OPINION ENTERED: November 30, 2012

CLAIM NO. 200972865 & 200564136

RICK MOBERLY PETITIONER

VS. **APPEAL FROM HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE**

ENTERPRISE MINING COMPANY, INC.
and HON. JOSEPH JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

ICG HAZARD, LLC PETITIONER

VS.

RICK MOBERLY;
ENTERPRISE MINING;
and HON. JOSEPH JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Rick Moberly ("Moberly") seeks review of a March 19, 2012 decision rendered by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ Justice"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits against Enterprise Mining Company, LLC ("Enterprise"). ALJ Justice also found ICG Hazard, LLC ("ICG") liable for benefits to be paid pursuant to KRS 342.730(1)(c)2 for the December 12, 2005 injury. Moberly also appeals from the June 25, 2012 order denying his petition for reconsideration.

ICG appeals from the March 19, 2012 decision finding it responsible for left knee replacement surgery Moberly may require in the future, and the orders entered May 12, 2012 and June 25, 2012, denying in part its petition for reconsideration.

On appeal, Moberly argues ALJ Justice erroneously calculated and awarded PPD benefits, by deducting 8% from the 20% impairment due to a prior active condition. Moberly takes issue with ALJ Justice's methodology in calculating his PPD award, and argues ALJ Justice should have provided credit based upon the dollar amount of the active impairment rather than reducing the impairment rating.

ICG argues on appeal ALJ Justice erred in finding it responsible for a left knee replacement surgery Moberly may undergo in the future. We affirm as to both issues.

Moberly sustained an injury to his left knee on December 12, 2005, while working for ICG and subsequently filed a Form 101. Dr. John Balthrop, Moberly's treating orthopedic surgeon, performed arthroscopic surgery on the left knee in February 2006. Moberly had previously undergone surgery to his left knee on two occasions. In an opinion rendered October 13, 2006, Hon. Marcel Smith, Administrative Law Judge ("ALJ Smith") found Moberly was injured when he twisted his left knee. ALJ Smith based her decision upon the 8% impairment rating assessed by Dr. Balthrop. ALJ Smith performed an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), and awarded benefits pursuant to KRS 342.730(1)(c)1. She further determined the two multiplier pursuant to KRS 342.730(1)(c)2 would be applicable during any period of cessation of Moberly's employment.

Moberly sustained another injury to his left knee on November 17, 2009, while working for Enterprise. He filed a Form 101 on October 11, 2010 claiming the shuttle car he was operating began to roll before he was in his seat. His left leg was outside the shuttle car, and was

dragged, which caused an immediate onset of pain and symptoms in his left leg and knee. Moberly attached records from the Whitesburg Appalachian Regional Hospital ("Whitesburg ARH") to the Form 101. The record dated November 17, 2009 indicates Moberly twisted his left knee while getting out of a shuttle car, and noted his three previous episodes of left knee problems, including a torn meniscus. The note also reflects he had limited extension in the left leg, and further indicated the complaints were secondary to a work-related injury. In addition to the claim for the November 17, 2009 injury, Moberly also filed a motion to reopen his previous claim.

Moberly testified by deposition on February 11, 2011 and September 4, 2011. He also testified at the hearing held January 18, 2012. Moberly is a resident of Hindman, Kentucky, who was born on June 30, 1979. He is a high school graduate and attended Hazard Community College. Moberly underwent surgeries on his left knee in 1989 and 1993 due to non-work-related conditions. He then injured his left knee in December 2005 while operating a ram car for ICG. He subsequently underwent surgery to his left knee then returned to work for approximately one month. He worked for two other coal companies before he was hired by Enterprise on October 16, 2006.

According to Moberly, on November 17, 2009, he was entering a shuttle car when it began rolling and dragged his left leg. He experienced an immediate onset of pain in his left knee which he reported to his section boss. He was taken from the mine to Whitesburg ARH where he received treatment. He subsequently returned to Dr. Balthrop for treatment.

Moberly has not returned to work anywhere since this accident, and continues to complain of pain in his left knee. Prior to this accident, Moberly stated he was able to work as a shuttle car driver and roof bolter. He was able to build brattices, hang miner cables, and shovel around the belt line without difficulty. He stated he was also able to hunt before this accident, but is no longer able to do so. He stated he has difficulty with walking and rising from a seated position. Moberly denied taking any medication for his knee prior to the November 2009 accident, but admitted he has taken Hydrocodone since 2006 for relief from kidney stones. He further stated no surgery has been performed since the November 2009 accident, and Dr. Balthrop has advised he must lose weight before any surgery will be recommended.

