

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 1, 2016

CLAIM NO. 201376941

RICHARD FISSE

PETITIONER

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

CARROLLTON MILL SERVICE, INC.
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**
* * * * *

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

RECHTER, Member. Richard Fisse ("Fisse") appeals from the October 12, 2015 Opinion and Order and the November 30, 2015 Order on Petition for Reconsideration rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). The ALJ dismissed Fisse's claim against Carrollton Mill Service, Inc. ("Carrollton"), finding he did not sustain a work-related injury. Fisse argues the ALJ erred in failing

to find a work-related injury and erroneously invaded the province of medical experts in dismissing the claim. For the reasons set forth herein, we affirm.

Fisse worked for Carrollton as a scrapyard operator maintaining a steel mill. He alleged his knee gave out while he was stepping up on a concrete slab and his right knee hit the concrete. He immediately reported the injury to his supervisor, Troy Hebner ("Hebner"), and sought medical treatment at the Carroll County Memorial Hospital emergency room. He was released to light duty but did not return to work.

Fisse denied any prior knee condition or treatment prior to this June 25, 2013 injury, but acknowledged a motor vehicle accident ("MVA") on June 17, 2013. He stated his shoulder was injured in the MVA, but not his knee. Fisse denied telling Hebner his knee had been hurting for a week following the MVA. He alleged Hebner tried to force him to report the knee condition was the result of the MVA. Fisse also denied telling Sandy Alvarez, an adjuster, that he had a prior knee problem.

Fisse initially denied any additional knee injury following the work incident. He later acknowledged an incident on July 13, 2013 when he was getting out of bed.

His knee gave out and he hit the floor. He stated his knee worsened after that incident at home.

A June 26, 2013 accident investigation report completed by Hebner was attached as an exhibit to Fisse's second deposition. In the report, Hebner indicated Fisse "told me his knee had been hurting all weekend after the car accident Monday." Hebner further noted, "After talking to Richard his knee was hurt before work and it just give out when he step [sic] up to check dust bag."

Hebner testified by deposition on March 16, 2015. He explained he helped Fisse get the job with Carrollton and considered Fisse to be a friend. Prior to June 25, 2013, Hebner was not aware of Fisse having any knee problems. On the date of the alleged injury, Fisse indicated he was stepping up or down from a piece of concrete and he "injured an old injury or reinjured an injury or some nature like that." Fisse did not report striking his knee, and theorized he could have injured it in the MVA a week prior. Hebner wanted the EMTs to check out the knee, but Fisse indicated "it wasn't nothing [sic] that he done, that he just aggravated it." Fisse's girlfriend picked him up and he never came back to work. Hebner later spoke to Fisse on several occasions. Fisse

would call inquiring whether he could come back to work, but never asked about the availability of light-duty work.

Fisse submitted the report of Dr. Jules Barefoot who performed an independent medical evaluation ("IME") on December 2, 2014. Dr. Barefoot noted a history of the work incident. Fisse denied any history of prior knee problems. Dr. Barefoot reviewed post-injury treatment notes, including treatment by Dr. Nunnelley on July 16, 2013 for a re-injury of the right knee. Dr. Barefoot diagnosed internal derangement of the right knee. He assigned a 4% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition. He attributed the impairment to the work injury.

Carrollton filed medical records of Dr. Travis E. Clegg who treated Fisse for a new complaint of right knee pain on November 15, 2012. Dr. Clegg noted Fisse stated the knee pain "gets to be up to a 10 out of 10 and is worse whenever recently he was roller skating with his daughter." X-rays revealed mild arthrosis and no acute abnormalities or fractures. Dr. Clegg diagnosed right knee patellofemoral pain syndrome. Dr. Clegg's records include a July 21, 2014 MRI report for the right knee from King's Daughters' Health. The MRI revealed mild medial

compartment chondromalacia, focal cartilage fissuring in the medial compartment, and minimal subchondral edema in the medial plateau. There was no discernable evidence of internal derangement.

