**OPINION ENTERED: March 15, 2013**

CLAIM NO. 201170625

ST. ELIZABETH MEDICAL CENTER PETITIONER

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

WILLIAM GENTER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
* * * * * *

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

**STIVERS, Member.** St. Elizabeth Medical Center ("St. Elizabeth") appeals from the October 9, 2012, opinion and order and the November 8, 2012, order on reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the October 9, 2012, opinion and order, the ALJ awarded William Genter ("Genter") temporary total

disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits.

The Form 101 alleges on September 9, 2011, Genter, a nurse, injured his back and neck in the following manner: "While moving a patient during a code, I felt a sharp pain down the center of my upper back and down the left side of my neck. I have had arm numbness, spasms and continual pain." The Form 101 indicates Genter gave notice of his injuries on September 9, 2011, when he filled out an incident report. The medical treatment Genter received is described as follows on the Form 101: "September 25, 2011, I went to Dr. Sanders. He referred me to Commonwealth Orthopedics and I have continued to treat with Commonwealth Orthopedics. I had neck surgery on November 29, 2011." The Form 101 also provides the following physical requirements of Genter's job: "Lifting and moving patients; pulling-pushing computer cart all day."

St. Elizabeth's Form 111, Notice of Claim Denial, asserts "Plaintiff's neck condition is caused in whole by his extensive pre-existing degenerative arthritis." St. Elizabeth checked "no" under the following admission: "Plaintiff gave due and timely notice of the injury."

The August 3, 2012, Benefit Review Conference ("BRC") order lists the following contested issues: "extent

& duration, notice, work-relatedness, TTD, all medicals, STD & LTD setoff, PTD." The BRC order indicates Genter last worked on September 23, 2011, and has no earnings since then.

Genter was deposed on May 3, 2012. He testified he had neck surgery on November 29, 2011. Regarding his ability to return to work and work restrictions, Genter testified as follows:

> A: I need a release from the physician following. I did physical therapy. In fact, I just got a release back for part-time work Tuesday.
>
> Q: Okay. Have you forwarded that release to St. Elizabeth?
>
> A: I meet with them tomorrow. I was supposed to meet with her yesterday, Mary, Mary Neuhaus but she got sick and rescheduled me.
>
> Q: All right. Are you on any physical restrictions?
>
> A: No weight restriction, no repetitive overhead work.
>
> Q: Anything else?
>
> A: Shorter shifts for now. I used to do twelve hours, now he only wants me to do eight as a trial.
>
> Q: And who has imposed these restrictions?
>
> A: Dr. Michael Grefer.

Genter was prescribed Vicodin for pain every four to six hours "prn." He testified it is not "a consistent thing." He was also prescribed Robaxin, a muscle relaxer, to be taken up to three times a day. He currently takes it once a day.

Genter went on a vacation to Myrtle Beach for six days immediately after the September 9, 2011, work incident. He currently reads, watches television, walks his dogs, and does light gardening.

Genter has a significant history of work injuries. In the early 1980s, while working as a nurse in New York State, Genter tore his left meniscus and filed a workers' compensation claim. In the 1980s, while in New York, Genter sought chiropractic care for low back pain. In 1992 or 1993, while working in the psychiatry unit, he sustained left shoulder damage trying to restrain a patient. He filed a workers' compensation claim and received physical therapy, injections, and time off. He did not receive any income benefits. In 1999 or 2000, while working for Health Alliance, Jewish Hospital Kenwood, Genter sustained a thoracic back strain. He filed a workers' compensation claim and received a small settlement.

St. Elizabeth introduced fifteen exhibits at Genter's May 3, 2012, deposition. St. Elizabeth's Exhibit 1, is a May 14, 2003, two-page medical record of Dr. Michael Grefer. The "present symptoms," were "intermittent neck pain" and "left arm pain." When asked what that refers to, Genter testified as follows: "I have degenerative disc disease as a baseline. So I have pain off and on, stiffness and soreness depending on the weather, activities, for a while." Genter testified the thoracic pain dates back to 2000 or 2001, and some days it is "great" and some days it is not. He attributes his neck pain to degenerative disc disease. He has also experienced left shoulder pain "off and on through the years."

