OPINION ENTERED: AUGUST 15, 2012

CLAIM NO. 201100543

RODNEY ELLIOTT PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

CHESTNUT FENCE CO.
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Rodney Elliott ("Elliott") seeks review of the decision rendered March 1, 2012 by Hon. Chris Davis, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a low back injury he sustained on October 11, 2010, while working for

Chestnut Fence Company ("Chestnut"). Elliott also appeals from the order entered March 16, 2012, denying his petition for reconsideration.

On appeal, Elliott argues the ALJ erred in failing to make a specific finding that his October 11, 2010 back injury was due to the arousal of a pre-existing, dormant degenerative condition aroused into disabling. We affirm.

On April 11, 2011, Elliott filed a Form 101 alleging injuries to his mid and low back while lifting a fifty pound bag of seed on October 30, 2010. He subsequently filed an amended Form 101 on May 25, 2011, reflecting the corrected injury date of October 11, 2010.

In support of the Form 101, Elliott attached office notes from Dr. Luis Pagani, his treating physical medicine and rehabilitation physician, dated January 3, 2011 and February 2, 2011. In the January note, Dr. Pagani noted the injury occurred on October 11, 2010 while lifting a fifty pound bag of horse feed. Dr. Pagani stated Elliott was temporarily totally disabled. He further documented Elliott's treatment with pain medication, muscle relaxers, and injections. He noted the MRI performed December 24, 2010, demonstrated mild degenerative changes with no nerve root impingement. In the February office note, Dr. Pagani

diagnosed herniated disks at L4-L5 and L5-S1; aggravation of pre-existing lumbar degenerative disk disease; and, congenital, previously asymptomatic, lumbar stenosis. He noted Elliott is not a surgical candidate and advised him to follow up with Dr. Aromola, a chiropractor.

Elliott testified by deposition on June 13, 2011, and at the hearing held January 19, 2012. Elliott is a resident of Walton, Kentucky, who was born on September 5, 1969. Elliot's work history consists of working primarily in small engine repair, with some laboring jobs. He stated all of his jobs required extended standing, bending, twisting, turning, and lifting greater than fifty pounds. He completed the ninth grade, and has not obtained a GED. Although he has no specialized vocational training, he is certified to work on Stihl equipment. He began working for Chestnut in September 2008.

Elliott testified he had no problems with his back prior to October 11, 2010. On that date, he was loading horse feed for a customer when he experienced back pain. He reported this to the owner, finished his shift, and went home. He testified the pain progressed during the day, and later that evening he sought treatment at the local emergency room. Subsequent treatment included an evaluation by Dr. Bradley Mullen, a neurosurgeon, who

referred Elliott to Dr. Joseph Aromola, a chiropractor. Later dissatisfied with Dr. Mullen, Elliott treated with Dr. Pagani. Elliott testified his treatment with Dr. Aromola consists of massage therapy and manipulations. Dr. Pagani manages his pain medication.

In addition to the medical records filed with the Form 101, Elliott filed records from the Chambers Medical Group which included notes from both Dr. Mullen and Dr. Aromola. Dr. Mullen initially saw Elliott on October 28, 2010, and diagnosed a lumbar strain due to the October 2010 work injury. He recommended Elliott undertake chiropractic treatment. On November 15, 2010, Dr. Mullen diagnosed lumbago, lumbar facet syndrome, thoracic spine sprain/ strain, and again recommended chiropractic care. On December 6, 2010, Dr. Mullen noted continued low back pain with no radiation. On December 13, 2010, Dr. Mullen recommended an MRI and continued chiropractic care.

Dr. Aromola began treating Elliott in December 2008 with lumbar and sacral adjustments. In his Form 107 report dated October 31, 2011, Dr. Aromola diagnosed a lumbar sprain/strain, an L5 subluxation, and lumbar radiculitis with thoracic neuritis. He assessed an 8% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent

Impairment, 5th Edition (AMA Guides") due to the injury. Dr. Aromola also assigned restrictions of no repetitive, excessive bending, twisting, turning, lifting, and no lifting in excess of twenty pounds.

