OPINION ENTERED: April 25, 2012

CLAIM NO. 200994359

REBECCA JOHNSON TINDALL PETITIONER

VS. **APPEAL FROM HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE**

LIBERTY MUTUAL
HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE
and HON. ALLISON EMERSON JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Rebecca Tindall ("Tindall") appeals the December 27, 2011, opinion and order of Lawrence F. Smith, Administrative Law Judge ("ALJ Smith") dismissing Tindall's claim against Liberty Mutual (“Liberty”). Tindall filed a petition for reconsideration which was granted in part and denied in part by order dated January 24, 2012, rendered by

Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ Jones"). Tindall also appeals the January 24, 2012, order.

The Form 101 alleges while working for Liberty, Tindall sustained an injury on February 26, 2009, as follows:

> I was working and flew to St. Louis, Missouri on 2/24/09 and returned on 2/25/09 and developed a recurrent deep vein thrombosis and pulmonary embolism for which I was first treated on 2/26/09 and returned to work on 3/9/09.

The affected body parts are "right leg with lung."

The July 13, 2011, benefit review conference ("BRC") order lists the following contested issues: "Causation/work relatedness; Extent and duration; Failure to pay medical expenses; Injury as defined by the Act; Pre-existing active disability."

Tindall was deposed on May 18, 2011, and testified at the October 28, 2011, hearing. At the hearing, Tindall testified concerning her prior history with deep vein thrombosis ("DVT") as follows:

> Q: Okay. And we talked about it just briefly in your deposition, but if you would, tell us again, quickly, what transpired on-- well, let's start before that. We're using a date of 2-24, 2-25 and 2-26 in our application. So, let's go to the day before, 2-23-09. Okay? Or if you would like 2-22-09. At that time, you were on the medication coumadin [sic].

A: Yes.

Q: And, you had been on that medication since you had suffered a deep vein thrombosis, according to the medical records, in September of 2004, or thereabouts?

A: August of 2004.

Q: As was noted as we were warming up for this, we talked about Doctor Huber's deposition and the CBC records and Doctor Huber's records and Doctor Weinstock's records. According to what I can glean from that, it looks like you were treated at CBC from September of '04, through May of 2007, prior to February of 2009, does that sound approximately accurate?

A: It does.

Q: And, the last note from May of 2007, reflects that Doctor Weinstock was doing a good job and that CBC was going to just let Doctor Weinstock take care of monitoring the coumadin [sic], is that what actually occurred?

A: It is.

Q: Okay. So, on February 23rd, 2009, you take coumadin [sic] for a prior deep vein thrombosis that you had suffered in 2004, is that accurate?

A: That is correct.

Q: Okay. Any other medication related to that thrombosis that had developed in 2004, before you got on the plane in February of 2009?

A: The folgard 2.2 was a prescription vitamin that I had been placed on...by the same doctor and continued.

> Q: Had you had any additional embolisms, deep vein thrombosis occur between September of 2004 and February of 2009?
>
> A: No. I had not.

At the hearing, Tindall testified concerning the events surrounding her flights to and from St. Louis as follows:

> Q: Okay. Walk me through then what happened on February 24th.
>
> A: As I stated in my deposition, I flew to St. Louis on a flight that was about an hour and fifteen minutes.
>
> Q: Did you have any difficulties on the flight itself?
>
> A: Not on the flight.
>
> Q: Okay. What happened next?
>
> A: Later that evening I had pain and achiness and swelling in my legs, in both legs and I noticed that.
>
> Q: Did you do anything to help it?
>
> A: I elevated my legs and slept with them elevated.
>
> Q: Okay. Had you had any occurrences like that between February-- I'm sorry, between September of '04 and February of 2009?
>
> A: I had had occasional swelling in my right leg after the 2004 clot incident from time to time, especially right after it had happened in 2004, my leg would be prone to swelling on occasion, my right leg. And, I would elevate,

it, I wore my stockings, etc., but it-it decreased over time....So--

Q: So, you weren't overly concerned on the night of the 24th or were you?

