OPINION ENTERED: May 17, 2012

CLAIM NO. 200987719

RALPH JEKEL PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

JFT PRECISION FABRICATION
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Ralph Jekel ("Jekel") seeks review of the December 19, 2011, opinion, order, and award rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced pursuant to KRS 342.730(1)(c)1, and medical benefits due to the effects of work-related injuries to

both legs. Jekel also appeals from the January 23, 2012, order overruling his petition for reconsideration.

On appeal, Jekel challenges the ALJ's decision on two grounds. First, Jekel asserts the ALJ failed to "properly deduct the carve-out for the preexisting active condition." Second, Jekel asserts the ALJ committed reversible error when he failed to find Jekel's prescription medication, Opana, compensable.

Jekel's Form 101 alleges while working for JFT Precision Fabrication ("JFT") he was injured on May 18, 2009, when the "front section of rock crushing unit fell upon both legs."

Jekel testified at a March 10, 2011, deposition and at the October 19, 2011, hearing. Jekel testified he was injured when a four hundred pound piece of steel fell on his legs breaking both legs. He was immediately taken to the University of Louisville Hospital where surgery was performed on both legs. Jekel spent one week in the hospital and one week at Frazier Rehabilitation. He then went to "Dr. Murphy's Pain Center" for treatment.[1] Jekel later underwent surgery performed by Drs. Jeremy Statton

[1] The correct name of the pain center is Murphy Pain Center.

and David Seligson to remove the hardware in his right knee.

Jekel testified he injured his right knee when he was twelve years old and as a result of the injury he developed arthritis in the right knee. Jekel testified he had been treated by Dr. Murphy since 2005 for problems with his right knee and low back. During that time, Dr. Murphy prescribed Opana, a pain medication. Jekel testified he currently takes the same pain medication which had been prescribed before the May 18, 2009, injury. Likewise, the amount and dosage of Opana he currently takes daily is no different than that prescribed by Dr. Murphy prior to the injury.

Relying upon the opinions of Dr. Richard Sheridan, an orthopedic surgeon, the ALJ determined the injury resulted in a 20% permanent impairment. Further, the ALJ determined that prior to his work injuries Jekel had a 5% impairment for what Dr. Sheridan characterized as pre-existing arthritis in the right knee. The ALJ also found Jekel was not capable of returning to the work he was performing at the time of the injury and enhanced his benefits by the three multiplier. Accordingly, the ALJ calculated Jekel's benefits as follows: ($504.01 (sixty-six and two-thirds of Jekel's average weekly wage) x 20% (the

impairment attributable to Jekel's work injuries) x 1 (the factor set forth in KRS 342.730(1)(b)) x 3 (the three multiplier contained in KRS 342.730(1)(c)1) = $302.41.[2]

Concerning the medical fee dispute filed by JFT, the ALJ determined as follows:

> On September 12, 2011 Defendant filed a Medical Dispute contesting its obligation to pay the Murphy Pain Center for Plaintiff's post-injury pain management treatment and medication. Defendant contends Plaintiff's present need for pain management and medication was not caused by the work injury but rather is needed due to his pre-existing condition. Defendant bases its contention on the fact Plaintiff is receiving exactly the same pain treatment he received before his work injury, even the medicine is basically the same.
>
> In a medical dispute filed while the claim is being litigated, it is Plaintiff's burden to prove the questioned medical treatment is reasonable, necessary and causally related to the work injury. Plaintiff's proof is not persuasive on the causation issues. Dr. Bilkey does not precisely address this issue but did write, "I do not have any opinion regarding medications at this time for the knee injuries." In contrast, Defendant's Dr. Gladstein testified, "He's getting the same pain management now that he has before the accident. It's not any different. The medicines

[2] In the December 19, 2011, opinion, order, and award, the ALJ calculated Jekel's PPD benefits to be $332.46, but pursuant to JFT's petition for reconsideration amended the award of PPD benefits to $302.41 per week for 425 weeks.

> haven't changed significantly." (Depo. p. 28). On page 29 of his deposition he answered, "No" to the question, "So in regards to the treatment from the Murphy Pain Center and the prescriptions, would you feel that's in any way attributable to the effects of the work injury in May 2009?"
>
> Based upon the above noted facts and testimony, it is determined Defendant's Medical Dispute is sustained. Defendant is not liable for Plaintiff's pain treatment or for providing Plaintiff's Opana ER.

Concerning, Jekel's first argument, Jekel asserts the ALJ should have calculated the award as follows:

$504.01 x 25% x 1.15 x 3 = $434.71

$504.01 x 5% x .65 x 3 = $49.14

$434.71 - $49.14 = $385.57

Jekel adopts the unsuccessful argument utilized in Tudor v. Industrial Mold & Machine Co., 2011-CA-000580-WC, currently on appeal to the Kentucky Supreme Court. Jekel asserts the ALJ erred by using the 20% impairment rating in calculating his award and should have used the total impairment rating of 25% assessed by Dr. Sheridan which included a 5% impairment for a pre-existing active non-work-related condition.

