Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 21, 2013

CLAIM NO. 200901393

TERRY WERNER PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

BOB RYAN AUTO SALES
UNINSURED EMPLOYERS' FUND
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Terry Werner ("Werner") seeks review of the February 18, 2013, opinion and order rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") dismissing his claim for income and medical benefits against Bob Ryan Auto Sales ("Ryan") and the Uninsured Employers' Fund ("UEF"). Werner also appeals from the

April 18, 2013, order overruling his petition for reconsideration.

Werner alleged a work-related injury to his left knee which resulted from a motor vehicle accident ("MVA") occurring in the course of his employment with Ryan.[1]

Werner explained how the MVA occurred as follows:

> Q: Let's turn to the day of the injury. Can you tell me on January 5th, 2008 what were you doing that day for Bob Ryan and what happened?
>
> A: Okay. I was on my way to pick up some parts at Auto Zone for a transmission I was getting ready to put in a Ford Explorer for him. On my way back, I was coming down Sixth Street, and I was going through a little mist of rain. And a lady pulled out in front of me, and I hit her, spun around, and landed up into a field.

The accident report prepared by the Louisville Metro Police indicates the driver of the vehicle which struck Werner was attempting to turn left from south Fifth Street on to west bound Hill Street. Werner was traveling eastbound on Hill Street when he was struck by the other vehicle. The accident report reveals after impact the vehicles remained within the intersection. The medical

[1] Pursuant to a benefit review conference ("BRC") order dated January 12, 2011, the ALJ first determined whether an employment relationship existed between Werner and Ryan. In an opinion rendered March 1, 2013, the ALJ determined Werner was an employee of Ryan on the date of the MVA.

records reveal Werner first sought medical treatment for his injuries at the emergency room at Norton Audubon Hospital two days later on January 7, 2008. Those records reflect Werner was injured in an MVA and complained of neck, lower back, and left elbow pain. The diagnosis was lumbar and neck strain and left elbow pain. As a result, x-rays were ordered of the cervical and lumbar spine and left elbow. There was no record of Werner complaining of knee pain.

Werner then sought treatment from Progressive Medical and Rehabilitation ("Progressive").[2] When he was first seen by Progressive, in addition to complaining of neck and lower back problems, Werner also complained of left knee symptoms. Werner was discharged by Progressive on February 27, 2008, and was referred to University of Louisville Orthopedics for his knee problems. The discharge summary states an MRI of the left knee showed a 5m type meniscal tear of the posterior horn of the medial meniscus extending to the medial and posterior services. At that time his status was post MVA with "intractable left knee pain secondary to medial meniscus posterior horn

[2] Although the first record of Progressive is dated January 30, 2008, the February 27, 2008, discharge summary reflects Werner first sought treatment on January 25, 2008, after being involved in a two car collision.

radial-type tear." Werner was treated by Injury Rehab Specialists from March through the latter part of 2008.

Werner first sought treatment from Dr. Alan Oster, an orthopedic surgeon, on February 24, 2009. Dr. Oster's February 24, 2009, record reveals Werner's chief complaints were right shoulder pain and left knee pain. He noted Werner stated his pain had begun approximately a year ago. At that time, Werner was seen by another orthopedic surgeon and an MRI was performed. Dr. Oster stated Werner was unable to follow-up with the orthopedic surgeon due to the "loss of insurance" and now that he has insurance he has elected to follow-up on these conditions. Dr. Oster's report also contains the following notation: "other injuries include herniated disc in his lower back from a car wreck in January 2008 and a fractured tail bone." On that date, Dr. Oster ordered an MRI of the left shoulder and right knee in order to re-evaluate Werner's problems. In his March 19, 2009, record, Dr. Oster stated the MRI revealed a degenerative signal in the posterior horn of the medial meniscus. Because of Werner's "ability to get around," Dr. Oster believed the knee and meniscal tear needed to be dealt with first and scheduled Werner for an arthroscopy of the left knee and partial medial meniscectomy. On April 17, 2009, Dr. Oster performed an

arthroscopy of the left knee with partial lateral meniscectomy.[3] Because Werner continued to have problems with the left knee, Dr. Oster ordered another MRI. On June 8, 2009, an MRI was performed revealing a displaced tear of the "anterior horn of the medial meniscus with the fragment lying in the intercondylar notch." As a result, on June 26, 2009, Dr. Oster performed an arthroscopy of the left knee with partial medial menscectomy.

