file, or permit to be filed, any false or fraudulent claim on his behalf to compensation or other benefits under this chapter, or by fraud, deceit, or misrepresentation procure or cause to be made or receive any payments of compensation or other benefits under this chapter to which the recipient is not lawfully entitled, or conspire with, aid, or abet another so to do. No person shall by deceit or misrepresentation or with intent to defraud cause or procure or conspire with, aid, or abet another in so causing or procuring any person entitled to compensation or other benefits under this chapter to delay or omit to claim title thereto or to accept the payment of a less sum than that to which he may be lawfully entitled to thereunder.

13. Herein, the Administrative Law Judge notes that the defendant-employer has paid the plaintiff temporary total disability benefits totaling $16,630.97 as well as medical benefits in the amount of $26,451.91. It is obvious to the undersigned and the undersigned so finds that the plaintiff knowingly lied under oath in respect to his extensive

prior treatment for carpal tunnel syndrome only one year previously including a prescription for braces and medication. It is beyond the pale to think that a person would not remember such an extensive work up with multiple office visits and yet fail to report that multiple times to various doctors. Further, the plaintiff fraudulently misrepresented his prior medical treatment at his deposition on May 18, 2011. Plaintiff's deceit has knowingly led to the defendant-employer and/or its insurer to expend $43,082.88 in workers' compensation benefits as well as litigation expenses including cost for medical evaluations and attorney fees. Despite heroic efforts by his attorney to rehabilitate him, it is obvious that the plaintiff perjured himself at his deposition for secondary gain and misrepresented himself to various doctors.

14. KRS 342.310 allows an Administrative Law Judge to assess costs for unreasonable proceedings. Given plaintiff's willful deceit, the Administrative Law Judge hereby orders the plaintiff to make restitution to the defendant-employer and its insurer for such compensation paid as the result of his violation of KRS 342.335 (1) in the amount of $16,630.97 for temporary total disability benefits paid and $26,451.91 for medical benefits expended.

15. Further, pursuant to KRS 342.310 (1), the Administrative Law Judge awards the defendant-employer its actual costs in defending this litigation to include travel expenses, deposition costs, physician expenses for attendance at depositions, attorney fees and all out-of-pocket expenses which have been incurred as the result of the

> maintenance of this unreasonable proceeding.
>
> 16. Finally, the undersigned shall refer this matter to the Department of Insurance for investigation by its fraud unit.

Smith filed a petition for reconsideration acknowledging the ALJ could reasonably conclude the carpal tunnel syndrome predated employment with Halton, but arguing it was plausible Smith did not recall the treatment in 2007 for the condition.

By order dated November 16, 2011, the ALJ denied the petition for reconsideration stating as follows:

> It appears to the undersigned that plaintiff's basis for the Petition for Reconsideration is a reargument of the merits of the claim. The undersigned continues to believe that the plaintiff willfully and intentionally intended to defraud the employer and insurance company by filing a claim for benefits as a result of symptoms which he developed prior to his employment with the defendant-employer.

We begin our analysis by noting KRS 342.335(1) states:

> No person shall knowingly file, or permit to be filed, any false or fraudulent claim on his behalf to compensation or other benefits under this chapter, or by fraud, deceit, or misrepresentation procure or cause to be made or receive any payments of compensation or other benefits under this chapter to which the recipient is

> not lawfully entitled, or conspire with, aid, or abet another so to do.

KRS 342.990(7), provides for civil penalties that shall be applied for violations of particular provisions of Chapter 342. Furthermore, KRS 342.990(11) states that, in addition to the penalties provided in this section, the commissioner, and any ALJ or court of jurisdiction may order restitution of a benefit secured through conduct proscribed by this chapter.

KRS 342.310(1) states as follows:

> If any administrative law judge, the board or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney's fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted or defended them.

Whether or not a claim has been brought and prosecuted without reasonable ground is a determination of fact to be made by the ALJ. KRS 342.310(1). On appeal from a decision of an ALJ, the Board is directed to review the decision in a summary manner as the ALJ's award or order is

conclusive and binding as to all questions of fact and this Board may not substitute its judgment for that of the Administrative Law Judge. KRS 342.285(1). It is the ALJ's role to determine the weight and credibility of the evidence. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). The fact that there is evidence which would support a different conclusion is not the basis for alteration of an Administrative Law Judge's determination on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

After a close examination of the record, we cannot say the ALJ's determination to assess sanctions against Smith was not supported by substantial evidence. Although Smith claimed his condition arose after he began his employment with Halton, there was evidence of substance from Dr. Patterson indicating the condition was active before his employment there. Furthermore, this finding was reinforced by the medical opinion of Dr. DuBou. Although the history given by Smith to his medical examiners was consistent, the credibility of this medical history was challenged by other evidence of record. Osborne v. Pepsi-Cola, 816 S.W.2d 643 (Ky. 1991). Smith acknowledges there was evidence sufficient to find a prior active condition.

Here, there was a clear diagnosis of carpal tunnel in the records of Dr. Patterson approximately one month prior to Smith's employment. The condition was serious enough for the doctor to prescribe a wrist brace and make a referral to an orthopedist. Despite numerous visits, the prescription for a wrist brace and a referral to an orthopedist, Smith denied any history of prior hand or wrist problems to numerous physicians who saw him in connection with the workers' compensation claim. The ALJ simply found Smith's explanation for his failure to disclose the prior problems and treatment to be without any credibility.

The ALJ was well within his role as fact-finder in rejecting Smith's testimony as lacking credibility. Further, the ALJ is empowered to draw any reasonable inference 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 could reasonably conclude Smith was aware of the prior condition and intentionally concealed it. There was evidence of substance to support the ALJ's finding that Smith's claim was brought and prosecuted without reasonable

grounds; therefore, we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the October 20, 2011 Opinion and Order rendered by Hon. James L. Kerr, Administrative Law Judge ("ALJ"), and November 16, 2011 Order denying Smith's petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON PHILLIPE W RICH
PO BOX 11357
LOUISVILLE, KY 40251

COUNSEL FOR RESPONDENT:

HON RODNEY J MAYER
600 E MAIN ST STE 100
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON. JONATHAN WEATHERBY
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511