OPINION ENTERED: NOVEMBER 20, 2012

CLAIM NO. 201100995

ROBBIE WILLIAMS PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

FEDERAL MATERIALS
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

SMITH, Member. Robbie Keith Williams, Jr. ("Williams") appeals from the June 20, 2012 Opinion and Order rendered by Hon. R Scott Borders, Administrative Law Judge ("ALJ"), dismissing his claim for a low back injury sustained on December 20, 2010, while employed with Federal Materials Company ("Federal Materials"). Williams argues the ALJ's decision is clearly erroneous and should be reversed. Williams also appeals from the July 18, 2012 order denying

his petition for reconsideration. Williams argues the ALJ's decision is clearly erroneous and should be reversed. For the reasons set out below, we affirm.

Williams testified by deposition on August 31, 2011, and at the hearing held April 25, 2012. Williams, now age 42, is a resident of Calvert City, Kentucky, where he lives with his wife and son. He began working for Federal Materials in June 2000, and he testified his job duties included "[w]elding, putting up concrete plants, you know, maintaining all of the concrete plants keeping them up and going, a little bit of jackhammering and all of that stuff." His Form 101, Application for Resolution of Injury Claim, filed on July 5, 2011, states he was injured on December 20, 2010, when he slipped in concrete sludge, sustaining an injury to his back. He explained at the formal hearing:

> Q. Can you tell the judge what happened on December 20th, 2010 while you were working for Federal Materials?
>
> A. We was [sic] pulling a pourer at -- a night pourer.
>
> . . .
>
> A. And Blake, the plant manager, hollered down, said that he run [sic] out of hot water. And me and Donny Morgan went around back. When we went around back, we hit some sludge around behind the compressor and fell down on my back. And Donny said, "You all right?" I said, "Yeah." I got up, but

> I was, you know, sore and everything, so -- but I went ahead and continued to work. And then we went back in there and told James Elder, my supervisor. And, of course, that's when they got ahold [sic] of Josh and them.

Williams indicated the incident caused pain to his lower back, then "a couple of days later getting worse and worse". He sought treatment several days later with Tracy Bullock, Advanced Registered Nurse Practitioner ("ARNP"). She referred him to Dr. Meriwether, a neurosurgeon in Paducah. Dr. Meriwether sent him for an MRI, then suggested surgery based upon the results of that test. Williams then saw Dr. Grimm in Evansville, Indiana, who performed surgery on his lower back in May 2011.

Williams testified the first surgery was unsuccessful necessitating a second surgery. He suffered complications after the second surgery and a third surgery was performed by Dr. Grimm. Although physical therapy was recommended, Williams could not participate because the insurance carrier refused to pay for it. Instead, he followed up with Dr. Grimm for several months and then was seen at the Pain Management Center of Paducah.

Williams has not returned to any type of work since the December 20, 2010 work injury incident. He testified he

cannot lift, stoop or bend and cannot stand or sit for more than an hour at a time.

Williams admitted to having a pre-existing low back condition for that required surgery in January of 2009. As a result, his treating physician, Dr. Gocio, assessed restrictions of no lifting over ten pounds, no climbing, and no standing and lifting for any period of time. Despite those restrictions, Williams was able to return to full-time work several weeks after the surgery. He worked without restrictions and at full duty until the December 20, 2010 incident.

On cross-examination, Williams confirmed that as early as 2005 and continuing thereafter for three years, he was treated by Dr. Manchikanti for low back pain. This treatment included multiple epidurals from 2005 to 2008. He admitted Dr. Manchikanti placed restrictions on him of no lifing more than five pounds, no standing more than thirty minutes and no climbing. In addition, he sought treatment with Evansville physicians from November 2008 through January 2009 for low back and left leg pain.

Williams also confirmed that subsequent to his January 2009 back surgery and nine months before the December 20, 2010 work incident, he requested and received an increase in his pain medication to Lortab 10. His physician added

Ambien and Neurontin in the summer of 2010. However, he denied knowing why Dr. Tveite increased his dosage of Lortab 10 from two times per day to four times per day in August 2010. Williams did not recall receiving an epidural injection at Dr. Tveite's office in October 2010, approximately two months before the work injury incident. In fact, Williams recalled very little of his medical consultations and treatment with Dr. Tveite. On cross-examination, he responded as follows:

> Q. All right. And were you taking the Lortab 10 and the Ambien and Neurontin in the summer of 2010?
>
> A. Yes.
>
> Q. Then in August of 2010, do you recall Dr. Tveite increasing your Lortab 10 dosage from two per day to four per day?
>
> A. I've always -- yeah, I do remember that.
>
> Q. Okay. Why was the dosage increased in August of 2010 from twice a day to four times a day?
>
> A. I don't know. I don't know why it was changed around.
>
> Q. Wasn't it because you were having increasing problems with your low back and left leg?
>
> A. No, not really.
>
> Q. Do you have any explanation why Dr. Tveite would increase your Lortab 10

dosage, double your dosage in August of 2010?