Moberly filed the Form 107-I report of Dr. Ira Potter who examined him on January 16, 2011. Dr. Potter

noted Moberly experienced pain in his left knee as he twisted his leg while entering a shuttle car on November 17, 2009. No surgery has been performed, and Euflexxa injections were only marginally successful. At the time of the evaluation, Moberly complained of left knee pain, stiffness and weakness, with signs of crepitus and giving way with ambulation. He also exhibited multiple positional intolerances, and complained of interference with activities of daily living. Dr. Potter noted 85% of the lateral meniscus had been removed by surgeries performed in 1989 and 1993. A third knee surgery was performed on February 8, 2006.

An x-ray taken on November 17, 2009 demonstrated moderate left knee degenerative arthritic changes. An MRI performed November 24, 2009 demonstrated meniscal changes consistent with the previous surgeries; irregular medial remnant of the posterior horn; degenerative disease greater than expected for his age; and, a fluid density lesion which could be a ganglion or other synovial cyst.

Dr. Potter diagnosed left knee osteoarthritis of the lateral compartment of at least moderate severity, left knee flexion contracture, left knee quadriceps weakness, and a history of three arthroscopic left knee surgeries with essentially complete lateral meniscectomy. Dr. Potter

opined the November 17, 2009 accident was the cause of the complaints. Dr. Potter assessed a 17% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides"), of which he found 9% to be pre-existing and active. Finally, Dr. Potter stated Moberly does not retain the physical capacity to return to work at the job he was performing at the time of the injury, and specifically recommended restrictions of no continuous standing or walking for more than thirty minutes; no balancing on the left foot; no heavy pushing, pulling, or carrying; and no kneeling, crouching, crawling or climbing. He further stated Moberly had not yet reached maximum medical improvement ("MMI").

Dr. Balthrop testified by deposition on August 22, 2012. He first saw Moberly for treatment on January 24, 2006, and subsequently performed surgery consisting of arthroscopically removing cartilage and cleaning out the knee. Moberly returned three years later complaining of a new injury. An MRI performed subsequent to the November 2009 injury showed the previous meniscus removal. Dr. Balthrop diagnosed an aggravation of pre-existing problems with a knee sprain co-existent with arthritis which he deemed to be causally related to the November 2009 work

accident. Dr. Balthrop noted the left knee complaints were also due in part to a combination of his injuries, excessive body weight and pre-disposition to the development of arthritis. He opined Moberly would eventually require a left total knee replacement. Dr. Balthrop stated Moberly would qualify for a functional impairment rating which would change with a knee replacement. He opined Moberly does not retain the capacity to return to work as an underground miner, and should avoid squatting, climbing, or stressing the knee. He also indicated Moberly would be limited in his standing or walking. Dr. Balthrop noted Moberly had no restrictions due to his knee before November 2009.

In addition to his deposition, Enterprise filed Dr. Balthrop's records from April 4, 2006 through May 8, 2006. On April 5, 2006, Dr. Balthrop assessed a 9% impairment rating pursuant to the AMA Guides and released Moberly to return to work with no restrictions. On May 8, 2006, he modified the impairment rating to 8% based upon the AMA Guides. Dr. Balthrop recommended Moberly undergo vocational retraining and obtain a less stressful job. He expressed concern regarding Moberly's ability to continue to work into his thirties or forties, and anticipated a worsening of his arthritis. He also stated Moberly's

weight would adversely affect his knee function. In a subsequent report dated September 20, 2012, Dr. Balthrop assessed a 20% impairment rating pursuant to the AMA Guides.

Moberly filed additional records of Dr. Balthrop covering the period from March 21, 2006 through August 11, 2010. Included in those records is a note from Dr. Greg D'Angelo, Dr. Balthrop's partner, dated May 29, 2007. Dr. D'Angelo apparently saw Moberly in Dr. Balthrop's absence and noted Moberly still takes occasional Ibuprofen or Tramadol for discomfort, and gets occasional irritation from underlying chondromalacia. The office note from March 18, 2010 states Moberly had lost seventy-five pounds and now weighs three hundred and fifty pounds. The note indicated Moberly has moderate osteoarthritis of the left knee, undoubtedly contributed to by his weight. On August 11, 2010, Dr. Balthrop noted lap band surgery was not recommended due to Moberly's inability to exercise. He assessed severe osteoarthritis of the left knee with no surgical option. Dr. Balthrop noted Moberly would return for Euflexxa injections.