Carrollton filed medical records from Carroll County Hospital, including a June 25, 2013 emergency room record of treatment for a reported right knee injury in a fall at work. In addition to the history of the work incident, a follow up report on June 26, 2013 notes "MVA 6/17/13." Fisse was diagnosed with a knee sprain and contusion. He was given a knee brace and crutches.

On July 16, 2013, Fisse again visited the emergency room and reported he reinjured his right knee. The note indicates Fisse was getting out of bed and stumbled over his shoes, causing him to twist his knee. He was diagnosed with internal derangement of the right knee. Diagnostic studies revealed a very small suprapatellar joint effusion.

Carrollton filed the July 30, 2014 record of Dr. Paul S. Rosenberg of the King's Daughters' Medical Group. He was not sure why Fisse had such a problem with the knee or why he had not worked for a year. Dr. Rosenberg noted Fisse did have "a little bit of chondral problems" and suspected the original injury was a bone bruise, but that

would have resolved before his MRI. On August 27, 2014, Dr. Rosenberg recommended arthroscopic surgery to ascertain a more precise diagnosis.

Carrollton filed medical records of Dr. Roy Miner who treated Fisse in 2014 and 2015 for chronic knee pain that had been ongoing since June 25, 2013. Dr. Miner saw Fisse on January 23, 2015 for right knee pain for two to three weeks, which he attributed to twisting his knee a week prior.

Dr. Thomas M. Loeb performed an IME on January 20, 2015. Fisse provided a history of the June 2013 incident at work and the July 2013 incident at home. Dr. Loeb diagnosed chondromalacia of the patella and the possibility of internal derangement, unconfirmed at this point. Regarding the cause of the knee condition, Dr. Loeb stated as follows:

If the claimant's history is accurate and the mechanism of injury that he described did indeed occur at the work place on the date listed, then there is some reasonable suspicion for a work related condition with a direct blow to the patella causing some articular cartilage damage to the under surface of the patella. Particularly, in lieu of the fact that he claims he was asymptomatic prior to this injury. It is certainly possible that there could have been an underlying, pre-existing condition or chondromalacia of the patella which was asymptomatic and

was aggravated and then brought into disabling reality by the work injury, rather than a primary causative factor.

Dr. Loeb indicated Fisse was not at maximum medical improvement and remained symptomatic. Dr. Loeb noted the mechanism of the injury would have been a direct blow to the patella and typically would not cause any internal derangement other than articular surface damage. However, a twisting injury could cause further internal derangement. Dr. Loeb stated that if internal derangement were found on an MRI, he would relate it to the injury that occurred at home and not to the alleged work injury.

Dr. Loeb issued a supplemental report on March 15, 2015. After reviewing medical records from Drs. Rosenberg, Miner, Steve Adams and the Carroll County Hospital, Dr. Loeb stated the June 25, 2013 injury was a direct blow to the anterior right knee. Fisse later sustained a twisting injury to the same knee at home. It is unknown whether Fisse had any degree of patellar chondromalacia before the injury date, but currently has symptomatic chondromalacia. Dr. Loeb stated, "This appears to have been at least, aggravated by his WC injury if his history is accurate." Dr. Loeb stated Fisse has arthritic changes in the medial compartment that are not work related. An MRI of the knee reveals arthritic changes in

the medial compartment which is not related to the method of injury. Regarding potential surgery, Dr. Loeb stated:

He is a candidate for arthroscopy of the right knee but the only procedure allowable would be chondroplasty of the patella, not the medial compartment. Any further treatment regarding progressive arthritis of the medial compartment should not be considered work related (i.e. possible knee arthroplasty in the future). No other internal derangement occurred in the right knee from the work injury of 6/25/13.

The ALJ's findings relevant to this appeal are as follows:

Plaintiff has not presented ample persuasive credible proof he sustained a compensable work injury as a result of a June 25, 2013 work incident.