St. Elizabeth's Exhibit 2 is a March 6, 2003, one-page MRI report generated as a result of a cervical MRI performed on the same date. The MRI was ordered by Dr. Mark Sander, Genter's family doctor, "[b]ecause of all those complaints where [he] was talking about having pain down the center of [his] back and up on the left side." Genter testified his neck and low back pain has "always" been more on the left side. Regarding the results of the MRI, Genter testified as follows:

> Q: Just looking at the impression, it says, quote, 'multilevel disc dessication and discogenic changes

> which are most pronounced at C5-6 and C6-7. Diffuse posterior annular disc bulges are present at both levels but I see no evidence of bony central canal stenosis, disc protrusion or significant foraminal narrowing.' Did he discuss those results with you?
>
> A: Yes.

Genter also underwent MRIs of his lumbar and thoracic spine performed on March 6, 2003, which he agreed revealed multilevel degenerative disc disease.

St. Elizabeth’s Exhibit 3 is a February 15, 2007, report concerning an MRI ordered by Dr. Kendall Hansen, a pain physician. Genter saw Dr. Hansen for epidural injections and radio therapy for the low, mid, and cervical spine. Genter believes he received two epidural injections in his neck and radio therapy.

Genter returned to Dr. Grefer in 2009 when he "started to have a lot of arm and hand symptoms and some neck discomfort." After reviewing the EMGs and MRIs, Dr. Grefer informed Genter he "had a bad left shoulder and carpal tunnel in [his] left hand." A “scope” was performed on Genter's left shoulder in December 2009. Genter also underwent carpal tunnel surgery in 2010 on his left wrist.

St. Elizabeth’s Exhibit 4 is an October 9, 2009, MRI report concerning an MRI of Genter's cervical spine which was performed "[b]ecause of having left-sided

shoulder, neck, hand numbness and we weren't really sure what was causing what."

St. Elizabeth’s Exhibit 5 is a March 30, 2010, physical therapy note which indicates Genter received an epidural injection in his neck on March 29, 2010. Genter testified that between this epidural injection and the work-related incident on September 9, 2011, he did not have many issues with his neck. He explained "Most of my pain issues have always been in the thoracic and the low back for the most part."

St. Elizabeth’s Exhibit 6 is Dr. Hansen’s January 25, 2010, three-page report which reflects he was treating Genter for cervical degenerative disc disease. On that date, Genter received a cervical epidural steroid injection.

On March 4, 2010, Genter had another cervical epidural injection administered by Dr. Jose Rivera. On March 25 and April 7, 2010, Dr. Rivera administered cervical medial branch blocks. In May 2010, Genter received a SI joint injection and on November 24, 2010, and January 19, 2011, additional cervical epidural injections were administered.

St. Elizabeth’s Exhibit 7 is Dr. Hansen’s two-page office note dated February 10, 2011, which reflects Genter rated his neck pain seven on a scale of one to ten.

On March 8 and May 5, 2011, Genter underwent more cervical medial branch blocks.

St. Elizabeth’s Exhibit 8 is Dr. Sander’s July 19, 2011, two-page record which indicates he gave Genter a Medrol Dosepak and Prednisone for low back pain.

St. Elizabeth’s Exhibit 9 is a one-page incident report dated September 9, 2011, which Genter filled out at 6 a.m. shortly after the incident at issue. He did not seek medical treatment. Genter testified when he returned to work on September 20, 2011, he experienced neck pain near the end of his shift.

St. Elizabeth’s Exhibit 10 is Dr. James Ravencraft’s September 26, 2011, progress note. Regarding the contents of the progress note, Genter testified as follows:

> Q: [Dr. Ravencraft] says, 'the history is provided by the patient. This is a chronic problem. The current episode started more than one year ago. The problem occurs intermittently. The problem has been waxing and waning. The symptoms are worsened by bending and twisting'?
>
> A: Right.

> Q: So is that the history you gave him?
>
> A: It's partial. I told him how I thought it occurred and made it worse this time but he didn't include that in the note at the time.

St. Elizabeth’s Exhibit 11 is a one-page history form completed by Genter at Dr. Grefer’s request in which Genter represented his back pain as "chronic" and not work-related.