A: No. I was a little concerned because I had not had that much pain and swelling for quite some time. And-- and I had not ever had it in my left leg.

Q: Okay. So, I think I asked you this, you said you elevated it. And, then did you go on and go to your training session the next day?

A: Yes. And, the next morning my legs felt fine and I continued through the course of my day and I just chalked it up to just an episode of swelling.

Q: Okay. What happened next?

A: At the end of that day, I think the flight was 6:00 or 6:30 p.m. Flew back to Louisville, Kentucky. Again, about an hour-- it might have been a slightly shorter flight just with tailwinds, maybe five minutes shorter, but I felt pain in my right leg at that time.

Q: Similar to the day before?

A: Similar, but-- I wouldn't describe it as a lot worse, but just an odd feeling, pain-- a little bit of a sharp pain. But, just something that I noted in the flight and was, again, making me concerned-- that something unusual was happening.

Q: What did you do that night?

A: That-- well, that night, when I got off the plane, I told my husband, that something wasn't right and I elevated

> my legs after we got home, and I said, if it's not totally better in the morning, I'm calling the doctor.
>
> Q: Was it better in the morning?
>
> A: It- it wasn't as bad, but it was still there and I called the doctor first thing.
>
> Q: Okay. And, according to your deposition, you went to see Doctor Weinstock. I believe, you were sent to Baptist Hospital East for testing. And, then they scheduled-- because they found a little something, they scheduled a retest a couple days later?
>
> A: Correct.
>
> Q: And, then you got a call from Doctor Weinstock telling you to go to the hospital.
>
> A: On the Sunday, the day after the repeat doctor.
>
> Q: How long were you in the hospital?
>
> A: Through Friday.

In the December 27, 2011, opinion and order, ALJ Smith set forth the following findings of fact and conclusions of law:

> The parties agreed that the plaintiff sustained no permanent impairment. The plaintiff argues that her employment aggravated her condition into a worsened condition, resulting in the need for a more expensive medication. The defendant argues that the plaintiff's condition is not work-related and therefore not compensable.

This Administrative Law Judge notes that the burden of proof and risk of non-persuasion are on the claimant, relative to each and every essential element of his claim. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979), *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 928 (Ky. 2002). KRS 342.0011(1) defines 'injury' as any work-related traumatic event or series of traumatic events, including cumulative trauma, 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. In the present case the plaintiff sat on an airplane for about an hour, twice. No evidence suggests a traumatic event of any kind. Nor does the evidence suggest a harmful change; the plaintiff had recurrent DVT before and after the flight.

When there is a conflict in the evidence, it is for the ALJ to resolve that conflict. *Millers Lane Concrete Co., Inc., v. Dennis*, 599 S.W.2d 464 (Ky. App. 1980). The ALJ as fact finder and the ultimate arbiter of the extent and duration of occupational disability, must draw reasonable inferences from the record. *Jackson v. General Refractories Co.*, 581 S.W.2d 10 (Ky. 1979). When, as here, the evidence is conflicting, it is up to the ALJ to resolve the conflict. *Codell Constr. v. Dixon*, 478 S.W.2d 703 (Ky. 1972).

With regard to causation, the plaintiff's best evidence indicates that the flight was one of several contributing factors. The defendant's physicians opine that a flight of short duration would not contribute to the plaintiff's susceptibility to recurrent

> DVT. When considering the plaintiff's medical history and the whole body of medical opinion on this issue, this Administrative Law Judge is more persuaded by the conclusions of Dr. Wolens and Dr. Snider. I find that the plaintiff's medical condition has no relationship to the plaintiff's airline flight to and from St. Louis in February of 2009.

Tindall filed a petition for reconsideration on January 11, 2012, asserting the ALJ committed error by stating the plaintiff had recurrent DVT before and after the February, 2009, flights. Tindall asserted as follows:

> The Claimant did not have a 'recurrent DVT' before the flight but did have one after the flights. If the ALJ felt that the Claimant had a DVT prior to the flight then that is an error that patently appears on the face of the Award and more importantly that error has produced a 'domino' affect [sic] in the Administrative Law Judge's ability to evaluate and assess this most difficult claim.