Werner testified at an October 18, 2010, deposition and the December 18, 2012, hearing. He testified his knee injury was the most serious injury resulting from the MVA. In addition to undergoing two surgeries on his left knee, Werner also received physical therapy and injections. Because of the condition of his knee, Werner believes he is unable to perform any yard work and is very limited in his ability to perform household tasks. His knee pain is constant. Werner was unable to explain why the Norton Audubon Hospital record did not reflect his knee injury complaints. Werner denied making a claim for Personal Injury Protection ("PIP") benefits and

[3] Although the operative report reflects surgery was performed on the right knee, it appears there is no dispute surgery was performed on the left knee.

receiving any benefits from an insurance company as a result of the MVA.

In addition to introducing Werner's voluminous medical records, the UEF also introduced the September 28, 2011, independent medical evaluation ("IME") report of Dr. Gregory Gleis. Dr. Gleis' report is equivocal as to whether Werner sustained a knee injury as a result of the MVA of January 5, 2008. However, Dr. Gleis assessed a 4% permanent impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") for Werner's left knee condition.

Werner introduced the July 13, 2011, report of Dr. Jules Barefoot, who also assessed a 4% permanent impairment which he directly attributed to the January 5, 2008, MVA.

The February 18, 2013, opinion and order contains, in relevant part, the following "Discussion and Determination":

> Before Plaintiff can establish entitlement to workers' compensation benefits, he must present persuasive proof he sustained an "injury." As above noted under KRS 342.0011 (1) the definition of "injury" contains several components, all of which must be proven before it can be said.

Plaintiff sustained a work-related injury. Plaintiff has shown a work-related traumatic event – he was doing an errand for Defendant when he was involved in the MVA.

The next component Plaintiff must prove is that the MVA was the proximate cause of his knee problems. Plaintiff has not presented persuasive evidence his left knee problems were proximately caused by the MVA.

On this point there are too many significant inconsistencies in Plaintiff's proof regarding whether his left knee problems are a result of the January 5, 2008 MVA.

The undersigned was afforded the opportunity to hear and observe Plaintiff during his final hearing testimony. The undersigned felt Plaintiff's testimony was questionable, somewhat calculating and not entirely credible.

The ALJ has the sole authority to determine the weight, credibility, substance and inference to be drawn from the evidence. Paramount Foods, Inc. supra. The ALJ has the discretion to reject any test and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the adverse party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Plaintiff's testimony contains numerous significant inconsistencies which undermine his left knee problem was caused by the MVA. These inconsistencies include:

1. On several occasions herein Plaintiff represented he experienced "immediate onset of left leg pain," "immediate complaints of knee pain."

Plaintiff's representations are in total conflict with the ER written records done pursuant to Plaintiff's first seeking medical treatment two days after the MVA. If he had immediate knee pain at the time of the MVA, surely he would have mentioned that when he first sought medical treatment. A review of the ER records of 1/7/08 show Plaintiff only complained of neck, back and left elbow pain. There is absolutely no mention of his knee. In fact, he specifically indicated he did not have pain or an injury to his left knee. He did not circle his left knee on the body image on page two of the ER record, to indicate pain in his left knee. Plaintiff testified he went to the ER because his knee pain was increasing, but the ER records do not even mention the left knee. He testified his left knee was x-rayed at the ER, but the records do not mention knee x-ray. Plaintiff is simply not believable. The written records squarely contradict Plaintiff's testimony regarding his left knee injury.