Enterprise filed the September 14, 2010 report of Dr. Daniel D. Primm, Jr., an orthopedic surgeon, who evaluated Moberly on September 14, 2010, at its request.

Dr. Primm diagnosed Moberly with morbid obesity, chronic degenerative joint disease in the knees, and a left knee sprain or strain occurring in November 2009. Dr. Primm stated Moberly's current condition was not caused by the November 2009 work incident, and he requires no treatment stemming from that event. Dr. Primm noted Moberly retains the ability to sit for up to eight hours, stand for up to two hours, walk for two hours, and drive for up to eight hours. He further noted Moberly can lift up to ten pounds continuously, twenty pounds frequently and fifty pounds occasionally. He opined Moberly can work within these restrictions.

Dr. Primm testified by deposition on March 4, 2011. He disagreed with the 20% impairment rating assessed by Dr. Balthrop. He found no basis to impose an impairment rating resulting from the November 17, 2009 injury because he found no objective evidence of an injury. At worst, he stated Moberly may have had a temporary aggravation of his ongoing active condition. He noted Moberly's complaints on examination were consistent with osteoarthritis which he determined to be unrelated to work. While Dr. Primm agreed Moberly should not return to work as an underground miner, he felt the complaints, including loss of range of motion,

are due to the previous injuries and surgeries which caused the osteoarthritis.

Enterprise also submitted a vocational report prepared by Dr. Stephanie Barnes dated March 1, 2011. Dr. Barnes indicated that while Moberly may be limited to light and sedentary work, he is not totally disabled.

A benefit review conference ("BRC") was held December 7, 2011. At that time, the issues preserved for determination included benefits per KRS 342.730; work-relatedness/causation; average weekly wage; unpaid or contested medical expenses; whether Moberly sustained an injury as defined by the Kentucky Workers' Compensation Act; TTD; exclusion for pre-existing disability/impairment; vocational rehabilitation; liability for medical treatment between employers; and applicability of the two multiplier on reopening.

In the opinion, order and award rendered March 19, 2012, ALJ Justice found as follows:

> The ALJ would first like to dispose of the issue of the two-multiplier in regard to the 2006 injury with Defendant, ICG Hazard, LLC. The ALJ Smith found that plaintiff was entitled to the two-multiplier enhancement because Plaintiff had gone back to work earning the same or greater wage into the indefinite future. Plaintiff had returned to underground coal mining. It is a consensus of opinion among the

physicians that plaintiff is not able to continue that type work because of the disabling combination of the 2006 injury and the 2009 injury. The Board cited *Hogston v. Bell South Telecommunications*, 325 S.W.3d 314 (Ky. 2010). The ALJ finds that Plaintiff is entitled to the two-multiplier enhancement of benefits for his first injury (2006), as he is no longer able to perform the type work that he did prior to 2006 because of his disability resulting from the 2006 injury and the 2009 injury. Plaintiff is entitled to $84.52 per week from 11/18/2009 for the balance of the 425 week compensation period.

Benefits for 2009 injury.

The ALJ was persuaded by the reports and testimony of Dr. Balthrop. He did surgery on Plaintiff's knee in 2006. He then treated Plaintiff for some time, but it had been over 2 ½ years since he had treated Plaintiff. During that time Plaintiff had carried on his job as a shuttle operator in underground mining. The seminal issue is whether Plaintiff's knee impairment was affected by the strain injury that he sustained in 2009. The following is Dr. Balthrop's testimony concerning causation:

> "…he had strained the ligaments in his knee and perhaps had caused what is called an internal derangement, which typically refers to tearing of cartilage in the knee.
>
> So basically the diagnosis at that time was aggravation of the pre-existing problem with a knee sprain and co-existent arthritis.

> Q. In your opinion is the current injury that he saw you about and condition of his left knee, directly and causally related to the injury that he gave you in the history in November of 2009?
>
> A. Yes, it is causally related, not totally related but causally related.
>
> Q. Dr. Balthrop, in your opinion did his physical activity as an underground miner, themselves, either trigger, contribute to, worsen or aggravate this degenerative condition of his knee that you've been talking about?
>
> A. Yes.

Dr. Balthrop, following the 2006 injury, assigned 8% WPI for Plaintiff's left knee. In a supplemental report setting out Plaintiff's current impairment, he assigned 20% WPI for the left knee.

The ALJ finds that Plaintiff's injury of November 17, 2009, aggravated his pre-existing active left knee condition, resulting in a 20% WPI. Plaintiff had a pre-existing active impairment of 8% of the left knee; therefore, 12% of the present impairment is attributable to the 2009 aggravation or arousal of the pre-existing active condition, which remains permanent. Plaintiff was working as an underground coal miner immediately prior to the injury, and it is a consensus opinion that Plaintiff cannot return to that type employment.