ALJ Jones, in an order dated January 24, 2012, ruled on Tindall's petition for reconsiderations as follows:

> Because the opinion in question was written by another ALJ, this ALJ is put in the difficult position of trying to assess whether the factual error had a material/patent effect on the outcome of this matter.
>
> Judge Smith's opinion states:

> KRS 342.0011(1) defines 'injury' as any work-related traumatic event or series of traumatic events, including cumulative trauma, 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. In the present case the plaintiff sat on an airplane for about an hour, twice. No evidence suggests a traumatic event of any kind. ***Nor does the evidence suggest a harmful change; the plaintiff had recurrent DVT before and after the flight.***

As explained, Plaintiff did not have a recurrent DVT before the flight. In fact, while she had had an initial DVT in the past, she presumably did not have an active DVT present before the flight. Thus, Plaintiff did have a harmful change to her condition.

This does not mean, however, that that [sic] the harmful change was caused by the flight. While the prior ALJ misstated the fact related to the existence of recurrent DVT before the flight, his opinion does not indicate that this factual error affected his conclusion on the causation element. He considered all the testimony and determined that Drs. Wolens and Snider were more credible on the issue of whether the flight caused the DVT than Dr. Huber. This determination does not appear to be the product of any factually or legally patent errors. As such, it is not the place of this ALJ to reweigh the merits on the causation issue. This portion of the Opinion and

> Order must remain intact and undisturbed.
>
> In conclusion, Plaintiff's petition for reconsideration **is GRANTED IN PART and DENIED in part. Page 7 of the prior Opinion and Order is AMENDED to correct that Plaintiff did not have recurrent DVT before the February 2009 flight. The Opinion and Order stands in all other respects.**

On appeal, Tindall makes two arguments. Tindall argues ALJ Smith erred as a matter of law in determining Tindall's DVT had no relationship to the flights to and from St. Louis on February 24 and 25, 2009. Next, Tindall asserts ALJ Jones erred by overruling Tindall's petition for reconsideration and by not ordering a second hearing. We affirm ALJ Smith's December 27, 2011, opinion and order and ALJ Jones' January 24, 2012, order ruling on Tindall's petition for reconsideration.

ALJ Smith's December 27, 2011, opinion and order is clear that with regard to causation, he relied upon opinions by Drs. Daniel Wolens and Gregory Snider to conclude "the plaintiff's medical condition has no relationship to the plaintiff's airline flight to and from St. Louis in February of 2009." The record contains a report by Dr. Wolens, dated June 3, 2011, in which Dr. Wolens concluded as follows regarding the causal connection between the February 2009 flights and Tindall's DVT:

> Travel for one hour in an airline seat would not present a unique risk for the development of DVT greater than an exposure of sitting elsewhere, i.e., office chair, theater, dining room table, etc. Even in absolute terms, sitting for one hour would not be considered a risk factor for the development of DVT. More importantly, Ms. Tindall has a history of having experienced DVT previously with chronic thrombosis within the popliteal vein, where she subsequently experienced a recurrence. She has a very substantial hypercoagulable disorder, and most critical to the development of her DVT on 2/26/2009, a substantially enlarged uterus causing compression of the right external iliac vein. Lastly, if the 2/26/2009 record of Baptist Medical Associates is correct, the symptoms associated with her DVT began one to two days prior to her airline flight. Therefore, given all of the information available, this individual's DVT would not have been causally associated with that airline flight.

