Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 24, 2015

CLAIM NO. 201270061

SLATER FORE CONSULTING, INC. PETITIONER

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

LESLIE B. RIFE and
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING & REMANDING

* * * * * *

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

ALVEY, Chairman. Slater Fore Consulting, Inc. ("Slater") appeals from the Opinion and Order rendered November 14, 2014, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ awarded Leslie Rife ("Rife") permanent total disability ("PTD") and medical benefits for lumbar and cervical injuries, as well as a neurocognitive disorder

resulting from a traumatic brain injury sustained in a June 10, 2012 work accident. Slater also appeals from the December 23, 2014 Order denying its petition for reconsideration.

On appeal, Slater argues the ALJ erred in finding Rife's cervical and lumbar conditions are work-related. It also asserts the low back injury was caused by a subsequent, intervening event. Slater argues the ALJ erred in failing to apportion any part of Rife's disability to pre-existing, active conditions. We will not summarize in detail the medical evidence pertaining to Rife's cognitive injury since the ALJ's findings regarding this issue are not challenged on appeal, however we will address the impairment ratings assessed for this condition. Because substantial evidence supports the ALJ's determination of causation, and pre-existing active disability, and no contrary result is compelled, we affirm. However, we remand to the ALJ for a determination of the appropriate impairment rating attributable to Rife's cognitive injury.

Rife filed a Form 101 alleging he injured his head, face, brain, neck, shoulder, arm and right knee on June 10, 2012 when he tripped over a hose and fell into a steel beam. He subsequently injured his back and hip when he fell in the hospital while recovering from the December

2012 cervical fusion surgery. The Form 101 was later amended to include an alleged psychological condition.

Rife testified by deposition on August 15, 2014 and at the hearing held October 24, 2014. Rife was born on May 6, 1952 and resides in Newport, Tennessee. He graduated from high school and completed three semesters of college where he studied business management. The commercial driver's license he held at the time of the accident has expired. Rife served in the Army from 1972 to 1978, and then worked as a welder. Rife worked as a truck driver for various companies beginning in 1995.

Rife began working for Slater in August 2010 driving a tanker truck delivering chemicals to coal mining sites. Rife loaded chemicals from facilities located in Kemper, Kentucky and Georgia, and drove to mining locations in Montana. Rife was required to load and unload the chemicals with a hose. At his deposition, Rife testified he drove to Montana once every ten days. It took him three days to get to Montana and three days to return home. At the hearing, Rife indicated he "would try to make a run once a week" prior to his work injury. In the months leading up to June 10, 2012, Rife had no problems with, and was not seeking medical treatment for, his neck or back. At the time of his work injury, he was working for Slater full-

time, without restrictions. Rife testified he had no previous head or brain injuries and has never been treated for a psychiatric condition. The parties stipulated Rife continued to work until September 9, 2012, and has not returned to any employment since. Rife testified he is receiving Social Security disability benefits.

Rife confirmed he sought treatment for low back pain in 2005 or 2006, which included injections and radiofrequency ablation. Rife has also had both knees replaced. Rife explained he began having neck pain immediately following his left knee replacement surgery in 2007, and eventually had a cervical fusion in 2008 by Dr. Todd Abel. While working for Slater, Rife sought treatment with Dr. Nicholas Grimaldi after he fell into a pit in February 2011. Rife stated he experienced inflammation, and a cervical x-ray was taken to ensure the hardware was intact. Rife stated he did not miss any work due to the February 2011 incident.

In October 2011, Rife “bumped” his head in the sleeper cab of the tanker truck. He did not recall having a cervical MRI. He took medication for a short period of time until his inflammation resolved, and he did not miss any work due to the October 2011 incident. Rife also confirmed he has diabetes and high blood pressure. Rife stated he

received Social Security disability benefits “several years ago” due to his knee condition. He did not receive those benefits while he was working for Slater.