The evidence in the record supports the proposition that Plaintiff was not being actively treated for his left

knee at the time of his 2009 injury, nor was he taking any prescription medication for his knee condition. Therefore, Plaintiff is entitled to future medical treatment for the left knee.

The ALJ was persuaded by the report and testimony of Dr. Balthrop in this claim, as his testimony is balanced, and he was very familiar with Plaintiff's knee condition since 2006. Dr. Primm does not allow that the strain injury of 2009 aggravated or aroused the pre-existing active condition of Plaintiff's knee into more permanent impairment. He says Plaintiff had chronic arthritis which existed prior to the injury, and the injury had nothing to do with the subsequent impairment. He said Plaintiff had 0% impairment.

Left Knee Replacement Surgery.

Plaintiff is claiming that he is entitled to bariatric surgery and left knee replacement following the 2009 injury. Dr. Balthrop testified that the option for Plaintiff to have knee replacement surgery was the same in 2006, with the same reluctance to do the surgery because of Plaintiff's age and weight. Although it is not clear to the ALJ that Plaintiff's physician will undertake knee replacement because of Plaintiff's age and weight, Plaintiff is claiming that one or the other of the Defendant/Employers is liable for preliminary bariatric surgery as one of the conditions of surgery.

On the issue of liability for bariatric surgery, the ALJ will point out that neither of the cases cited by Plaintiff in support of his claim really addresses the issue. *National Pizza Co.*

v. Curry, 902 S.W.2d 949 (1991), stands for the proposition that the statutory words “cure and relief” actually mean “cure and/or relief.” This case does not stand for the proposition that the employer is liable for surgical weight loss, (weight loss being volitional) in order to increase the chance of successful surgery on the work-related knee injury. Even successful bariatric surgery requires a volitional change of habits, conduct or behavior on the part of the individual following such surgery. In *Derr Construction Co., v. Bennett*, 873 S.W.2d 824 (1994), the court held that a work-related injury from cumulative trauma to iron worker's knees occurred to [sic] extent that work caused arthritic condition to result in active impairment sooner than otherwise would have been the case, and employer was liable for the medical treatment. The ALJ has not found in any of the reports that Dr. Balthrop would undertake the surgery if weight was not an issue, because of Plaintiff's young age.

The controlling testimony for the ALJ, in being persuaded by the testimony of Dr. Balthrop, is that the knee issue as to replacement surgery was the same in 2006 as it was in 2009. Plaintiff needed knee replacement surgery in 2006, but the doctor would not consider it because of the factors of Plaintiff's age and weight. Plaintiff has not pointed the ALJ to any case, and the ALJ is not aware of one, that would support placing liability on the current employer for surgery that was needed following the 2006 injury, but was not undertaken because of the same countervailing considerations of age and weight.

> The ALJ finds that Defendant, Enterprise Mining, is not liable for the knee replacement surgery. The responsibility for such surgery, if it is undertaken, is that of Defendant, ICG Hazard, LLC, the employer responsible for medical treatment for the 2006 knee injury. Defendant, Enterprise Mining, is responsible for medical treatment, other than the knee replacement surgery, following the 2009 injury.
>
> **Permanent total disability.**
>
> Having reviewed the evidence of record, and being persuaded by the testimony of Dr. Balthrop, the ALJ is not persuaded that Plaintiff is totally disabled. Considering Plaintiff's injuries and accompanying restrictions in the context of his age, experience, and education, the ALJ finds Plaintiff is not precluded from returning to all gainful employment on a regular and sustained basis. For these reasons, it is determined Plaintiff is not totally disabled.
>
> Instead, the evidence persuades the ALJ that Plaintiff is entitled to an award of permanent partial disability based on Dr. Balthrop’s 12% WPI, after deducting the pre-existing 8% WPI found by Dr. Balthrop for the 2006 injury, with application of the three-multiplier set forth in KRS 342.730(1)(c)1, because his restrictions prevent him from returning to the kind of work he performed at the time of his injury.

Moberly filed a petition for reconsideration on April 2, 2012, arguing, as he does on appeal, ALJ Justice

erred in his calculation of PPD benefits by incorrectly excluding the pre-existing active impairment rating. He argued ALJ Justice should have subtracted the actual dollars, rather than the impairment rating, in calculating the reduction for pre-existing active disability. The petition for reconsideration was denied by order entered on June 25, 2012.