Elliott filed additional office records of Dr. Pagani reflecting from May 2011 to September 2011, Dr. Pagani diagnoses of herniated disks at L4-L5 and L5-S1. He also diagnosed the aggravation of pre-existing lumbar degenerative disk disease, and a previously asymptomatic lumbar stenosis. He continued to prescribe pain medication and determined was unable to return to work due to lifting restrictions.

Dr. A. Lee Greiner treated Elliott on December 19, 2011. He noted Elliott complained of back pain radiating down both legs, more so on the left than the right. He also diagnosed herniated lumbar disks at L4-L5 and L5-S1, and the aggravation of pre-existing lumbar degenerative disk disease.

Dr. Richard Sheridan, an orthopedic surgeon, examined Elliott at Chestnut's request on March 15 2011. In his report, he noted the history of injury occurring on October 11, 2010, as Elliott was lifting a fifty pound bag of horse feed. Elliott reported he experienced immediate low back pain radiating down his right lower extremity.

Dr. Sheridan diagnosed a resolved acute lumbar strain, and opined Elliott had reached maximum medical improvement ("MMI"). He further opined Elliott could continue to work as a laborer with no restrictions. He assessed a 0% impairment rating pursuant to the AMA Guides.

Dr. Thomas Loeb, an orthopedic surgeon, evaluated Elliott at Chestnut's request on August 4, 2011. Dr. Loeb noted the history of injury, and Elliott's complaints of low back pain with intermittent paresthesias in both lower extremities in a non-dermatomal pattern. He interpreted the MRI performed in December 2010 as demonstrating moderate spinal stenosis at L4-L5; left paracentral disc bulge at L4-L5; and a central disc bulge at L5-S1. He diagnosed Elliott with a resolved acute lumbar sprain/ strain. He opined Elliott reached MMI eight to twelve weeks after the injury. Although he indicated Elliott would qualify for an 8% impairment rating pursuant to the AMA Guides due to his pre-existing congenital conditions, Dr. Loeb assessed a 0% rating due to the October 2010 work injury. Dr. Loeb stated Elliott could return to work, restricted only from lifting over thirty pounds. He concluded no additional medical treatment is necessary for the October 11, 2010 work injury.

Finally, Chestnut filed the April 7, 2011, utilization review notice of denial based upon a review performed by Dr. Steven B. Smith, D.C., who opined an additional MRI requested by Dr. Aromola was unnecessary.

A benefit review conference ("BRC") was held on November 2, 2011. In the BRC order and memorandum, the contested issues were listed as benefits per KRS 342.730; unpaid or contested medical expenses; credit for unemployment benefits; and exclusion of pre-existing disability impairment.

In the decision rendered March 1, 2012, the ALJ found as follows:

> 9. The issues to be decided are benefits per KRS 342.730; unpaid or contested medical expenses; credit for unemployment benefits; and exclusion for pre-existing, active disability/ impairment.
>
> As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. *Paramount Foods Inc., v. Burkhardt*, 695 S.W. 2d 418 (Ky., 1985).
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> In analyzing this claim the Administrative Law Judge has reviewed

all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.

Having carefully reviewed the evidence, including the medical reports and records of Dr. Aromola, Dr. Pagani, Dr. Sheridan and Dr. Loeb, as well as the Plaintiff's testimony I see no reason to find that prior to the date of injury herein the Plaintiff's condition resulted in an impairment rating, occupational disability or even required medical treatment. As such it cannot be said it was pre-existing, active and that issue is dismissed.

As far as extent and duration I do not believe that the Plaintiff is permanently and totally disabled. It is true that his restrictions prevent him from returning to his prior work. It is also true that he has limited education. However his work as a mechanic cannot be legitimately termed unskilled labor. Further, as noted, he does not have a surgical lesion. Finally, while I can and will find that he lacks the capacity to return to the type of work done on the date of injury I note that most, if not all, of his treatment and the basis for his restrictions is based on his subjective complaints. I do not believe these are, objectively rather than subjectively, sufficient to warrant a total disability award.