On June 10, 2012, Rife was in Montana at a mining site unloading chemicals. He tripped over the hose as he walked outside the tanker, striking his head and face against a steel beam. Rife sustained lacerations to his face, and experienced headaches and right knee stiffness. He was taken to the emergency room in Montana, where he underwent diagnostic testing, and his lacerations were sutured. He was subsequently discharged, and began his trip home to Tennessee the day after the accident. Rife testified he had difficulty making the trip home, indicating it took him longer than usual. Subsequent to the work accident, Rife made one more trip to and from Montana.

Once Rife returned to Tennessee, he followed up with his family physician, Dr. Derek Cooze who removed his stitches and eventually referred him to Dr. Abel, a neurosurgeon, for his cervical complaints. Dr. Abel performed a two-level cervical fusion on December 8, 2012 at the University of Tennessee Medical Center. Rife developed post-operative complications, requiring the removal of a hematoma in his neck. While recovering in the intensive care unit, Rife fell trying to get from a chair to his

hospital bed injuring his low back. Subsequently, Dr. Abel treated Rife's cervical and lumbar conditions. After a course of conservative treatment failed, Dr. Abel performed a lumbar fusion in June 2013. Rife testified neither the cervical nor lumbar surgery resolved his symptoms.

Following the work accident, Rife testified he continued to experience headaches, as well as difficulty with memory and concentration, and ringing in his ears. Rife was eventually referred to Dr. Samir Kabani to address these complaints. Rife indicated no physician has released him to return to work.

Rife testified he currently experiences constant neck pain radiating into his arms, low back pain radiating into his legs, and numbness in his feet. He experiences ringing in his ears, constant headaches, difficulty with memory, concentration, and verbalization of his thoughts. He experiences dizziness, and has balance problems for which he uses a cane prescribed by either Dr. Abel or Dr. Kabani. Rife does not believe he can return to any type of work due to his current condition.

Rife filed treatment records from the Billings Clinic Emergency Room in Montana with his Form 101 documenting lacerations to his face and complaints of right knee pain after falling at work and striking his head on a

steel beam. Rife was unsure whether or not he lost consciousness when he fell. A cervical CT-scan demonstrated significant degenerative changes with foraminal stenosis. A brain CT-scan demonstrated no intracranial pathology. Rife's lacerations were sutured, and he was diagnosed with a closed head injury, cervical strain, facial lacerations, and knee abrasion and contusion.

Rife treated with Dr. Cooze from June 15, 2012 through November 1, 2013. Rife presented on June 15, 2012 with increasing back pain after a recent fall. Dr. Cooze removed Rife's sutures and prescribed pain medication. A lumbar x-ray demonstrated diffuse degenerative changes with spondylolisthesis L4 on L5. Rife returned on July 31, 2012, complaining of headaches and neck pain with radicular symptoms, and was referred to Dr. Abel for a neurosurgical evaluation. Rife continued to treat with Dr. Cooze for his cervical complaints, and he additionally complained of joint, low back, right leg pain after he fell in December 2012 at the University of Tennessee Medical Center. Throughout his course of treatment, Dr. Cooze ordered physical therapy and diagnostic studies and prescribed medication.

Rife treated with Dr. Abel, or Charley Haney PA-C, from September 12, 2012 to December 18, 2013. Mr. Haney

noted on September 12, 2012, Rife underwent an anterior cervical discectomy and fusion by Dr. Abel in 2008, and was last seen in 2009 for bilateral carpal tunnel releases. Mr. Haney noted Rife complained of headaches, neck and shoulder pain, and numbness in his hands since he tripped and fell on June 10, 2012. Additional diagnostic studies were ordered, and Rife was restricted from work. On October 10, 2012, Mr. Haney noted an MRI demonstrated multilevel cervical degenerative changes, and recommended surgery. Dr. Abel performed an anterior cervical discectomy and fusion at C3-4 and C4-5 on December 7, 2012. Rife subsequently developed a cervical wound hematoma which was surgically removed on December 8, 2012. On May 8, 2013, Dr. Abel noted Rife's cervical spine was doing well, but he had been complaining of severe and progressing back and right leg pain since December 2012. He noted conservative treatment, including physical therapy, injections and medications had failed. A lumbar MRI demonstrated grade I degeneration at L4 and L5 spondylolisthesis with significant facet hypertrophy and severe lateral recess stenosis, and moderate degenerative changes at L5/S1. Dr. Abel performed fusion surgery at L4-S1, on June 3, 3013.