2. A second major inconsistency occurred when Plaintiff represented to Dr. Glies [sic] that in the MVA, "the Explorer spun and landed in a field."

A review of the Louisville Metro Police Collision Report of January 5, 2008 does not mention any spinning of Plaintiff's vehicle nor is there any indication Plaintiff's vehicle was ever locate anywhere but on the paved roadway at the intersection of Hill and Fifth Street heading north. Again,

Plaintiff's testimony is contradicted by the written records.

3. Another inconsistency is that within two weeks of the MVA Plaintiff applied to Kentucky Farm Bureau for No-Fault benefits. In his discovery deposition and at his Final Hearing, he had not received any medical or lost wage benefits from Farm Bureau, he did qualify his response by adding "I can't remember on." These representations are inconsistent with the written documents for Plaintiff did apply for and received No-Fault insurance benefits for medical expenses and lost wages. Canceled checks from Farm Bureau were filed herein, and the checks were payable to Terry Warner [sic], not to any other person.

4. A [sic] another significant inconsistency is contained in Dr. Barefoot's IME report [sic] July 13, 2011. This IME was conducted at Plaintiff's request. Apparently Plaintiff represented to Dr. Barefoot, "he reports that he was seen in [sic] the next day [sic] Audobon [sic] Hospital and then was referred to Progressive Medical." Not only is the representation that he was seen in the ER on the day following the MVA not accurate, but the ER records do not indicate he was referred to any medical provider for further medical treatment. This distinction may seem minor, but the documented false representations could affect the outcome of an IME.

5. Another inconsistency appears in the office visit records of Dr. Alan Oster - February 24, 2009 (initial visit); March 19, 2009 and April 27, 2009 -there is no indication or reference to a MVA as being the cause of Plaintiff's left knee problems. In the initial visit record no reference was

> made to the cause of Plaintiff's left knee complaints, but an entry was written reading, "other injuries include herniated disc in his lower back from a car wreck in January 2008 and a fractured tailbone." Though the undersigned may well have overlooked an entry in the records, he is unaware of any proof Plaintiff sustained a herniated disc or a fractured tailbone as a result of the 2008 MVA. The occurrence of fractured tailbone is documented in Dr. Koford's record of October 7, 2008 which reads, "Fell has a small fracture in tailbone."
>
> There are other inconsistencies in the record, but the five inconsistencies above noted are of sufficient significance and number to discredit Plaintiff's contention his knee problem was a result of his MVA. Plaintiff has not presented sufficient persuasive evidence showing the MVA was the proximate cause of Plaintiff's alleged left knee injury. Plaintiff having failed to meet one of the components in the definition of an "injury," his claim must be dismissed.

Werner filed a petition for reconsideration making many of the same arguments he now makes on appeal. As previously noted, in an order dated April 18, 2013, the ALJ overruled the petition for reconsideration.

On appeal, Werner advances two arguments in support of his contention the ALJ's decision should be reversed. First, he contends the ALJ erred in failing to make a finding he did not have a pre-existing active impairment or condition of his left knee. Werner asserts

there is no proof he had any left knee problems or had been treated for left knee symptoms prior to January 5, 2008.

Next, Werner argues the ALJ erred in not finding the MVA caused his left knee injury. Werner asserts since the medical evidence established he had no left knee problem prior to the MVA, "there is no other possible cause for the meniscal tear other than the work-related MVA." Werner goes on to refute the various reasons given by the ALJ for finding he did not sustain a work-related injury.

Since the ALJ's finding the left knee injury was not proximately caused by the work-related MVA "is not supported by sufficient evidence," and the uncontradicted evidence compels a finding of a work-related left knee injury, Werner argues the decision must be reversed.

For reasons other than those espoused by Werner, we vacate the ALJ's decision finding the MVA was not the proximate cause of Werner's alleged left knee injury and ordering the claim dismissed.