St. Elizabeth’s Exhibit 12 is Dr. Grefer’s September 27, 2011, one-page progress note which Genter conceded does not mention a work injury. At that time, Dr. Grefer diagnosed cervical and thoracic strain with cervical radiculopathy.

St. Elizabeth’s Exhibit 13 is Dr. Grefer’s October 25, 2011, one-page progress note.

St. Elizabeth’s Exhibit 14 is an MRI report, dated September 28, 2011.

St. Elizabeth’s Exhibit 15 is Dr. Grefer’s one-page progress note dated October 11, 2011, which indicates Genter stated "this all started when [he] was moving a large individual at work around the end of August."

Genter testified at the August 29, 2012, hearing he filed an incident report for the September 9, 2011, injury. On cross-examination, Genter confirmed the injury

in this litigation is not confined to his neck but also includes damage to his left shoulder and some soft tissue in the upper back.

Genter has met all of his restrictions for returning to work at St. Elizabeth which only pertain to the number of hours he works.

When asked when he first learned he was injured due to the events on September 9, 2011, Genter testified as follows:

> I had the first follow up- and this is a correction from the deposition, because I was a week off or somewhere in there. I actually just went back to Dr. Grefer on 10/11. And we went over the test results and talked about how I thought it might have happened and that he was going to put me into physical therapy and was hoping to resolve it that way. And- and then after about a couple weeks of that, we realized that was not going to resolve. That it was definitely an injury. We had talked briefly about possibly referral to a spine specialist, but we didn't really do that until- I think I went and saw Dr. Kakarlapudi 11/18/11. And then he said that's not going to go back with physical therapy and we need to fix it.

Genter testified that before the September 9, 2011, incident, he was working without restrictions.

Regarding the September 9, 2011, incident report in which he indicated "back" as the body part injured he testified as follows:

> A: I just put back.
>
> Q: And is that what you thought at the time?
>
> A: That's what I thought.

Mary Neuhaus ("Neuhaus") also testified at the hearing. Neuhaus manages work injuries and non-occupational leaves at St. Elizabeth. Neuhaus testified she did not receive the incident report from Genter regarding the September 9, 2011, injury until September 19, 2011. In addition to filing an incident report, employees of St. Elizabeth are supposed to contact Neuhaus and report the work injury. Neuhaus testified Genter did not report the injury explaining as follows:

> On October 26th, he came to my office claiming that he was off on a non-occupational medical leave, receiving our short-term disability. And on the 26th of October, he came to my office and said- told me that he's off with this neck injury, but this was related to an injury that he sustained right before he went on vacation and did I have the incident report. And I did not have the incident report of that date, which would have been more like towards the 20th of September. I don't know the exact date. But I did tell him that I do have one from 9/9, but you didn't call or say that anything was wrong,

> so- and he said, no, that's not the one. There's another one. So I directed him to his nurse manager to see if she had that incident report. And then later, he came down and told me that there- she did not have another incident report, so this had to have been the incident that this happened to him.

St. Elizabeth introduced Dr. Thomas A. Bender's May 9, 2012, independent medical examination ("IME") in which he opines as follows:

> It is my understanding the claimant is alleging a cervical spine injury to have occurred in the course of his employment on 9/9/11. At most the claimant appears to have sustained a cervical strain with referred pain to the left scapular region as a result of muscular irritability. I do not believe the claimant has an injury with structural permanency related to the event of 9/9/11. Specifically the claimant does not have a specific structural injury to the cervical spine as a result of the injury of 9/9/11 based upon review of the sequential MRI scans including 3/6/03, 2/15/07, 10/9/9, and 9/28/11. I do not believe that the surgery that was performed on 11/30/11 was necessitated by the work event of 9/9/11. Frankly, the claimant has chronic, degenerative structural spondylosis in the cervical spine documented as remote as 2003 for which he underwent surgery on 11/30/11. It is evident the claimant underwent relatively intensive injection therapy in late 2010 and 2011 for this structural degenerative disease. Specifically comparing the MRI scan of 10/9/09 to the subsequently obtained

scan of 9/28/11 verifies no change in disc position or strategically located disc herniation to result in symptoms that would be attributable to the event of 9/9/11.