Rife also treated with Dr. Kabani at East Tennessee Neurology Clinic from January 9, 2013 through

January 27, 2014 for complaints of headaches, ringing in the ears, neck pain, and difficulty with concentration and balance. Dr. Kabani prescribed medication, ordered a brain MRI and an EEG, which were normal. Dr. Kabani restricted Rife from work.

Slater filed the December 26, 2011 note of Dr. Grimaldi stating Rife reported neck and left shoulder pain, as well as numbness and paresthesias in both hands after he fell into a pit in February 2011. He reported Dr. Cooze prescribed Mobic and Norco for pain, which alleviated his symptoms until October 2011 when he struck his head inside the sleeper of his truck. Thereafter, his symptoms increased. A cervical x-ray demonstrated a solid fusion. Dr. Grimaldi diagnosed cervicalgia, degenerative disc disease at C4-5, bilateral upper extremity radiculitis and possible bilateral carpal tunnel syndrome. Dr. Grimaldi recommended a cervical MRI, a bilateral upper extremity nerve conduction study and physical therapy. The January 20, 2012 cervical MRI demonstrated degenerative changes with facet arthropathy, predominately left foraminal narrowing at C2-C4, and right worse than left at C6-7, with minimal canal stenosis at C3-4.

Rife filed the April 30, 2014 report of Dr. Jules Barefoot who also testified by deposition on August 19,

2014. Dr. Barefoot noted Rife's past medical history of hypertension and diabetes, bilateral knee replacements, and the April 2008 cervical fusion at C5-6 and C6-7. He reviewed the June 10, 2012 work accident and subsequent treatment, including the December 2012 cervical fusion, December 2012 hematoma evacuation, and June 2013 lumbar fusion. He reviewed and summarized medical records from 2005 through 2009, the December 26, 2011 note of Dr. Grimaldi, and the records generated subsequent to the June 10, 2012 work event. Dr. Barefoot noted Rife's symptoms resolved following the cervical fusion surgery in April 2008, and he was able to return to work. Dr. Barefoot noted prior to June 10, 2012, Rife "had no complaints of any persistent severe neck pain or low back pain" and "he was not working under any type of work restriction."

Dr. Barefoot diagnosed 1) status post C5-6 and C6-7 cervical fusion on April 25, 2008; 2) status post C3-4 and 4-5 cervical fusion with removal of C7 screws on December 7, 2012; 3) cervical wound hematoma evacuation on December 8, 2012; 4) L4-S1 lumbar fusion on June 3, 2013; 5) closed head injury with ongoing complaints of cognitive impairments; and 6) tinnitus.

Dr. Barefoot opined the December 2012 cervical surgery, June 2013 lumbar surgery, and persistent cognitive

impairments with tinnitus were caused by the June 10, 2012 injury. He stated the treatment provided to Rife was reasonable and necessary for the cure and/or relief of his work-related injuries. Dr. Barefoot stated Rife will need ongoing treatment for chronic severe neck and low back pain, as well as an evaluation to address his complaints of memory and concentration.

Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Barefoot assessed a 28% impairment rating for the cervical spine, but apportioned 10% to the 2008 cervical fusion. Therefore, Dr. Barefoot assessed an 18% impairment rating for the cervical spine "solely attributable to his workplace injury that occurred in June, 2012." Dr. Barefoot assessed a 32% impairment rating for the lumbar spine. Dr. Barefoot assessed a combined 44% impairment rating due to Rife's work injuries occurring on June 10, 2012. Dr. Barefoot stated Rife's chronic and severe pain in his neck and lower back severely limits his mobility. "He would not be able to return to his prior position as a driver. Mr. Rife should be considered totally and permanently occupationally disabled due to the marked limitations he exhibited on his examination today."