A. Well I've always took four a day. That's what I can't figure out.

Q. How long have you taken four Lortab 10s per day?

A. I can't recall on that either. I don't know how long it's been.

Q. Were you on a regular regimen of four Lortab 10s per day prior to December of 2010 when this accident we’re here on today occurred?

A. I wasn't taking four a day, no. I mean the bottle might have said four a day, but I wasn't.

Q. Well, you just testified that you have always taken four Lortab 10s per day and I'm just trying to understand --

A. (Interrupting) No.

Q. -- how long you did that.

A. I wasn't taking four a day. The bottle said -- might say four a day, but I was only taking maybe one a day, sometimes I didn't take none. Depends on what we do down there. I mean, when you work an 80-hour a week, yeah, you're going to be hurting.

Q. Do you have any explanation for why your dosage was increased from two to four per day on August 30, 2010?

A. I don't know.

Q. And that would be less than three months before this accident we're here on today?

A. No, I don't.

Q. Records indicate that on October 5 of 2010, you were still having low back with sharp pain down the left leg. Do you recall receiving an injection at Dr. Tveite's office in October of 2010 about two months before the accident?

A. I can't recall that either.

Q. Okay. Dr. Tveite's record indicates he added Mobic to the medications you are taking; do you recall that?

A. Mobic. I remember Dr. -- Who did you say the doctor was?

Q. Dr. Tveite. And that was in October -- October 5 of 2010.

A. No, that's -- I'm trying to think on that. He might have. I ain't for sure on that.

Q. On October 5 of 2010, Dr. Tveite recommended you go back to pain management; do you remember that?

A. Yes, I do on that.

Q. What did you tell him about your problems that led to the referral to pain management on October 5 of 2010?

A. That my lower back, you know, sore.

Q. You just said it was sore?

A. Yeah, it was hurting.

Q. Okay. Did you tell him that your left leg was also causing problems as of October 2010?

A. I can't recall that either.

Q. Will you agree that you told him you were having sharp pains down your left leg as of October 5 of 2010?

A. I can't recall on that.

Q. According to Dr. Tveite's records on October 5 of 2010, you asked that he change you from Lortab 10 to Percocet. Why did you make that request of him?

A. I don't know.

Q. Would you agree you had taken Percocet 10 before you had your January 2009 low back surgery?

A. I can't recall. I can't remember that far back on that.

Q. Okay. Do you remember that in October of 2010, Dr. Tveite wanted you to have an MRI on your low back and he also discussed sending you back to a neurosurgeon for further evaluations?

A. Hmm. I can't recall on that either. I mean, it's been too far back.

Q. Now, this was just two months before the accident we're here on today. Do you recall that discussion about a referral to a neurosurgeon?

A. Two months before I got hurt at federal?

MR. HUTSON: Two months before the December 2010 accident, yes, sir.

A. Yeah.

Q. Do you recall being referred to a neurosurgeon before, in the two-month period before the accident?

A. No, I don't. I don't recall that.

Williams also had trouble recalling the character of his treatment with Dr. Meriwether and Tracy Bullock, ARNP ("Ms. Bullock"). However he did agree that in the months before the alleged work injury, he was consulting regularly with Dr. Meriwether and Ms. Bullock for his low back pain. However, Williams maintained the surgery Dr. Gocio performed completely resolved his left leg problems. Williams testified he had no left leg pain leading up to the December 20, 2010 incident. He could not recall telling Dr. Tveite three weeks before the accident that his low back pain was the same and that he was having shock like sensations in his left leg.

The ALJ rendered an opinion and order on June 20, 2012. First, he reviewed in detail Williams' hearing testimony. The ALJ then summarized in detail medical evidence submitted by the parties from Drs. Grimm, Epstein, Meriwether, Tveite, Gocio, Gray, Ante, Noonan, Manchikanti, and Arendall and Ms. Bullock.

Dr. Grimm initially treated Williams in January 2009 diagnosing a left L5-S1 herniated disc. Dr. Grimm reported he had been having left leg pain and low back pain for more than four years. At his deposition, Dr. Grimm confirmed that pursuant to the American Medical Association, Guides to

the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") Williams would have retained an impairment rating of between 8% and 15% as a result of the 2009 surgery.

Williams saw Dr. Grimm again in April 2011, following his December 20, 2010 slip and fall. Williams reported doing well following the surgery until that incident. On June 3, 2011, Dr. Grimm diagnosed Williams with chronic left S1 radiculopathy secondary to recurrent lumbar disc herniation at L5-S1. He noted Williams had been doing well until a slip and fall incident at work. Dr. Grimm believed Williams' pre-existing condition amounted to 25% of the current aggravation of his December 20, 2010 work event. He also concluded Williams was no longer capable of working.