Regarding causation, in his October 19, 2011, independent medical evaluation ("IME") report, Dr. Snider states as follows:

> All-in-all, I agree with Dr. Wolens that there is no clear evidence that Ms. Tindall's DVT occurred as a result of these short plane flights. It is well known that long plane flights, three hours or more, predispose individuals, especially older individuals, to DVT. The theory behind this is that prolonged periods of immobilization, perhaps combined with some dehydration, produce conditions suitable for the formation of clots. I have seen no evidence that this risk is

> increased with short flights, for example of one hour duration, or that similar short periods of sitting would pose an increased risk of developing DVT. Ms. Tindall has a combination of other risk factors that explain the development of this recurrent DVT, including a prior chronic DVT, known hypercoagulable state, and enlarged uterus producing venous compression and obstruction. In summary, I do not see any convincing evidence that the plane flights described caused a measurable risk in forming recurrent DVT.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id. Kentucky law holds when the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). 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). So long as any evidence of

substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The above-cited opinions by Drs. Wolens and Snider constitute substantial evidence in support of ALJ Smith's conclusion that the DVT had "no relationship" to the flights Tindall took to and from St. Louis on February 24 and 25, 2009. With such evidence in the record, a determination contrary to that reached by the ALJ regarding causation is certainly not compelled. The ALJ's December 27, 2011, opinion and order will not be disturbed.

Tindall's second argument on appeal is that ALJ Jones erred by overruling Tindall's petition for reconsideration and by failing to order a new hearing. Tindall reasons as follows:

> A Petition for Reconsideration having been filed and responded to, the second ALJ was confronted with the fact that the first ALJ had made an obvious erroneous finding of fact. The second ALJ acknowledged that the Claimant did in fact have a harmful change to her condition. The second ALJ said the first ALJ had considered all of the testimony and determined that Drs. Wolens and Snider were the [sic] more credible and that determination did not appear to be the product of any factually or legally patent errors and therefore it was not the place of the current ALJ to re-weight [sic] the merits on the causation issue.

> Therefore, that portion of the Opinion and Order must remain intact and undisturbed. To the contrary, it is counsel's position that the ALJ had to re-weigh the merits on the causation issue in light of the first significant error of fact. Accordingly, the ALJ erred as a matter of fact first in not re-examining the evidence and making her own findings of fact and conclusions of law, or in the alternative in granting a second hearing and then making her own determination on matters of fact and issues of law. It is submitted that the ALJ erred in not so doing.

In the January 24, 2012, order ruling on Tindall's petition for reconsideration, ALJ Jones corrected ALJ Smith's erroneous statement in the December 27, 2011, opinion and order that Tindall had "recurrent DVT before and after the flight" to St. Louis on February 24 and 25, 2009. Medical records from Jewish Hospital indicate Tindall has had a significant medical history with DVT and treatment for a blood clotting disorder. Tindall was diagnosed with a DVT in the right popliteal vein on August 4, 2004. Jewish Hospital records spanning 2004 through 2006 describe the DVT as "chronic" in nature. Records by Dr. Frances Weinstock, dated May 18, 2007, indicate an October 2004 "Doppler study of the lower extremities showed no acute thrombosis but showed chronic deep vein thrombosis involving the right popliteal and posterior tibialis

veins." Dr. Weinstock also noted Tindall has "thrombophilia with lifelong anticoagulation." Despite Tindall's assessment regarding the gravity of ALJ Smith's error, this Board views this error as nothing more than a harmless semantic oversight that has been corrected. This is particularly true in light of there being substantial evidence in the record in support of ALJ Smith's determination regarding a failure to prove causation. ALJ Smith's December 27, 2011, opinion and order reflects he understood that although Tindall was actively being treated with Coumadin for a blood clotting disorder at the time of the February 24 and 25, 2009, flights, she suffered only one DVT, in 2004, prior to her flights to and from St. Louis on February 24 and 25, 2009. The language in the December 27, 2011, opinion and order demonstrates ALJ Smith understood Tindall's medical history, and any error in the precise language used is harmless. ALJ Jones' January 24, 2012, order ruling on Tindall's petition for reconsideration will not be disturbed.

We do not agree a second hearing is necessary. A second hearing, in light of such a harmless error, is not warranted since substantial evidence supports ALJ Smith's dismissal of Tindall's claim.

Accordingly, ALJ Smith's December 27, 2011, opinion and order and ALJ Jones' January 24, 2012, order ruling on Tindall's petition for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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