Slater filed the April 16, 2013 report of Dr. Thomas O'Brien who diagnosed Rife with a right knee contusion and forehead laceration with mild concussion due to the June 10, 2012 incident. Dr. O'Brien stated Rife's injuries should have healed in one to two weeks, and he reached medical maximum improvement ("MMI") on June 24, 2012. Dr. O'Brien opined Rife did not sustain any permanent impairment due to the June 10, 2012 work injuries.

Dr. O'Brien opined Rife has significant pre-existing, non-work-related conditions bearing no causal relationship to the work accident. He specifically stated the December 2012 cervical fusion is due to pre-existing, multilevel cervical degenerative stenosis and disc disease. He further stated the June 12, 2012 incident did not aggravate, precipitate or accelerate his pre-existing condition. Dr. O'Brien likewise found Rife's low back condition and cognitive complaints are unrelated to the June 10, 2012 work incident. Dr. O'Brien stated Rife is able to return to work as a truck driver and declined to assign restrictions. Regardless of causation, he stated Rife does not require additional treatment for his cervical or lumbar spine and recommended discontinuing Lortab, Hydrocodone and Diazepam.

Slater also filed the September 16, 2014 report of Dr. Henry Tutt who diagnosed forehead and nasal bridge lacerations and a right knee abrasion/contusion due to the June 10, 2012 work injury, both of which have resolved. Dr. Tutt opined work injuries did not warrant a permanent impairment rating, and found Rife reached MMI on July 10, 2012.

Dr. Tutt also diagnosed Rife with multilevel cervical spondylosis status post anterior cervical discectomy and fusion at C5-6 and C6-7 in 2008, and multilevel lumbar spondylosis with L4-5 degenerative spondylolisthesis, both of which were pre-existing conditions. Dr. Tutt opined Rife had an active impairment prior to his June 10, 2012 injury, and he assessed a 25% impairment rating for the prior 2008 cervical fusion and a 10% impairment rating for the symptomatic lumbar condition. Therefore, Rife had a combined 33% pre-existing, active impairment rating.

Dr. Tutt found no evidence of a closed head injury. He further noted the multi-level cervical and lumbar degenerative disc disease, for which surgery was performed, had no relationship to, and was not precipitated or exaggerated by, the work event. Dr. Tutt opined Rife is capable of returning to work as a truck driver and has no

work-related limitations. He also stated Rife shows no indication for his ongoing opioid analgesics.

Regarding Rife's traumatic brain injury or cognitive deficits, the reports of Drs. Michael Cecil, Psy.D., and David Sharberg, M.D. were introduced. Dr. Cecil also testified by deposition on October 16, 2014. In his April 29, 2014 report, Dr. Cecil diagnosed Rife with major neurocognitive disorder due to traumatic brain injury, probably acute and chronic. He assessed a 15% impairment rating pursuant to the AMA Guides, however he failed to address which edition he utilized. Dr. Cecil also recommended additional treatment and testing. He reiterated the impairment rating in his deposition testimony, but again failed to address which edition he utilized. Dr. Shraberg found Rife has some neurocognitive impairment, but was unsure whether it was due to the concussive injury, or was a residual from surgery. In either event, he assessed a 12% impairment rating pursuant to the 2nd Edition of the AMA Guides for mild cognitive impairment.