From medical records supplied to him, Dr. Grimm learned Williams had been taking pain medications beginning in March 2010 and had been receiving medical treatment for his low back condition several months prior to the December 2010 accident. Dr. Grimm testified that as of October 2010, Williams was receiving medical treatment due to his consistent complaints of low back and left lower extremity pain in October and November of 2010.

Williams submitted the December 6, 2011 medical report of Dr. Charles Epstein, his chiropractor, who related a history of a workplace fall causing immediate severe pain in

his low back, left leg, and ankles along with numbness and tingling. He noted Williams had a disc herniation at L5-S1 and underwent surgery on May 13, 2011. Dr. Epstein conducted a physical examination and concluded Williams had a 13% impairment rating based upon the AMA Guides, of which 5% was pre-existing and active and 8% was due to the work injury occurring December 20, 2010.

Ms. Bullock saw Williams on numerous occasions in consultation with Dr. Charles Meriwether. Ms. Bullock first saw Williams on November 15, 2010 for complaints of low back and leg pain. He reported the same complaints on November 18, 2010. He was prescribed pain medications on both occasions. He was seen again on December 3, 2010.

The records of Dr. John Tveite reflect Williams was seen numerous times from May 3, 2007 through November 30, 2010, complaining of pain radiating down the left leg. Almost always Dr. Tveite prescribed narcotic pain medication.

The records of Dr. William Ante reflect a December 4, 2008 MRI of the lumbar spine showed possible L5-S1 radiculopathy affecting the left lower limb.

The medical records of Dr. Laxmaiah Manchikanti indicate Williams had monthly pain management treatment from August 31, 2005 to December of 2005. Beginning in March

2006, he received pain management treatment every three months continuing until January 2008. Thereafter, he was seen every three months until October 2008. Dr. Manchikanti administered lumbar injections and anti-inflammatories.

Dr. Rex Arendall, a neurosurgeon, treated Williams in 2007. A March 2, 2007 MRI showed a focal left paracentral herniated disc at L5-S1 causing posterior displacement of the left S1 nerve root, as well as the left side neuroforaminal encroachment. Williams provided a history indicating a nine year history of low back pain radiating into the left leg.

Dr. Gocio records indicate Williams was seen on January 13, 2009 and was diagnosed with a disc protrusion on the left side of L5-S1.

In the opinion rendered June 20, 2012, the ALJ dismissed Williams' claim stating as follows:

> The first issue for determination is whether the Plaintiff suffered an injury as defined by the Act which encompasses the issue of whether or not his current lumbar spine condition is causally related to the December 20, 2010, work-related incident.
>
> KRS 342.0011 (1) defines injury as meaning, "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 harmful change in the human organism evidenced

by objective medical findings." The Plaintiff bears the burden of proof and risk of non-persuasion in each and every element of his case *Snawder vs. Stice*, 576 SW 2d 276 (KY App. 1979).*Jones vs. Newberg*, 890 SW 2d 284 (KY 1994).

The record is clear that Mr. Williams had a pre-existing lumbar spine condition necessitating his undergoing a lumbar discectomy at the L5–S1 level in 2009 by Dr. Gocia [sic].

Mr. Williams testified that after the 2009 surgery he recovered to the extent he was able to return to work for Federal Materials as a maintenance man performing maintenance on the concrete plant without restrictions and with minor difficulty until December 20, 2010, when he alleges he slipped on some sludge and landed on his back causing a new injury to his lumbar spine that has necessitated his undergoing three surgeries performed by Dr. Grimm.

Mr. Williams supports this position with medical proof from Dr. Epstein, chiropractor, who opined his current lumbar spine condition is causally related to his December 20, 2010, work-related incident and for which he assessed him a functional impairment rating pursuant to the Fifth Edition of the AMA Guides. In addition, Mr. Williams submitted a medical report from Dr. Grimm dated June 3, 2011, wherein he opined that assuming Mr. Williams' history is accurate that his current condition is causally related to the job injury of December 20, 2010.

Federal Materials Company submitted medical proof from Dr. Meriwether and Nurse Practitioner Bullock indicating that Mr. Williams was having low back pain with left leg radiculopathy for at

least six months prior to the December 2010 work-related incident. They [sic] submitted medical proof from Dr. Tveite indicating that Mr. Williams had chronic low back pain and in the months preceding the December 2010 incident recommendations of an MRI scan, a referral for neurosurgical evaluation, and referral for pain management had been made.