I do find, based on the report of Dr. Aromola, that the Plaintiff retains an 8% impairment rating. I note that Dr. Loeb agreed on this rating, but disagreed as to the cause. I find, in reliance on Dr. Aromola, that this rating is work-related and that the Plaintiff lacks the capacity to return

to the type of work done on the date of injury.

I choose to rely upon the restrictions as set forth by Dr. Aromola because I believe that given the nature of the lumbar strain some;[sic] rather, than no, restrictions apply. The arguments set forth by the Defendant as to the rating assigned by Dr. Aromola address weight, not admissibility, and as I have stated, Dr. Loeb agrees with the 8%, simply not the cause.

Because there is no overlap between the periods of TTD and unemployment benefits and because the Plaintiff is permanently, totally disabled the issue of credit for unemployment benefits is moot.

For purposes of contested and future medical expenses I find that the correct, work related diagnosis, for the Plaintiff is of a lumbar strain.

Finally, the only medical fee dispute is regarding a repeat MRI. Pursuant to the report of Dr. Smith I find this proposed procedure is not reasonable and necessary.

The Plaintiff's permanent partial disability award shall be 368.44 (AWW) x 2/3 (comp rate subject to statutory maximum) x .08 (impairment rating) x .85 (grid factor) x 3.2 (KRS 342.730(c)1 and 3) = $53.45 per week, for 425 weeks, from October 11, 2010, and to exclude all periods of temporary total disability benefits. He is also entitled to all past, present and future work-related and reasonable and necessary medical expenses for the lumbar strain.

Both Elliott and Chestnut filed petitions for reconsideration. Elliott argued, as he does on appeal, the ALJ erred by failing to make a finding the injury caused an arousal of a pre-existing dormant non-disabling condition into disabling reality. Chestnut argued the ALJ inadvertently stated Elliott was permanently, totally disabled when discussing credit for unemployment benefits, despite previously awarding only permanent partial disability benefits. The ALJ denied Elliott's petition, and amended his opinion based upon Chestnut's petition by order entered March 16, 2012. In his order dated March 23, 2012, the ALJ stated:

> IT IS HEREBY ORDERED that the last paragraph on page 11 of the March 1, 2012 Opinion, Order and Award shall be amended to read as follows:
>
> > Because there is no overlap between the period of TTD and unemployment benefits and because the Plaintiff is not permanently, totally disabled the issue of credit for unemployment benefits is moot.

It is well established the claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his or her cause of action before the ALJ. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

Where the claimant is unsuccessful with regard to that burden, the question on appeal is whether the evidence compels a finding in her favor. 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The extent of an ALJ's discretion and authority in deciding disputed issues in workers' compensation proceedings is both wide ranging and well established. In rendering a decision, KRS 342.275 and KRS 342.285 grant 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). 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 that would have supported 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).

Elliott argues the ALJ erred by not addressing whether he had pre-existing dormant degenerative conditions aroused into disabling reality. He was not required to do so. First, this was not an issue listed in the BRC order and memorandum. The requirements of a BRC are listed in KRS 342.275(1) and 803 KAR 25:010 § 13. 803 KAR 25:010 § 13(14) specifically mandates that following a BRC, only those contested issues identified at the time of the BRC shall be the subject of further proceedings. In the BRC order and memorandum, only an issue regarding active

impairment was listed, and therefore properly preserved for the Board's review.

Even were we to reach this issue, we would nonetheless affirm the decision of the ALJ. The ALJ clearly found Elliott sustained a work-related back strain injury on October 11, 2010. He awarded TTD benefits, PPD benefits and medical benefits stemming from the injury. He likewise found in Elliott's favor regarding the issue of pre-existing active disability. Despite prevailing on the issues preserved at the BRC, except for the compensability of an additional MRI, Elliott filed this appeal which we believe borders on frivolous.

Based upon the foregoing, we find no error in the ALJ's failure to specifically find Elliott sustained an arousal or aggravation of a pre-existing dormant, degenerative condition into disabling reality. The ALJ appropriately decided the issues which were properly preserved.

Accordingly, the decision by Hon. Chris Davis, Administrative Law Judge, rendered March 1, 2012, and the orders on reconsideration issued March 16, 2012, and March 23, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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