In the November 14, 2014 opinion, the ALJ summarized the evidence. After finding Rife was a credible witness, and citing the statutory definition of an injury and objective medical findings, the ALJ stated as follows

under “Injury as defined by the Act; work-relatedness/ causation,”

> I make the determination that the medical evidence from Dr. Barefoot, as covered in detail above, and the evidence from Dr. Cecil, as covered in detail above, is very persuasive and compelling. I make the determination that Mr. Rife sustained significant work-related injuries to his neck and back and also major neurocognitive disorder due to his traumatic brain injury directly resulting from his job accident on June 10, 2012.
>
> Mr. Rife testified that while he was confined to the hospital for the neck surgery performed upon him by Dr. Abel, he fell and injured his back, resulting in Dr. Abel performing back surgery. His testimony is consistent with the persuasive and compelling medical evidence from Dr. Barefoot covered above. There is a landmark Kentucky case directly on case with the case at bar. In *Pond Creek Collieries Co. v. LaSantos*, 307 Ky. 866, 212 S.W.2d 530 (1948), the plaintiff was confined to the hospital for treatment of work-related injuries and fell out of his hospital bed, injuring his hip. The plaintiff claimed and the Workers’ Compensation Board found that the plaintiff’s hip injury occurred during his medical treatment and as a direct and proximate result of his original work-related injury. I rely upon the *Pond Creek* case as well as *Elizabethtown Sportswear v. Stice*, 720 S.W.2d 732 (Ky. App. 1986) in making the determination that the plaintiff’s back injury was compensable.

Under “Pre-existing active,” the ALJ stated as follows:

> The correct standard regarding a carve-out for a pre-existing active condition is set forth by the Court of Appeals in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). In *Finley*, *supra*, the Court instructed in order for a pre-existing condition to be characterized as active, it must be both *symptomatic* and *impairment ratable* pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. *Finley v. DBM Technologies*, *supra*.
>
> Mr. Rife testified that he had had prior neck surgery and back trouble before his work accident on June 10, 2012, but that he was not under any physical restrictions at the time of his June 10, 2012 work injuries. Based on the credible and convincing lay testimony of the plaintiff, as covered above, and the persuasive and compelling medical evidence from Dr. Barefoot, as covered in detail above, I make the determination that Mr. Rife did not have any pre-existing active impairment or occupational disability prior to his work-related injuries on June 10, 2012. I further make the determination that the defendant has not met the burden of proving the existence of a pre-existing active impairment or occupational disability on the part of the plaintiff before his accident on June 10, 2012.

After referencing the statutory definition of PTD and the analysis set forth in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (KY. 2000), the ALJ determined Rife is permanently totally disabled. The ALJ primarily relied

upon Rife's testimony and the opinion of Dr. Barefoot in awarding Rife PTD and medical benefits.

Slater filed a petition for reconsideration essentially raising the same arguments it now makes on appeal. It requested the ALJ reconsider his finding of work-related causation with regard to the cervical and lumbar spine conditions, and his findings regarding a carve-out for pre-existing active conditions. In the December 23, 2014 Order denying Slater's petition, the ALJ largely repeated language contained in the November 14, 2014 opinion regarding causation and pre-existing disability. After reiterating his reliance upon Drs. Barefoot and Cecil, the ALJ additionally stated, "In making the determinations in this case, I carefully considered, compared and contrasted the evidence from Dr. Barefoot and Dr. Cecil with that from Dr. Grimaldi, Dr. O'Brien, Dr. Tutt and Dr. Shraberg." The ALJ then reiterated his findings of permanent total disability.

On appeal, Slater argues the ALJ erred in finding the cervical condition is due to the work injury, pointing to the fact Rife had complained of cervical pain in 2007, undergone a cervical fusion in 2008, reported neck pain to Dr. Grimaldi at the December 2011 visit, and had a cervical MRI in January 2012. It points to the fact Rife did not

report neck pain immediately following the June 10, 2012 work accident at the emergency room. It asserts Rife only suffers from degenerative changes, which Drs. Tutt and O'Brien opined are not work-related. Slater asserts the ALJ failed to consider Rife's prior medical treatment and requested the claim be remanded for consideration of the evidence, and specific findings in support of his conclusion.