In addition, Federal Materials cross-examined Dr. Grimm and supplied him with additional medical proof indicating that Mr. Williams had a chronic low back condition that was evolving prior to the occurrence of the December 20, 2010, incident. And finally Federal Materials submitted proof from Mr. Williams' co-worker, Donnie Morgan who testified that he did not see Mr. Williams actually fall on December 20, 2010, and that Mr. Williams came up to him and said "I fell" and Mr. Williams advised that he was okay. Further, Mr. Williams' supervisor, Mr. Elder, testified that he spoke with Mr. Williams after the December 20, 2010, incident and was advised by him that he was okay.

The Administrative Law Judge had the opportunity to observe Mr. Williams during the Final Hearing held on April 25, 2012. At that Hearing, Mr. Williams was confronted with several medical records that clearly reflected he was having ongoing back and left lower extremity pain immediately preceding the December 20, 2010, work-related incident. Mr. Williams either did not recall the medical treatment received prior to the December 20, 2010, incident or purposely downplayed it in an attempt to bolster his claim.

> Mr. Williams did not recall complaining of left lower extremity pain, which was clearly indicated in the medical records, and denied taking pain medications except when absolutely necessary, when the medical records indicated that he was seeing his physician and asking for increased doses of pain medication. In addition, Mr. Williams testified that his incident of December 20, 2010, was witnessed by Mr. Morgan and that he immediately reported it to Mr. Elder, facts which are denied by both individuals. The Administrative Law Judge did not find Mr. Williams to be a credible witness.
>
> In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds that Mr. Williams has not met his burden of proving that he suffered an injury as defined by the Act and that his current lumbar spine condition is not causally related to the December 20, 2010, work-related incident. In fact, the Administrative Law Judge questions whether or not an actual incident occurred on December 20, 2010, based on the testimony of Mr. Williams co-worker, Mr. Morgan. The Administrative Law Judge believes that Mr. Williams' back condition was gradually worsening prior to the alleged December 20, 2010, incident and that his lumbar spine condition was clearly an active and ongoing situation.
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> Therefore, Mr. Williams' claim for Worker's Compensation benefits arising out of an alleged December 20, 2010, work-related incident shall be dismissed in its entirety.

Williams filed a petition for reconsideration on July 3, 2012 arguing the ALJ's decision was clearly erroneous.

Williams argued the evidence indicates he suffered a work-related injury to his back when he slipped and fell on December 20, 2010. However, at the time he did not recognize the magnitude of his injuries. Williams notes both Dr. Grimm and Dr. Epstein, while recognizing his previous back problems as pre-existing active, concluded his slip and fall of December 2010 was responsible for the majority of the impairment to his back. Williams argued he should be entitled to all past, present and future medical treatment related to his December 20, 2010 work injury, and income benefits should be awarded based upon an 8% impairment rating pursuant to the AMA Guides. On July 18, 2012, the ALJ summarily denied Williams' petition.

On appeal, Williams argues the ALJ failed to properly weigh the evidence and "the decision was wrong on the basis of the reliable material evidence contained in the record as a whole." Williams further argues the ALJ noted discrepancies in the history and testimony, but failed to consider Williams' limited educational background accompanied by the passage of multiple years of treatment accounted for these discrepancies.

A claimant in a workers' compensation case bears the burden of proving each essential element of his cause of action, including the occurrence of a work-related injury.

Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Williams, the party with the burden of proof, was unsuccessful before the ALJ, the issue on appeal is whether the evidence compels a contrary conclusion. *See* 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). It is not enough for Williams to merely show some evidence supports his position. *See* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As long as the ALJ's opinion is supported by evidence of substance, the Board may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ, as fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she may reject any testimony and believe or disbelieve various parts of the

evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Thus, the ALJ has discretion under the law to pick and choose from the evidence.

Williams' arguments on appeal amount to no more than an attempt to have the Board re-weigh the evidence and direct a finding contrary to the ALJ's decision. We may not do so. The ALJ found Williams was not credible and doubted the occurrence of the alleged incident. Further, the ALJ identified ample evidence in the record establishing Williams had longstanding complaints of pain and extensive treatment for his back condition prior to the alleged incident. Contrary to Williams' assertions, the ALJ clearly considered the opinions of Dr. Epstein and Dr. Grimm. The ALJ was simply more persuaded by the medical evidence indicating Williams' back problem was active immediately prior to the alleged work injury. The ALJ thoroughly reviewed all evidence of record and identified substantial evidence supporting his findings. Based upon the totality of the evidence, the ALJ's finding that Williams failed to meet his burden of proving he suffered an injury as defined by the Act is reasonable. While Williams cites to evidence

that could support a finding in his favor, the evidence does not compel such a finding.

Accordingly, the June 20, 2012 Opinion and Order rendered by Hon. R Scott Borders, Administrative Law Judge, and the July 18, 2012 Order denying Williams' petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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