It is my opinion that the claimant did have preexisting active impairment to the cervical spine before the work injury of 9/9/11. Due to the repeated occurrence of symptoms with some frequency since 2003 and the need for injection therapy, it is my opinion that the claimant would be considered to have an active impairment based upon the following calculations. Referencing Table 15-5 on page 392, the claimant would be considered to have 5% whole body impairment as a DRE Category II before the event of 9/9/11. It is my opinion the claimant did not sustain any harmful injury to a body organ as a result of work circumstances on 9/9/11. I do not believe that the surgery performed on 11/30/11 was necessitated or caused by the work circumstances of 9/9/11. The claimant does not have further impairment of the cervical spine as a result of the surgery performed on 11/30/11 to address the chronic degenerative conditions. Although the claimant did not have a documentable radiculopathy on an objective basis before the surgery, the claimant is now considered to be a DRE category 4 with 25% whole body impairment due to the 2-level cervical spine fusion surgery by Dr. Kakarlapudi. As outlined above, I do not believe this impairment is in any way related to work circumstances occurring on 9/9/11. It is my opinion, the claimant can return to his preinjury level of employment considering the injury that I identify in terms of the event of 9/9/11. The claimant does not require restrictions

> in terms of the work injury that I identify in terms of the event of 9/9/11. The claimant does not require future treatment for the work injury that I identify in terms of the event of 9/9/11.

Dr. Grefer's July 25, 2012, report reads as follows:

> I do feel that Mr. Genter is basically at maximum medical improvement as of 7/24/12. His prognosis is poor for full recovery. I do think he will have significant permanent residuals as a result of the 9/9/11 work related injury. Anticipated future medical treatment is observation, activity limitation, medications, and exercises. No surgery is planned at this time, but he could possibly require surgery of that left shoulder at some point in the future if his symptoms continue or worsen. His work related injury has significantly affected and limited his activity level to the point that I think he can only function in a sedentary to light situation. His testing is suggestive that he limit his activities to part-time because of his endurance situation. Dr. Haskel, at St. Elizabeth Employee Health, was involved with Mr. Genter's rehabilitation and thought that he could only work 3 hours a day. With Dr. Haskel's recommendations, there does not appear to be a position for Mr. Genter at St. Elizabeth Healthcare and, therefore, I feel that he cannot work at that facility and is essentially unable to work at this time since nothing is available for him. Therefore, I think he is totally disabled from his job as a result of the work related injury sustained in September 2011 and the

> aggravation of pre-existing dormant conditions by this accident.
>
> Mr. Genter has a thirty (30) percent impairment to the body as a whole using Tables 16-35, 15-5, and 15-4 in the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment. I do think he is at maximum medical improvement and his permanent restrictions are part-time sedentary to light work with frequent changes of position.

In the October 9, 2012, opinion and order, the ALJ set forth the following summary of the evidence:

> The plaintiff gave a deposition and testified at the hearing. The plaintiff filed as evidence the following: Records of Commonwealth Orthopedic and Dr. James Ravencraft and reports of Dr. Kakarlapudi and Dr. Michael Grefer. The defendant filed as evidence the following: Deposition of plaintiff, report of Dr. Thomas Bender and St. Elizabeth Work Rehabilitation Center, records of Dr. Jose Rivera and Dr. Michael Grefer, exhibits attached to deposition of Mr. Genter and Hearing Transcript, witness Mary Neuhas [sic] and the depositions of Tandy Mamutse, Stephanie Mardis and Rosemary Martin.
>
> All of the above evidence has been carefully reviewed and considered by the Administrative Law Judge.
>
> The plaintiff **William Genter** testified that while working for the defendant on September 9, 2011 and moving a patient he sustained injuries to his neck, back and left shoulder.

He related his subsequent medical treatment.