As noted by the ALJ in his discussion and determination, KRS 342.0011(1) defines injury as follows:

> "Injury" means 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.

It is clear from the parties' briefs to the ALJ and the ALJ's February 18, 2013, opinion and order, the sole issue was whether Werner sustained a left knee injury as a result of the MVA of January 5, 2008. The ALJ specifically noted such in his introduction stating as follows:

> On January 5, 2008 Plaintiff was involved in a MVA. Plaintiff alleges a permanent injury to his left knee as a result of that MVA.
>
> At the April 12, 2012 Benefit Review Conference (BRC) the parties were unable to make any stipulations, but that Plaintiff was born on March 7, 1963, that an auto accident did occur on January 5, 2008 and that Plaintiff has an 8% [sic] WPI.

The ALJ stated the first determination which must be made is whether Werner sustained an injury as defined in KRS 342.0011(1). After reviewing the evidence and reciting the definition of injury, the ALJ specifically found Werner sustained a work-related injury as he had shown a work-related traumatic event. Specifically, Werner was "doing an errand" for Ryan when he was involved in an MVA. However, the ALJ then erroneously stated the next component Werner must prove is that the MVA was the proximate cause of his knee problems, and Werner had not introduced persuasive

evidence his left knee problems were proximately caused by the MVA. The ALJ went on to note there were too many inconsistencies in Werner's proof and listed five inconsistencies which he deemed significant. The ALJ further compounded this error in the last sentence of his "Discussion and Determination" by stating Werner "had failed to meet one of the components in the definition of injury."

Because the ALJ found Werner sustained a work-related injury which could only be to the left knee and reinforced that finding by stating Werner had shown a work-related traumatic event, the decision dismissing Werner's claim must be vacated and remanded for clarification of the basis for the ALJ's decision dismissing the claim. The ALJ's findings of a work-related injury and a work-related traumatic event occurred cannot be reconciled with the remainder of his findings.

The parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

In his February 18, 2013, opinion, order, the ALJ first determined Werner sustained a work-related injury and had shown a work-related traumatic event. The ALJ's

reference to “a next component” is clearly erroneous, as the ALJ had already determined Werner had “shown a work-related traumatic event” and he sustained a work-related injury. In short, there is no next component. Further, the ALJ’s statement Werner must prove an MVA was the proximate cause of his knee problems is incorrect. The ALJ had already made the determination in the previous paragraph that Werner had sustained a work-related injury; therefore, the work-related MVA was the proximate cause of his knee problems.

Werner was required to prove he sustained a work-related traumatic event or series of traumatic events arising out of or in the course of his employment which proximately caused a harmful change in his knee as evidenced by objective medical findings. Here, the ALJ stated Werner “sustained a work-related injury” and had “shown a work-related traumatic event” occurred while performing an errand for Ryan. As noted by the ALJ and as evidenced by the parties’ arguments to the ALJ, it stands to reason the only possible work-related injury had to be the left knee. Thus, the finding Werner sustained a work-related injury is a finding the work-related traumatic event produced a harmful change in Werner’s left knee as evidenced by objective medical findings. Clearly, the

medical evidence establishes that there has been a harmful change in Werner's left knee. The real issue was whether the MVA caused the left knee condition.

After making the initial finding Werner sustained a work-related injury, there was nothing else for the ALJ to resolve except for the extent of the occupational disability caused by the knee injury. The ALJ's findings are contradictory.

The ALJ's decision shall be vacated and remanded for additional findings. On remand, the ALJ must review the evidence, and clearly and unambiguously determine whether Werner sustained a work-related injury to his left knee as a result of the MVA. The ALJ shall support his determination with the appropriate findings of fact.

Accordingly, the February 18, 2013, opinion and order dismissing Werner's claim and the April 18, 2013, order overruling the petitioner for reconsideration are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an opinion and order in conformity with the views expressed herein.

ALL CONCUR.

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