Slater likewise argues the ALJ erred in finding Rife's low back condition was due to the work injury for two reasons. First, Slater points out Rife received treatment for low back pain in 2005, and had a lumbar x-ray in August 2011.[1] It also points to the opinions of Drs. Tutt and O'Brien. Second, Slater argues the ALJ erred in relying upon Pond Creek Collieries Co. v. LaSantos, 212 S.W.2d 530 (Ky. 1948) and Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986) in finding the subsequent lumbar injury work-related. Slater argues in order to be found compensable, a subsequent injury must be a direct and natural result of the work injury. In this instance, there was no evidence Rife's fall at the hospital

[1] Medical records from 2011 relating to treatment for low back pain were not filed in the record. Rather, a January 2013 x-ray was compared to an x-ray taken August 12, 2011.

was caused by his work injury or the treatment he was receiving. Therefore, the hospital fall must be considered a subsequent, intervening event.

Slater argues the ALJ erred in failing to apportion any part of Rife's disability to pre-existing, active conditions. Slater points to Rife's diabetes, COPD, bilateral knee replacements, bilateral carpal tunnel releases, and previous cervical fusion. Slater argues Dr. Barefoot's assessment of 10% for the prior cervical fusion is erroneous, and a 25-28% for a two-level fusion was required using the DRE method of the AMA Guides. Slater argues Dr. Barefoot erred in declining to assess an impairment rating for a pre-existing, active lumbar condition. Slater states Rife would not be totally disabled due to his June 2012 accident, absent his "plethora of pre-existing conditions." Slater asserts the ALJ's findings are insufficient, and Slater had a symptomatic and impairment ratable condition prior to his work injury under Finley v. DBM Technologies, Inc., 217 S.W.3d 261 (Ky. App. 2007).

As the claimant in a workers' compensation proceeding, Rife had the burden of proving each of the essential elements of his cause of action, including causation/work-relatedness. *See* KRS 342.0011(1); Snawder v.

Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Rife was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must

be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. 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, supra.

Substantial evidence exists supporting the ALJ's determination Rife's cervical and lumbar conditions are work-related. An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). The ALJ clearly found Dr. Barefoot's opinion more persuasive than those of Drs. Tutt and O'Brien.

The April 30, 2014 report reveals Dr. Barefoot was well aware of Rife's prior lumbar and cervical treatment, as noted by Slater in its brief to the Board. In his review of medical records, Dr. Barefoot noted Dr. Dennis Harris and Dr. Jett treated Rife from 2005 and 2006 for low back pain,

which consisted of medial branch blocks and radiofrequency ablation. In May 2006, Dr. Harris noted Rife reported minimal, if any, back pain. Likewise, Dr. Barefoot noted Rife began complaining of cervical symptoms to Dr. Harris in January 2007, had at least three cervical epidural injections that same year, and ultimately underwent an anterior cervical discectomy with fusion on April 25, 2008 by Dr. Abel. Dr. Barefoot noted Dr. Abel reported Rife was doing well by June 2008, and subsequently addressed his carpal tunnel complaints in 2008 and 2009. Dr. Barefoot also reviewed a November 2011 emergency room record which stated Rife hit his head, and the consultation note dated December 26, 2011 by Dr. Grimaldi.

Dr. Barefoot also noted Rife reported his previous cervical symptoms had resolved after the 2008 fusion surgery and he was able to return to work. He also noted prior to the June 2010 work injury, Rife “had no complaints of any persistent severe neck pain” and was not working under any restriction. After performing an examination and reviewing the medical records, Dr. Barefoot opined the December 2012 cervical surgery and the June 2013 lumbar surgery were caused by the June 10, 2012 work injury. Dr. Barefoot assessed a 28% impairment rating for the cervical spine, but apportioned 10% to the 2008 cervical fusion. Therefore, Dr.

Barefoot assessed an 18% impairment rating for the cervical spine "solely attributable to his workplace injury that occurred in June, 2012." He then assessed a 32% impairment rating for the lumbar spine. Combined, Dr. Barefoot assessed a 44% impairment rating due to Rife's workplace injuries occurring on June 10, 2012.