Plaintiff has not proven a sufficient link between his work and his knee problems. Any link Plaintiff contends he has shown is completely broken by his lack of credibility.

Plaintiff is not credible. At his first deposition Plaintiff answered "No" to the clear and unambiguous question, "Have you ever (before 6/25/13) ever required any medical treatment for your right knee?" (1st Depo., p. 13-14). At his second deposition Plaintiff answered "No" to the questions "Before June 25, 2013 did you ever have any right knee problems before" and "Have you ever had any medical treatment for right knee problems before that?" (2nd Depo., p. 13).

Despite Plaintiff's sworn representations, the black-and-white medical records, written only six months before his alleged work incident, confirm Plaintiff sought treatment from an orthopaedic surgeon because of right knee pain. The pain was so severe Plaintiff indicated it was 10 pain level, on a scale from one to ten. In November 2012 he was X-rayed, diagnosed with "Right knee patellofemoral pain syndrome," told to do the patellofemoral pain protocol, and to do VMO strengthening and other modalities.

Perhaps this oversight could be explained if it was in Plaintiff's distant past, but it was not, his right knee pain treatment was approximately six months before his alleged work injury. As to the input of Mr. Hebner and Ms. Alvarez, Plaintiff testified Mr. Hebner is not telling the truth and Ms. Alvarez is a straight and simple "liar."

Why would ER personnel document Plaintiff told them (concerning his 7/16/13 knee injury) his injury occurred "getting out of bed, stumbled over his shoes causing him to twist his knee", and Plaintiff later deny having said so and the record entry was totally wrong.

The opinions of Plaintiff's IME physician and Defendant's IME physician, on the issue of work-relatedness, are not persuasive because they opined thinking Plaintiff did not have a pre-June 25, 2013 right knee problem and medical treatment.

A significant point is also black-and-white, Plaintiff's Carroll County Hospital right knee X-ray from June 25,

2013 was essentially negative, but his Carroll County Hospital right knee X-ray of July 16, 2013 revealed "a very small suprapatellar joint effusion present." It seems logical that the objective medical findings of a small suprapatellar joint effusion would be the result of Plaintiff stumbling over his shoes in his bedroom rather than [sic] being the result of his alleged work incident.

When determining whether there is a convincing link between one's injury and work the decision must be based on the quantum of aggregate facts rather than the existence or non-existence of any particular factor. *Hayes v. Gibson Hart Co.*, 789 S.W.2d 775 (Ky. 1990).

Taking into consideration the quantum of aggregate facts, it is determined Plaintiff has not presented ample persuasive proof his right knee problem is due to the work he did for Defendant; and, consequently this claim will be dismissed.

Fisse filed a petition for reconsideration requesting additional findings of fact on the issue of causation and what medical opinion was relied upon in dismissing the claim. He also requested additional findings as to whether he sustained an injury on June 25, 2013, whether his pre-existing knee condition was active or dormant just prior to the work incident, and why Dr. Barefoot's opinion was dismissed. By order dated November 30, 2015, the ALJ overruled the petition for reconsideration.

On appeal, Fisse argues the evidence compels a finding a work-related accident occurred on June 25, 2013. He reported the accident, sought medical treatment that day, and an accident report was completed. Fisse contends a single office visit for knee pain six months prior to the work accident is not sufficient to break the causal connection between the work incident and the work accident. Likewise, Fisse contends the IME is nonetheless reliable despite omitting his prior treatment for knee pain, and is unlike the situation in Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004).

In a related argument, Fisse contends the ALJ invaded the province of medical experts by entering the following finding: "It seems logical that the objective medical findings of a small suprapatellar joint effusion would be the result of Plaintiff stumbling over his shoes in his bedroom rather [than] being the result of his alleged work incident." Fisse asserts this is a case involving a complex question of causation and both IME physicians found a work-related element to the knee condition. Furthermore, Dr. Loeb specifically took into account the July 16, 2013 fall. Fisse contends that Dr. Loeb's report supports a finding of a work injury and

recommended surgery for which at least medical bills and temporary total disability benefits would be appropriate.