**Dr. Michael Grefer**, the plaintiff's treating orthopedic surgeon, filed his medical report dated July 25, 2012. He recited the plaintiff's history of having injured his neck, back and left shoulder on September 9, 2011 while moving a patient at work. He related the plaintiff's past history of neck and left shoulder problems, including left shoulder surgery. He also recounted the plaintiff's medical treatment for his alleged work injuries on September 9, 2011. Dr. Grefer stated that he last examined the plaintiff on July 24, 2012, at which time Mr. Genter continued to experience significant residuals of his work injury and had a decreased range of motion, pain, stiffness, tightness and muscle weakness of his cervicothoracic spine and his left shoulder. Dr. Grefer stated that Mr. Genter was at maximum medical improvement as of July 24, 2012, that his prognosis was poor for a full recovery and that he will have significant permanent residuals as a result of his September 9, 2011 work injuries. Dr. Grefer stated that Mr. Genter will sustain a 30% permanent impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Grefer stated that Mr. Genter will have permanent restrictions limiting him to part-time sedentary to light work with frequent changes of position.

**Dr. Thomas Bender**, an orthopedic surgeon, examined Mr. Genter at the request of the defendant and filed his medical report dated May 9, 2012. Dr. Bender took a comprehensive medical history from the plaintiff, which

> included the plaintiff's alleged work injuries on September 9, 2011 and his past medical history. Dr. Bender carefully reviewed Mr. Genter's medical records and performed a thorough physical examination.
>
> Dr. Bender stated that Mr. Genter had a pre-existing active impairment to his cervical spine before the work injuries of September 9, 2011. In his opinion, Mr. Genter will not sustain any permanent impairment as a result of his work injuries, can return to his pre-injury level of employment and does not require restrictions in terms of his work injuries, and further that Mr. Genter will not require future treatment for his work injuries.

The ALJ set forth the following findings of fact, conclusions of law:

> **A. Work-relatedness.**
>
> KRS 342.0011(1) defines "injury" to mean 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 a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.
>
> I saw and heard Mr. Genter testify at the hearing. He was a credible and convincing witness. Based on the totality of the evidence, including the plaintiff's testimony and all of the medical records, including the medical

records and reports from Dr. Grefer, the treating orthopedic surgeon, which I found very persuasive, I make the factual determination that Mr. Genter sustained work-related injuries to his neck, back and left shoulder while employed by defendant on September 9, 2011.

**B. Notice.**

KRS 342.185(1) mandates that no proceeding for workers' compensation for an injury shall be maintained unless notice of the accident shall have been given to the employer as soon as practicable after the happening thereof. Based on the totality of the evidence in the record, including the credible and convincing testimony of the plaintiff, I make the factual determination that Mr. Genter gave due and timely notice of his September 9, 2011 work injuries to his employer as soon as practicable after the happening thereof.

**C. Temporary total disability.**

KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

Based upon Dr. Grefer's persuasive medical report, which states that Mr. Genter reached maximum medical improvement on July 24, 2012, I make the factual determination that Mr. Genter was temporarily totally disabled from September 23, 2011 to July 24, 2012 and is entitled to recover income benefits for that period of time.

**D. Extent and duration and permanent total disability.**

In rendering a decision, KRS 342.285 grants the Administrative Law Judge 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 this case I find very persuasive the opinion of Dr. Grefer and find that the plaintiff has sustained a 30% whole person permanent impairment.

"'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

“the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured.”

> Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).
>
> In the present case, I considered the severity of the plaintiff's work injuries, his age, his work history, the testimony of the plaintiff and Dr. Grefer's medical report regarding Mr. Genter's permanent impairment and occupational disability. Based on all of those factors, I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled and is entitled to recover appropriate workers' compensation benefits.

St. Elizabeth filed a petition for reconsideration asserting as follows:

- The ALJ failed to cite to voluminous evidence in the record as to virtually all issues, leaving an inadequate record for review.
- The ALJ failed to make any findings of fact as to the contested issue of pre-existing active condition, for which there was ample substantial evidence that was unrebutted.
- Regarding permanent total disability, the ALJ failed to apply the proper legal standard and failed to address or weigh unrebutted evidence that Mr. Genter could not return to his St. Elizabeth job because of unrelated knee and low-back conditions.
- The ALJ failed to apply the proper legal standard or analysis on the issue of notice and failed to address or weigh voluminous evidence in that regard.

- The ALJ failed to adequately address the issue of work-related injury or impairment.
- The ALJ erred by failing to allow counsel to cross-examine Plaintiff as to whether he knew how to describe and report a work injury, based on the four previous times he had reported one. The questioning was pertinent to the issues of causation and notice.

