OPINION ENTERED: NOVEMBER 30, 2012

CLAIM NO. 201188778

RIDGEWOOD TRUCKING COMPANY, INC. PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

EARMEL CHARLES
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

* * * * * *

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

SMITH, Member. Ridgewood Trucking Company, Inc. ("Ridgewood") appeals from the Opinion and Order rendered June 11, 2012, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), and from the July 9, 2012 Opinion and Order on Reconsideration. The ALJ, in his Opinion and Award, awarded permanent partial disability ("PPD") benefits and medical benefits based upon a 10% functional impairment

rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fifth Edition, ("AMA Guides"). Following a petition for reconsideration filed by Earmel Charles ("Charles"), the ALJ issued an Opinion and Order on Reconsideration basing the PPD award upon a 20% impairment rating pursuant to the AMA Guides. On appeal, Ridgewood argues the ALJ exceeded his authority in changing the impairment rating on reconsideration.

Charles testified by deposition on April 19, 2012 and at the hearing held June 5, 2012. Charles stated he injured his back on March 21, 2011, when he was involved in an accident while driving a coal truck for Ridgewood. He had never had a low back injury or low back pain prior to the work injury.

The medical evidence relevant to this appeal consists of reports from Dr. James R. Bean, Charles' treating physician. In an October 31, 2011 report, Dr. Bean stated:

> He has reached maximum medical improvement. He has pre-existent spondylolisthesis at L5-S1. This may be the principle or contributing cause of the pain but it is unlikely that surgical fusion is going to give him complete relief with return to full duty as would be the aim of surgery.
>
> I estimate a 10% impairment rating based on AMA guidelines due to the radiculopathy extending to his legs,

> associated with foraminal stenosis at L5-S1. Permanent impairment.

In a November 22, 2011 report, Dr. Bean stated:

> In response to your letter of November 17th regarding Earmel Charles, the spondylolisthesis was pre-existent at L5-S1 but it was completely asymptomatic. The injury he sustained at work in the coal truck accident created the symptoms and converted an asymptomatic condition to a symptomatic disabling condition that would not have been present without the accident. Therefore, the 10% impairment rating is completely attributable to the radiculopathy resulting from the spondylolisthesis and injury.
>
> Were I to rate the spondylolisthesis, this would be a 20% impairment rating; and I have decided not to do that since it was a pre-existent condition.

In his June 11, 2012 Opinion and Order, the ALJ concluded:

> The plaintiff argues that he has sustained a 10% whole person impairment as a result of the work injury. The defendant argues that the plaintiff has sustained a 0% whole person impairment. In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008).
>
> In the present case the ALJ finds more convincing the opinions of Dr. Bean, the treating neurosurgeon. Dr. Bean's opinion fully accounts for the plaintiff's dormant pre-existing component and best conforms to the

> evidence as a whole. I therefore find that the plaintiff sustained a 10% whole person impairment as a result of the March 21, 2011 work injury.
>
> . . . .
>
> The defendant argues that a portion of the plaintiff's disability should be excluded as being caused by non-work-related conditions. The ALJ again finds more persuasive the opinion of Dr. Bean, who accounted for the plaintiff's entire physical condition. Dr. Bean opined that the plaintiff's pre-existing condition had been completely asymptomatic prior to the work injury. Even Dr. Best opined that the plaintiff had no active pre-existing condition. I therefore find no part of the plaintiff's impairment excludable.

Charles filed a petition for reconsideration on June 19, 2012, asserting the ALJ had overlooked Dr. Bean's findings that he sustained a 20% impairment. Charles argued the full 20% impairment was compensable as a matter of law since Dr. Bean had determined the work injury caused the arousal of a prior dormant condition into disabling reality.

In his Opinion and Order on Reconsideration rendered July 9, 2012, the ALJ ruled as follows:

> 5. The plaintiff filed two medical reports from Dr. Bean dated October 31, 2011 and November 22, 2011. In his October 31, 2011 report Dr. Bean stated that the plaintiff had reached maximum medical improvement, that he had a pre-existent spondylolisthesis at L5-S1 and that this may be the principle or contributing cause of the pain. Dr.

Bean further stated in said report that he estimated a 10% permanent impairment rating based on the AMA guidelines due to the radiculopathy extending to the plaintiff's legs. In his November 22, 2011 report Dr. Bean stated that the spondylolisthesis was pre-existent at L5-S1, but was completely asymptomatic and that plaintiff's work injury created the symptoms and converted an asymptomatic condition to a symptomatic condition that would not have been present without the accident. Dr. Bean further stated that the 10% permanent impairment rating is completely attributable to the radiculopathy resulting from the spondylolisthesis and injury. Finally, Dr. Bean states that if he were to rate the spondylolisthesis, the plaintiff would have a 20% permanent impairment rating, but that he had decided not to do that since it was a pre-existent condition.

6. Of course, under Kentucky evidence law, a physician's opinion must be based on reasonable medical probability or "more likely than not" and not a possibility. *See* Rogers v. Sullivan, 410 S.W.2d 624 (Ky. 1966) and Seaton v. Rosenberg, 573 S.W.2d 333 (Ky. 1978).