We find no merit in Jekel's argument. The Court of Appeals in Tudor, supra, expressly rejected the formula

Jekel argues should have been utilized in the case *sub judice*.

In Tudor, supra, the ALJ, relying upon the opinion of Dr. Travis, found Tudor had a pre-existing impairment of 9% and a 9% impairment as a result of a work injury. The ALJ determined the total benefits payable for an 18% impairment and then excluded the amount attributable to the pre-existing 9% impairment. The ALJ's calculations are as follows: ($509.50 (sixty-six and two-thirds of Tudor's average weekly wage) x 18% (the total combined impairment) x 1 (the factor set out in KRS 342.730(1)(b)) = $91.71. The ALJ then calculated the value of Tudor's 9% pre-existing impairment as follows: $509.50 x 9% x .85 (the factor set out in KRS 342.730(1)(b)) = $38.98. The ALJ then subtracted the value of the pre-existing impairment from $91.71 and arrived at PPD benefits of $52.73 per week. This Board reversed and remanded for entry of an award based solely on the 9% impairment attributable to the work injury. The Court of Appeals affirmed holding as follows:

> Having accepted the ALJ's findings regarding Tudor's impairments, and after reviewing the record and relevant law, we agree with the Board that the ALJ incorrectly calculated Tudor's benefit rate. The calculation of benefit rate depends, in pertinent part, on several factors. First, the ALJ must determine, as he did herein,

that the claimant suffered a work-related injury. KRS 342.0011(1).

Next, the ALJ must determine if the claimant has any permanent impairment rating, which is defined as the "percentage of whole body impairment *caused by the injury* ... as determined by the 'Guides to Evaluation of Permanent Impairment' ..." KRS 342 .0011(35) (emphasis added). Based on this statutory definition, "permanent impairment rating" differs from "impairment" because a "permanent impairment rating" must be the result of a work injury.

Once the ALJ has determined that a claimant has a permanent impairment rating, he must calculate the claimant's "permanent disability rating." A permanent disability rating is calculated by multiplying the permanent impairment rating by the appropriate factor from KRS 342.730(1)(b). KRS 342.0011(36). Thus, a permanent disability rating must be based on a permanent impairment rating, which must be a percentage of impairment caused by the injury. It is when he analyzed these two factors that the ALJ went astray.

The ALJ found that Tudor "has a permanent disability rating of 18%, which is 18% impairment under the AMA *Guides* multiplied by 1.0, the factor contained in KRS 342.730." That finding is unsupported by the record and inconsistent with the ALJ's finding that half of Tudor's 18% impairment preexisted the injury. Once the ALJ determined that 9% of Tudor's impairment preexisted the work injury, that percentage of impairment could not be included in calculating Tudor's permanent impairment rating or

> permanent disability rating. Since only 9% of Tudor's impairment was caused by the work injury, the ALJ could only use that 9% impairment in calculating Tudor's permanent impairment rating and his permanent disability rating.
>
> The ALJ also erred when he found that "[i]mmediately prior to the injury of August 31, 2009, Roger W. Tudor had a permanent disability rating of 7.65% which is 9% impairment under the AMA *Guides* multiplied by 0.85, the factor contained in KRS 342.730." The 9% impairment Tudor had prior to the work injury was not caused by the work injury; therefore, it cannot be the basis for a permanent impairment rating and it cannot be used to calculate a permanent disability rating.

Slip op. at 2-3.

Jekel seeks to use the 25% impairment so his factor, set forth in KRS 342.730(1)(b) is 1.15. KRS 342.730(1)(b) states for an impairment assessed pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") ranging from 16% to 20% shall be multiplied by 1. However, impairments of 21% to 25% shall be multiplied by a factor of 1.15. Thus, had the ALJ utilizes the 25% impairment rating in calculating Jekel's PPD benefits, the factor would be 1.15. However, since the ALJ used the 20% impairment rating attributable to Jekel's injury in calculating his PPD benefits, the factor is 1. As pointed

out in Tudor, supra, a proper calculation of Jekel's PPD benefits requires the use of the 20% impairment rating. The ALJ is required to use the actual impairment rating attributable to Jekel's work-related injuries in computing his benefits. The ALJ did not err in his award of PPD benefits and his award will be affirmed.

Likewise, we find no merit in Jekel's second argument regarding the prescription medication Opana. Jekel's testimony establishes he had been going to Murphy Pain Center for approximately four years prior to his work injury. During that time, Dr. Murphy prescribed Opana for pain in his right knee and lower back. Jekel testified that because of his work injury and the fact he was not working, Dr. Murphy lowered the Opana dosage. However, when he returned to work Dr. Murphy increased the dosage of Opana to the pre-injury dosage. Jekel testified he was taking one Opana twice a day well before the work injury. Significantly, Dr. Warren Bilkey, who performed an independent medical evaluation ("IME") at the request of Jekel, stated he did not have "any opinion regarding medications at this time for the knee injury." During his August 2, 2011, deposition, Dr. Mark Gladstein testified the treatment Jekel was receiving was not due to the May 18, 2009, work injury. Dr. Gladstein testified as follows:

Q: So it looks like he was seen within a few days of the incident complaining of back and knee pain?