In the November 8, 2012, order overruling the petition for reconsideration, the ALJ stated as follows:

> 1. Defendant has filed a Petition for Reconsideration and plaintiff has responded thereto.
>
> 2. In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. It is clear that the defendant is attempting to reargue the case on a Petition for Reconsideration, which is improper.
>
> 3. 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). An 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky.1979); 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 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 (Ky.1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky.2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky.1976).

4. The Opinion and Order rendered on October 9, 2012 addresses all of the contested issues raised by the parties in the Benefit Review Conference Order.

5. This case was thoroughly litigated and the issue of notice was thoroughly explored. The sum and substance of the plaintiff's testimony is that he promptly reported to his employer his work injury on September 9, 2011. As the Kentucky Supreme Court stated in Hill v. Sextet Mining Corporation, 65 S.W.3d 503 (Ky.2001), medical causation is a matter for the medical experts and plaintiff cannot be expected to self-diagnose a work-related injury. In Logan Aluminum v. Bullard, 2006 WL 2707952 (Ky.2006), the Kentucky Supreme Court held that the evidence supported the Judge's finding that the employer was not prejudiced when it did not receive notice that the plaintiff's injury was work-related

> until he filed his claim. Based on the totality of the evidence on notice, including the credible and convincing testimony of the plaintiff, I again make the factual determination that Mr. Genter gave due and timely notice of his September 9, 2011 work injury to his employer as soon as practicable after the happening thereof and complied with the requirements of KRS 342.185(1).
>
> WHEREFORE, defendant’s Petition for Reconsideration is hereby overruled and denied.

St. Elizabeth's first argument on appeal is the ALJ failed to provide an adequate summary of the evidence. St. Elizabeth has provided a 10-page summary of the lay and medical testimony. The Board agrees the ALJ failed to adequately summarize the evidence, particularly Genter's testimony. Genter's deposition spanned 76 pages and his hearing testimony spanned 45 pages. The ALJ summarized this testimony in two lines. However, because the ALJ listed the evidence filed by each party and provided the evidence upon which he relied in resolving the contested issues, we will not remand the claim to an ALJ for the purpose of engaging in an additional summary of the evidence.

St. Elizabeth's second argument on appeal is that the ALJ failed to make findings of fact on the issue of a pre-existing active condition. While we acknowledge there

is a substantial amount of evidence in the record on this issue, and the issue was addressed in closing arguments at the hearing, *St. Elizabeth failed to list pre-existing active as a contested issue at the August 3, 2012, BRC*. 803 KAR 25:010, Section 13 (13) and (14), in relevant part, provides as follows regarding the BRC:

> (13) If at the conclusion of the benefit review conference the parties have not reached agreement on all the issues, the administrative law judge shall:
>
> (a) Prepare a summary stipulation of all contested and uncontested issues which shall be signed by representatives of the parties and by the administrative law judge; and
>
> (b) Schedule a final hearing.
>
> (14) Only contested issues shall be the subject of further proceedings.

In its appeal brief, St. Elizabeth maintains a pre-existing active condition is a "part of extent and duration." This is incorrect. Just as pre-existing active condition is not included in work-relatedness and causation, a pre-existing active condition is also not included in extent and duration. *See* KenAmerican Resources, Inc. v. Warren, 2012-CA-001045-WC, rendered January 11, 2013, Designated Not To Be Published. St. Elizabeth could have filed a motion requesting relief from the contested issues listed at the

BRC and failed to do so. Since St. Elizabeth did not list pre-existing active condition as a contested issue, it waived the right to make such an argument before the ALJ and the Board. The ALJ was bound to consider only the contested issues listed at the BRC. Further, the issue of pre-existing active condition cannot be a part of extent and duration. Since the claimant has the burden of proving the extent and duration of his occupational disability, the presence of a pre-existing active condition cannot be considered a part of extent and duration as the employer has the burden of proving a pre-existing condition. Thus, placing the defense of a pre-existing active condition within extent and duration would relieve the employer of its burden of proof.