ICG filed a petition for reconsideration on March 28, 2012, arguing ALJ Justice erred by awarding the two multiplier for the 2005 injury; improperly referred to the 2005 injury as a 2006 injury; erred in finding it responsible for any future knee replacement surgery for the left knee; and erred in his calculation of benefits when applying the two multiplier. In orders dated May 10, 2012 and June 25, 2012, ALJ Justice corrected the calculation and date errors, but found ICG responsible for a future left knee replacement surgery and for the enhancement of the 2006 award by the two multiplier.

First we will address ICG's argument ALJ Justice erred by finding it responsible for future left knee replacement surgery. KRS 342.285 designates the ALJ as the fact-finder. In that role, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky.

1993). The ALJ may draw reasonable inferences from the evidence, 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than that reached by the ALJ, such evidence 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 weight and credibility, or by noting reasonable inferences that otherwise could have been drawn from the evidence. 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).

Factual issues to be determined rest within the sound discretion and province of the ALJ as fact-finder. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969). Where the evidence concerning an issue is conflicting, the ALJ as

fact-finder is free to pick and choose whom and what to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003).

We find no error in ALJ Justice's determination ICG is responsible for future left knee replacement surgery. ALJ Justice was persuaded by Dr. Balthrop's deposition testimony that total knee replacement was an option for Moberly's pain relief prior to November 17, 2009. In light of this evidence, we cannot say ALJ Justice's determination ICG is responsible for future knee replacement surgery was unwarranted or improper as a matter of law, or his decision was so unreasonable it compelled a different outcome.

We next turn to Moberly's argument ALJ Justice erred in carving out a percentage of impairment due to a pre-existing, active condition. On appeal, Moberly adopts the unsuccessful argument advanced by the claimant in Tudor v. Industrial Mold & Machine Co., 375 S.W.3d 63 (Ky. 2012). Moberly asserts ALJ Justice erred by calculating his award based upon a 12% impairment rating, rather than the total impairment rating of 20% assessed by Dr. Balthrop which included an 8% impairment for a pre-existing active condition for which he was continuing to receive benefits from a previous award. We find no merit in this argument.

The Kentucky Supreme Court in Tudor, supra, expressly rejected the formula Moberly argues should have been utilized in the case *sub judice*.

As in Tudor, supra, the Kentucky Supreme Court held in Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181, 183 (Ky. 2003), the appropriate methodology for excluding pre-existing active conditions from awards of PPD benefits in contrast to awards of permanent total disability benefits. In Roberts, the Kentucky Supreme Court instructed:

> Thus, awards under KRS 342.730(1)(a) continue to be based upon a finding of disability. In contrast, an award of permanent partial disability under KRS 342.730(1)(b) is based solely on a finding that the injury resulted in a particular AMA impairment rating, with the amount of disability being determined by statute. In other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. We conclude, therefore, that an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment.

In Tudor, supra, the ALJ, relying upon Dr. Travis' opinion, found Tudor had a pre-existing, active

impairment of 9%, and an additional 9% impairment due to a work injury. The ALJ determined the total benefits payable for an 18% impairment and then excluded the monetary amount attributable to the pre-existing 9% impairment.

The Kentucky Court of Appeals affirmed this Board's decision reversing the ALJ. In affirming the Kentucky Court of Appeals, the Kentucky Supreme Court held as follows:

> KRS 342.730(1)(e) is unambiguous. It prohibits "impairment" from nonwork-related disabilities to be considered when determining not only the extent of the worker's disability but also whether the worker's benefits will extend for 425 or 520 weeks. In other words, unlike the statutes at issue in Transport Motor Express, Inc. v. Finn, the post–1996 versions of KRS 342.730(1)(b)–(e) and KRS 342.120 do not require "compensation" for nonwork-related disability to be excluded from an award. They prohibit "impairment" from a nonwork-related disability from being considered when selecting the permanent impairment rating caused by an injury; when calculating the disability rating and permanent partial disability benefit; and when determining the duration of the benefit.

As pointed out in Tudor, supra, a proper calculation of Moberly's PPD benefits requires the use of the 12% impairment rating. ALJ Justice was required to use the actual impairment rating attributable to Moberly's

work-related injury occurring November 17, 2009 in computing his benefits. ALJ Justice did not err in the award of PPD benefits, and the award must be affirmed.

Accordingly, the decision rendered March 19, 2012 by Hon. Joseph W. Justice, Administrative Law Judge, and the orders denying in part the petitions for reconsideration issued May 12, 2012 and June 25, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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