7. Dr. Bean's two medical reports are not phrased in medical-legal terminology. However, when we take Dr. Bean's opinions in their entirety, it is my analysis that he was stating that Mr. Charles' complete permanent impairment is 20% to the body as a whole under the holding of the Kentucky Supreme Court in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). In McNutt, the Supreme Court held that where a work-related trauma causes a dormant degenerative condition to become disabling and to result in a

> functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury.
>
> 8. Therefore, on reconsideration, I make the factual determination that Dr. Bean's work-related permanent impairment rating is 20% to the body as a whole and plaintiff's enhanced permanent partial disability benefits award is increased accordingly.

On appeal, Ridgewood argues the ALJ exceeded his authority in changing the impairment rating on reconsideration. In the July 9, 2012 opinion, the ALJ determined Charles had a 10% impairment as assessed by Dr. Bean. Ridgewood contends that while Dr. Bean indicated he could assess a 20% rating for a spondylolisthesis, he did not address the specifics as to how the condition would warrant a 20% rating under the AMA Guides. Ridgewood asserts the AMA Guides does not provide for an impairment rating merely based upon the diagnosis of spondylolisthesis.

Ridgewood argues the ALJ was limited on reconsideration to correcting errors appearing on the face of the prior order. Ridgewood contends there was no patent error and no failure by the ALJ to make a finding relating to the impairment rating to be used. Ridgewood argues the ALJ in the original opinion specifically recognized the 10% rating includes and fully accounts for Charles' dormant pre-

existing component and best conforms to the evidence as a whole. Thus, Ridgewood argues the ALJ exceeded his authority on reconsideration by adopting a different rating. Accordingly, Ridgewood requests the Board reverse and direct the ALJ to reinstate an award based upon a 10% impairment rating.

KRS 342.281 sets out the procedure by which an aggrieved party can petition an ALJ to correct his findings if there is an error "patently appearing" on the face of an award, order or decision. Our Courts have held KRS 342.281 is to be liberally construed and is not merely intended to address clerical errors, but all patent errors. Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104, 106 (Ky. App. 1985). Consequently, an ALJ has the authority both to correct errors in the original decision that are plainly "apparent," and to address omissions of fact or evidence overlooked at the time the decision was rendered. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Francis v. Glenmore Distilleries, 718 S.W.2d 953 (Ky. App. 1986). The ALJ has authority to correct patent errors on petitions for reconsideration, including clerical, factual, or legal errors. Commonwealth, Dept. of Mental Health v. Robertson, 447 S.W.2d 857, 859 (Ky. 1986) (overruled on other grounds

in Whittaker v. Wright, 969 S.W.2d 209 (Ky. 1998)); Wells v. Beth-Elkhorn Coal Corp., supra.

In the case *sub judice*, in the original decision, the ALJ erroneously stated Charles argued for a 10% impairment rating as a result of the work injury. At the hearing, Charles' counsel unequivocally argued for a 20% impairment rating based upon Dr. Bean's assessment, including impairment for the pre-existing, dormant spondylolisthesis aroused by the work injury. Clearly, the ALJ committed a patent error in stating Charles argued for a 10% impairment.

We find it necessary to vacate the ALJ's finding regarding the selection of an impairment rating on reconsideration because the ALJ failed to identify the error contained in the original decision. This Board and the parties are left to guess the reason for the ALJ's change in the impairment rating on reconsideration. The ALJ is not permitted to simply change his determination on reconsideration without a proper explanation of his reason for doing so. The parties are entitled to know the justification for the change from a 10% to a 20% impairment rating.

If the ALJ's selection of a 10% impairment was based upon the incorrect belief Charles was only seeking a 10% impairment or if the ALJ committed a clerical error in

substituting 10% for the 20% Charles was actually seeking, the ALJ could change the award on reconsideration. Additionally, if the ALJ overlooked Dr. Bean's November 22, 2011 report, which was not referenced in the original decision, that oversight would provide a basis for altering the decision on reconsideration.

An award based upon a 10% impairment rating pursuant to the AMA Guides also appears to be inconsistent with the ALJ's findings in the original decision. At the benefit review conference, the issue of "exclusion of any active or non-work-related condition" was preserved as a contested issue. The condition alleged to be pre-existing or non-work-related was Charles' spondylolisthesis. In the original decision, the ALJ accepted Dr. Bean's opinion that the spondylolisthesis was a pre-existing, dormant condition which was completely asymptomatic prior to the work injury. Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

The ALJ stated Dr. Bean's opinion "accounted for" Charles' "entire physical condition." Dr. Bean's opinion

can only be viewed as “accounting for” the “entire condition” if one includes the impairment assessed for the spondylolisthesis as addressed in Dr. Bean’s November 22, 2011 report. Dr. Bean’s October 31, 2011 report does not address Charles’ spondylolisthesis. As noted by the ALJ, even Dr. Bean opined there was no active pre-existing condition. The ALJ specifically found no part of Charles’ impairment should be excluded. Since the ALJ determined Charles was completely asymptomatic and had a dormant pre-existing condition for which no part of the impairment was excludable, an award of a 10% impairment and excluding 10% for Charles’ impairment related to the spondylolisthesis would be a legal error correctable on reconsideration.

Accordingly, that portion of the June 11, 2012 Opinion and Order finding Charles to have a 10% impairment and the July 9, 2012 Opinion and Order on Reconsideration finding Charles has a 20% impairment, rendered by Hon. William J. Rudloff, Administrative Law Judge, are **AFFIRMED IN PART**, **VACATED IN PART** and this matter is **REMANDED** for entry of an amended Opinion and Order in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS IN RESULT ONLY.

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