A: Yes, same complaints.

Q: What medication was he on April, May of 2009?

A: Opana ER.

Q: And what exactly is that, Doctor?

A: As far as I'm concerned, it is an extremely dangerous and addicting narcotic, so much so that they won't even carry it at Jewish Hospital to be used on patients, and if you will note that over the years, his dosage has had to be increased, because it's almost like heroin or other illicit drugs. You don't get the relief that you do – initially did, and, so, the dose has to be increased and increased.

He started off I believe at 10. Then he went to 20. Then he went to 20 extended relief, and now he's up to 40 milligrams in 2000 – 40 milligrams twice a day. So, it's a drug I have never used, okay, but I called the pharmacist at Jewish Hospital about it, because I had a patient I thought we might try it for a brief period. He said, Doc, we won't even carry it here it is so dangerous.

Q: The ER, does that stand for the extended relief?

A: Yes.

Q: So, he was on 40 milligrams twice a day?

A: Twice a day.

Q: Extended relief?

A: Yes.

Q: And to put it in context, Doctor, is that a high dosage, average, low?

A: I don't honestly know, because it's a drug that I have never used. I tried to use it one time and I couldn't. They wouldn't get it for me. So, he told me about it, and I said, well, I think maybe it's a wise decision for me to stay away from it.

Q: He had been on some form of Opana I think you said for years prior to 2009?

A: Yes.

Q: And it was progressively getting increased the dosage he was on?

A: Right.

Q: Given those review of the records, Doctor, is it your opinion that Mr. Jekel had a pre-existing condition in his right knee before May of 2009?

A: Yes.

Q: Would you classify that condition as active or dormant?

A: If he's getting treatment for it, I would assume it to be active.

Q: Okay. And it appears from the review of the records from Murphy's [sic] Pain Clinic he was seen about once a month.

A: That's typically what the pain clinics do, because they don't want to give them any long-term medicines, but, if you'll note, there's no physical

examination. They come in, get their medicines renewed, they charge for an extended office visit, and they send them on their way, but you'll seldom see a physical examination by a pain management physician.

[text omitted]

Q: I understand there's an issue of difference between reasonableness and necessity of treatment and work-relatedness.

A: Yes.

Q: You have some issue with reasonableness and necessity of this pain management since the injury and before?

A: Right. I mean, you know, he's getting the same pain management now that he was before the accident. It's not any different. The medicines haven't changed significantly.

Q: I guess my question is if he's been on the same regimen of visits and same regimen of treatment after—

A: Then we have to say there's been no significant change.

Q: So, in regards [sic] to the treatment from the Murphy Pain Center and the prescriptions, would you feel that's in any way attributable to the effects of the work injury in May 2009?

A: No.

[text omitted]

Q: What your testimony is today is if he were your patient, you would not have referred him to pain management?

> A: No. I don't see anything that needs pain management in this gentleman.

Jekel's testimony that he was being treated at Murphy Pain Center four years prior to his injury and received the same dosage of Opana prior to the work injury as he did after the work injury, and the testimony of Dr. Gladstein recited herein constitutes substantial evidence which supports the ALJ's determination the pain medication Opana is not compensable.

As the claimant in a workers' compensation proceeding, Jekel had the burden of proving each of the essential elements of his cause of action, including the compensability of certain medications. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Jekel was unsuccessful in that 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 that 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). 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).

Contrary to Jekel's assertions, the testimony of Dr. Gladstein in conjunction with Jekel's testimony constitutes substantial evidence upon which the ALJ was free to rely in reaching the decision the prescription medication Opana is not compensable. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939).

Although Jekel argues his pain symptoms had increased substantially as a result of his work-related injury the fact remains Dr. Murphy did not increase the amount and dosage of Opana. We disagree with Jekel's assertion the ALJ's decision has allowed JFT to skirt its liability for pain medication entirely. The ALJ's decision relates solely to the prescription medication Opana. JFT is still responsible for paying "for the cure and relief from the effects of an injury." The ALJ's decision does not prohibit Drs. Statton, Seligson, and Murphy from prescribing pain medications which relate to and are reasonable and necessary treatment of Jekel's work injury. Because the outcome selected by the ALJ regarding the

prescription medication Opana is supported by the record, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON CHED JENNINGS
455 S 4TH ST STE 1450
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON THOMAS L EDELEN
1315 HERR LN STE 210
LOUISVILLE KY 40222

ADMINISTRATIVE LAW JUDGE:

HON OTTO D WOLFF IV
8120 DREAM ST
FLORENCE KY 41042