Causation/work-relatedness is a threshold issue. To prevail on the issue, a claimant must prove to the satisfaction of the fact-finder that his impairment/disability was probably caused by a work-related event. Markwell & Hartz, Inc. v. Pigman, 473 S.W.2d 842 (Ky. 1971); Stauffer Chemical Co. v. Greenwell, 713 S.W.2d 825 (Ky. App. 1986). When the causal relationship between an injury and trauma is not readily apparent to a layman, the question is one properly within the province of medical experts. Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Pursuant to Osborne v. Pepsi-Cola Co., 816 S.W.2d 643 (Ky. 1991), the ALJ is free to disregard even the unrebutted testimony of a physician where the facts or data upon which the expert's opinion is based are sufficiently impeached. Thus, where the evidence establishes that a physician's opinion as to causation is based upon an inaccurate past medical history, the fact-finder may reject that opinion as lacking in reliability and probative value. This is a discretionary matter in which the ALJ is generally accorded considerable deference as fact-finder.

In Cepero, the Supreme Court found a medical opinion erroneously premised on the claimant's egregious omission of directly relevant past medical history was sufficient to mandate reversal based on an insufficient history received by the medical expert. The Court held "medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable." Cepero, 132 S.W.3d at 482.

Here, Fisse sought treatment for knee pain that he described as a level ten on a scale from one to ten on November 15, 2012, just six months prior to the alleged work injury. Diagnostic studies revealed mild arthritis of the right knee at that time. Dr. Clegg, an orthopedic surgeon, diagnosed patellofemoral pain syndrome. Stedman's Medical Dictionary 28th Edition at page 1888 notes "syndrome" is not properly applied to a solitary symptom or sign. Stedman's defines "syndrome" as "The aggregate of symptoms and signs associated with any morbid process, together constituting the picture of the disease." Id. Stedman's further defines "patellofemoral syndrome" as "anterior knee pain due to a structural or functional disturbance in the relation between the patella and distal femur." Id. at 1908.

Fisse did not advise the IME physicians of the prior diagnosis or treatment for the right knee. Dr. Loeb expressly conditioned his opinion regarding causation on the accuracy of the history Fisse provided. Neither evaluating physician had a complete and accurate history of the prior diagnosis and treatment when they offered their opinions on causation. The ALJ determined the concealment of the past complaints and treatment was significant enough to render the physicians' opinions regarding causation lacking in probative value. Although Fisse attempts to minimize the importance of the prior treatment, questions of the weight to be assigned the evidence are reserved for the ALJ. The ALJ could reasonably conclude the prior treatment and diagnosis of patellofemoral pain syndrome was significant enough that the physicians who opined regarding causation of Fisse's knee complaints following the alleged work incident would need to be aware of that diagnosis and treatment to formulate an accurate assessment. Because the ALJ had a reasonable basis to reject and did reject the medical opinions of Drs. Loeb and Barefoot regarding causation, there was no probative medical opinion remaining in evidence to establish causation. Therefore, it cannot be said the evidence compels a finding that Fisse sustained a compensable injury. We are unable to say the ALJ's

findings are so unreasonable that his opinion must be reversed as a matter of law or that any other fact-finding is warranted.

Moreover, the evidence does not compel a finding that the alleged work accident actually occurred. Although Fisse stated other workers observed the accident, he produced no witness to corroborate his account. Because Fisse's and Hebner's testimony are in conflict, Fisse's credibility was crucial. The ALJ emphatically stated he did not find Fisse credible. The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). This Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact. KRS 342.285(2).

Accordingly, the October 12, 2015 Opinion and Order and the November 30, 2015 order on Fisse's petition for reconsideration rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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