

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 20, 2015

CLAIM NO. 201100145

TIMOTHY BIRGE

PETITIONER

VS.

APPEAL FROM HON. STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE

DOLLAR GENERAL CORPORATION and  
HON. STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

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

**ALVEY, Chairman.** Timothy Birge ("Birge") appeals from the October 2, 2014 order rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") dismissing his claim against Dollar General Corporation ("Dollar General"), and from the October 31, 2014 order denying his petition for reconsideration.

In a decision rendered on July 25, 2013, the ALJ entered an order on the bifurcated issues of the compensability of knee replacement surgery, and temporary total disability ("TTD") benefits from the date of surgery until Birge reached maximum medical improvement ("MMI"). On September 8, 2014, Dollar General filed a motion to remove the claim from abeyance, and to dismiss the claim. Birge responded to the motions stating he had no objection to removing the claim from abeyance, but he objected to the motion to dismiss. The ALJ entered a one paragraph order on October 2, 2014 which states as follows:

IT IS HEREBY ORDERED that Defendant's Motion is GRANTED. By prior Opinion and Order of July 25, 2013, the undersigned ruled that Plaintiff's complaints and request for relief all relate to the 1998 injury. As Plaintiff has received the medical benefits and temporary total disability benefits previously ordered and as Plaintiff is not entitled to additional permanent partial disability benefits or permanent total disability benefits per KRS 342.125(3), the remainder of this claim is hereby dismissed.

Birge filed a petition for reconsideration of the order on October 2, 2014, indicating additional issues remain unresolved. He requested the ALJ issue a scheduling order, and hold an additional benefit review conference

("BRC"). The petition for reconsideration was denied by order entered October 31, 2014.

On appeal, Birge argues the ALJ abused his discretion in dismissing the claim. Because we agree the ALJ erred in dismissing the claim, the order dismissing and the order on reconsideration must be vacated, and the claim remanded for additional proceedings.

Birge sustained a left knee injury on June 9, 1998, stepping off of a forklift while working for Dollar General. He underwent a left knee surgery performed by Dr. Narashimha Reddy. Birge settled his claim with Dollar General based upon a 3% impairment rating which was approved by Hon. J. Kevin King, Chief Arbitrator, on March 23, 1999. Birge returned to work for Dollar General. On September 7, 2010, Birge filed a motion to reopen the claim, alleging his left knee condition had worsened to the point he needed a total left knee replacement. He requested Dollar General to pay for the surgery, and pay TTD benefits from the date of surgery until he reached MMI. On October 28, 2010, Hon. J. Landon Overfield, Chief Administrative Law Judge, entered an order reopening the claim.

On January 28, 2011, Birge filed a Form 101 alleging a left knee injury occurring in January 2009 due

to repetitively standing on a tow motor, walking, standing, lifting, bending and squatting while working for Dollar General. The medical documentation attached with the Form 101 includes records of treatment with Dr. Reddy for the left knee in 1998, 2000, 2004, 2005, 2007, 2008, 2009 and 2010. They reflect recurring left knee pain, and treatment which included draining the knee, injections, and medication. Birge later moved to amend the Form 101 to include an allegation of a right foot injury due to overuse because of his left knee problems.

Birge filed a motion to consolidate the reopening with the new claim. An order was issued on February 15, 2011 consolidating the claim, and assigning both to the Hon. Joseph W. Justice, Administrative Law Judge ("ALJ Justice").

Birge testified by deposition on May 11, 2011 and at the hearing held on November 16, 2012. Birge was born on March 7, 1960. He is a resident of Gamaliel, Monroe County, Kentucky, and began working for Dollar General in 1981. He had stopped working before the hearing due to his knee pain. His primary work duty while working for Dollar General involved operating a stand up forklift. At the hearing, he testified he climbed in and out of the forklift

150 to 200 times per day. After the 1998 injury, he had restrictions of no squatting, stooping or twisting.

Birge stated his knee continued to bother him after 1998, but he only sought medical treatment when the pain became unbearable. At some point he advised Dr. Reddy he felt a slipping in his knee. Dr. Reddy advised him the repeating squatting and kneeling at work caused fluid build-up in his knee. After July 2010 his job involved operating the lift, and placing boxes on conveyors. Beginning in August 2010, when he solely operated the lift, and stood all day. His knee pain eventually worsened to the point he could no longer work overtime. Dr. Reddy occasionally drained the knee and administered injections. In 2007, Dr. Reddy prescribed a knee brace which provided minimal relief. In 2010, Dr. Reddy recommended knee replacement surgery.