St. Elizabeth's third argument on appeal is the ALJ failed to apply the proper legal standard regarding permanent and total disability. St. Elizabeth also asserts the ALJ failed to weigh the unrebutted evidence that Genter could not return to his former job at St. Elizabeth because of unrelated knee and low back conditions. While the ALJ's analysis regarding permanent and total disability is scant, it is sufficient. In the October 9, 2012, opinion and order, the ALJ stated he relied upon "the severity of the plaintiff's work injuries, his age, his work history, [and]

the testimony of the plaintiff" as well as Dr. Grefer's medical report. Dr. Grefer opined Genter "is totally disabled from his job as a result of the work related injury sustained in September 2011 and the aggravation of pre-existing dormant conditions by this accident." Dr. Grefer also assigned a 30% impairment rating and permanent restrictions of part-time sedentary to light work. Since Genter had the burden of proof regarding permanent and total disability and was successful before the ALJ, our task is to determine whether substantial evidence supports the ALJ's determination. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Dr. Grefer's July 25, 2012, opinions constitute substantial evidence in support of the ALJ's determination Genter is permanently and totally disabled, and this determination will remain undisturbed.

St. Elizabeth's fourth argument on appeal is that the ALJ failed to apply the proper legal standard or analysis relative to the issue of notice. St. Elizabeth asserts as follows:

> The testimony in the record is that Genter gave notice of a back injury on Sept. 9- not a neck injury or a shoulder injury....Even though Genter testified at [sic] hearing he hurt his neck and shoulder on Sept. 9, there is absolutely no record or evidence that he actually reported these as work-related until on or about Oct. 24.

KRS 342.185 provides notice of an *accident* must be “given to the employer as soon as practicable after the happening thereof.” KRS 342.190 provides this notice "shall be in writing." The courts have long held that if the employer has notice of the incident or accident which reasonably might be expected to cause an injury, the employer is then held to be reasonably apprised of the probability of injury so no further notice is necessary until the injury gradually progresses into a compensable state which is diagnosed. *See* Reliance Diecasting Co. v. Freeman, 471 S.W.2d 311 (Ky. 1971); Roe v. Semet-Solvay Division Allied Chemical and Die Corp., 268 S.W.2d 416 (Ky. 1954). Additionally, the Board has held on a number of occasions that requiring an injured worker to not only provide due and timely notice of her accident but also to provide notice to the employer each time a new diagnosis is made by a physician during the course of medical treatment is a burden not required by KRS 342.185 or KRS 342.190.

In the present case, the ALJ made it clear he relied upon Genter's testimony in resolving the issue of notice. Genter's testified he filled out an incident report on September 9, 2011, and listed "back" on the injury form. This is sufficient notice of both the accident and all injuries subsequently diagnosed. As the ALJ's determination

is supported by substantial evidence, this determination will not be disturbed. We also note that any deficiencies in the ALJ's analysis of the notice issue in the October 9, 2012, opinion and order was cured in the November 8, 2012, order on reconsideration when the ALJ rendered additional findings.

St. Elizabeth's fifth argument on appeal is the ALJ failed to adequately address the issue of a work-related injury. Once again, the ALJ made it clear in the October 9, 2012, opinion and order that he relied upon Genter's testimony and Dr. Grefer's report in determining Genter sustained an injury as defined by the Act. While the ALJ certainly did not go into detail discussing which aspects of the testimony and medical records he relied upon in reaching any of his legal conclusions, including injury as defined by the Act, a review of this evidence reveals substantial evidence supports the ALJ's determination Genter sustained work-related injuries to his neck, back, and left shoulder. This determination will not be disturbed.

St. Elizabeth's final argument on appeal is that the ALJ erred by failing to allow Genter to be cross-examined on the issue of his knowledge of how to fill out an injury report. A review of the pertinent portions of the

hearing transcript reveals the ALJ sustained objections made by Genter's counsel to certain questions based on relevance. In light of the ALJ's finding on the issue of notice, we will not second-guess his actions. A review of the hearing transcript indicates the ALJ acted well within his discretion as the gatekeeper and arbiter of the record in sustaining the objections made, and we will not intervene. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2006).

Accordingly, as to all issues raised on appeal, the October 9, 2012, opinion and order and the November 8, 2012, order ruling on the petition for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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