We acknowledge Slater is able to point to contrary evidence in its favor, primarily the opinions of Drs. Tutt and O'Brien. However, such is not an adequate basis to reverse on appeal. Dr. Barefoot's opinion, together with Rife's testimony, constitutes substantial evidence supporting the ALJ's determination his cervical and lumbar injuries are work-related.

We likewise find the ALJ properly relied upon the Pond Creek Collieries Co. v. LaSantos, 212 S.W.2d 530 (Ky. 1948) and Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986) in finding Rife's subsequent lumbar injury work-related. It is undisputed Rife developed a complication due to the December 2012 cervical fusion surgery, a neck hematoma, which had to be surgically evacuated. At the deposition, Rife testified he was in a coma for a week following the removal of the hematoma. After he came out of the coma and the tubes were removed, "I'd asked a nurse to set me up in a chair, and they set me

in a bedside chair. And no one ever came back. I stood up to get back in bed and that's when I fell." At the hearing, Rife similarly stated after he came out of the coma, the hospital staff in the intensive care unit had moved him from the bed to the chair. "And I couldn't holler at nobody, so I got up to take a step to turn around. And I sat down on the bed and just fell flat" injuring his back. The medical records of Dr. Abel, including the December 7, 2012 and December 8, 2012 operative report, corroborate Rife's testimony. Slater does not appear to dispute Rife's account of his fall in the hospital.

In Pond Creek Collieries Co. v. LaSantos, supra, the Claimant sustained a work-related injury, was admitted to the hospital, and given morphine. Three days after entering the hospital, the Claimant either stepped out of or fell from his bed fracturing his hip. The Court found the subsequent hip injury compensable, stating,

> . . . it occurred during treatment in such a manner as to constitute in effect an aggravation of the original injuries. In this connection we note that the patient was suffering from 'severe shock' and was emotionally unbalanced for the first few days he was in the hospital. His chest was crushed; his condition was 'bad'; and it was necessary to give him oxygen, other respiratory stimulants, and morphine. Under such circumstances, even if his hip was

> fractured when he fell from or beside his hospital bed, this occurred during his medical treatment at a time when he could not be held accountable for his acts, and as a direct and proximate result of the original injury suffered in an 'accident arising out of and in the course of his employment.' KRS 342.005. Clearly, if this was a subsequent fracture, it resulted from his medical treatment as an aggravation of his initial injuries.
> Id. at 868

In Elizabethtown Sportswear v. Stice, supra, the Claimant suffered a work-related back injury, for which she was subsequently hospitalized for a lumbar myelogram. The Claimant died shortly thereafter due to an allergic reaction to the dye used in the procedure. In affirming the award of death benefits to the widower, the Court noted it was uncontradicted the Claimant's death resulted from the allegoric reaction, and the myelogram was a necessary procedure for diagnosis and treatment of her work-related injury. Id. at 733. The Court stated,

> Professor Larson tells us that it is now uniformly held that aggravation of the primary injury by necessary medical or surgical treatment is compensable. He cites numerous examples, including exacerbation of a claimant's condition, or death, resulting from antibiotics, antitoxins, sedatives, pain-killers, anesthesia, electrical treatments, or corrective or exploratory surgery. A. Larson, *Workmen's Compensation Law,* Vol. 1, sec. 13.21 (1985).
> Id. at 734

The Court also reviewed Pond Creek Collieries Co. v. LaSantos, supra, and indicated the Claimant had a right to submit herself to what is usually a routine diagnostic procedure recommended by her physician. Id.

Based upon our review, the cases of Pond Creek Collieries Co. v. LaSantos, supra, and Elizabethtown Sportswear v. Stice, supra, are controlling and the ALJ properly relied upon them in determining Rife's subsequent low back injury sustained as a result of his fall at the hospital while recovering from complications arising from his work-related cervical fusion is compensable. Like the Claimant's hip injury in Pond Creek Collieries Co. v. LaSantos, we find Rife's subsequent low back injury occurred during treatment in such a manner as to constitute in effect an aggravation of the original injuries.

Rife's testimony and Dr. Barefoot's opinion constitute substantial evidence supporting the ALJ's determination Rife's cervical and lumbar conditions are work-related, and the ALJ properly relied upon Pond Creek Collieries Co. v. LaSantos, supra, and Elizabethtown Sportswear v. Stice, supra. We therefore affirm on this issue.

Since Slater was unsuccessful on this issue before the ALJ, the question on appeal is whether the evidence

compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

Although the ALJ did not reference the standard set forth in Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), he correctly conducted the proper analysis in both the November 14, 2014, Opinion and Award and the December 23, 2014, Opinion and Order on Reconsideration. The ALJ cited to Rife's testimony he had previous neck surgery and back trouble before the accident of June 10, 2012, but had no physical restrictions at the time of the June 10, 2012 work injury. The ALJ then concluded Rife did not have a pre-existing active impairment or occupational disability prior to the June 10, 2012 work injury, based upon his testimony and Dr. Barefoot's report. The ALJ then determined Slater had not met the burden of proving the existence of a pre-existing active impairment or occupational disability before Rife's June 10, 2012 accident.

In its petition for reconsideration, Slater challenged the ALJ's finding of no pre-existing active impairment or disability was insufficient, citing to Finley v. DBM Technologies, Inc., 217 S.W.3d 261 (Ky. App. 2007). This was addressed by the ALJ in his order on reconsideration by noting Rife's testimony regarding his

previous neck surgery and back trouble but he had no physical restrictions at the time of the work injury. Referencing Rife's testimony and the medical evidence from Dr. Barefoot, the ALJ again made the determination Rife did not have a pre-existing active impairment or occupational disability. He also stated Slater had not met its burden of proving existence of a pre-existing active impairment or occupational disability.

Although the ALJ did not specifically cite to Roberts Bros., supra, he appropriately performed an analysis as to whether there should be an exclusion from the total disability award based on a pre-existing disability. In Roberts Bros., supra, the Kentucky Supreme Court stated as follows:

> 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. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).
>
> Id. at 183.

Here, the ALJ specifically found Rife did not have a pre-existing occupational disability. He relied upon Rife's testimony he had no physical restrictions at the time of the work injury as well as the medical evidence provided by Dr. Barefoot. Although he did not clearly refer to Roberts Bros., supra, the ALJ made the appropriate analysis in arriving at his determination. While Rife may have indeed had a pre-existing impairment, that does not equate to an occupational disability, and the ALJ's determination will not be disturbed.

That said, this Board is permitted to *sua sponte* address issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Here, the ALJ acknowledged Drs. Cecil and Barefoot addressed Rife's traumatic brain injury, or neurocognitive disorder, but failed to make a determination regarding the appropriate impairment rating.

There appears to be no dispute Rife has some cognitive disorder due to his accident, whether it be from the acute traumatic brain injury, or as a residual from his surgery as noted by Dr. Shraberg. In either event, the ALJ must make a determination of whether Rife has an impairment rating as a result of his neurocognitive disorder due to

the traumatic brain injury resulting from his accident work accident. While the ALJ stated he relied upon the evidence from Dr. Cecil, he did not make a finding as to the appropriate impairment rating resulting from the major neurocognitive disorder. Such finding is necessary to avoid future disputes regarding whether Rife is entitled to future medical benefits for this injury. If the ALJ determines Rife is entitled to an impairment rating assessed for the work-related neurocognitive disorder, then as a matter of law, he is entitled to future medical benefits for this work injury. This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Accordingly, the November 14, 2014 Opinion and Order and the December 23, 2014 Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED AND REMANDED** to the ALJ for a determination of the appropriate impairment rating stemming from Rife's cognitive condition.

ALL CONCUR.

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