In support of his claim, Birge filed Dr. Reddy's office notes listed above reflecting treatment for the left knee. Birge additionally filed Dr. Reddy's August 18, 2010 treatment note indicating the need for knee replacement surgery. Dr. Reddy's April 8, 2011 office note reflects Birge had medial and lateral condyle defects in 1998 for which he underwent surgery. He stated Birge had sustained a worsening of his left knee condition due to continued

operation of the forklift. He continued to recommend the knee replacement, and he anticipated an eight to twelve week recovery period after surgery. Birge also filed Dr. Reddy's office note dated February 14, 2011 reflecting an increase in left knee pain. He stated Birge has osteoarthritis of the left knee with possible early metatarsalgia of the right foot due to weight shifting.

Birge also filed the March 14, 2011 treatment note of Dr. Neha Pansuria, a rheumatologist at the Graves-Gilbert Clinic in Bowling Green. Dr. Pansuria discussed Birge's right foot pain. He diagnosed polyarthralgia secondary to favoring the right leg to avoid left knee pain.

Birge also filed the May 12, 2011 report of Dr. Craig Roberts who examined him on May 12, 2011. Dr. Roberts diagnosed left medial compartment arthrosis, bone on bone, which he attributed to the 1998 injury. He also diagnosed right foot metatarsalgia due to a contralateral knee injury which was work-related. He recommended a total knee replacement. He stated if surgery was not performed, Birge had reached MMI, and would qualify for a 20% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment.

Dollar General filed the report of Dr. Bart Goldman who evaluated Birge on January 5, 2011. Dr. Goldman noted Birge's history of injury in 1998, surgery, and continuing complaints. He diagnosed severe degenerative joint disease of the left knee due to the natural effects of the aging process on the pre-existing chondromalacia which was accelerated by the 1998 surgery. He stated Birge will require a left knee replacement at some point, due to the natural aging process, unrelated to his 1998 work injury.

Dollar General filed a supplemental report prepared by Dr. Goldman on June 22, 2011. He referenced the findings from the previous evaluation. He reiterated the need for surgery was due to the natural aging process. He stated restrictions were appropriate for the natural aging process, unrelated to the 1998 injury. He found no treatment was necessary for the 1998 injury. He disagreed with Dr. Roberts as to causation.

On May 25, 2011, Birge filed a motion to bifurcate the claim to decide the entitlement to the recommended surgery and TTD benefits. In the BRC order and memorandum, ALJ Justice denied the motion to bifurcate. The contested issues included benefits per KRS 342.730; unpaid or contested medical expenses, work-relatedness/causation, average weekly wage, unpaid or contested medical

expenses, and statute of limitations (January 2009). A hearing was scheduled for August 4, 2011. The hearing was subsequently cancelled, and the parties were allowed additional time to introduce evidence.

On July 13, 2012, ALJ Justice entered an order reassigning this claim to the ALJ. A telephonic BRC was held on August 27, 2012. The ALJ listed TTD as the contested issue. A hearing was held on November 16, 2012. The ALJ noted in both the hearing order and the hearing transcript the claim was bifurcated for decision on the issues of compensability of the proposed knee replacement surgery, and if found compensable, TTD from the date of surgery until Birge reaches MMI. The parties subsequently briefed the bifurcated issues, and the ALJ rendered a decision on July 25, 2013. The ALJ found the recommended surgery reasonable and necessary, and ordered Dollar General to pay for it. He also ordered Dollar General to pay TTD benefits from the date of surgery until Birge reached MMI.

Birge subsequently underwent the knee replacement surgery. On September 8, 2014, Dollar General filed a motion to remove the claim from abeyance, and to dismiss the claim. Birge responded he had no objection to removing the claim from abeyance, but objected to the dismissal. On

October 21, 2014, the ALJ issued the decision dismissing the claim, as stated above. Birge filed a petition for reconsideration which was denied.

On appeal, Birge argues the ALJ abused his discretion in dismissing the claim. It is well settled an ALJ has broad discretion to control the taking and presentation of proof in a worker's compensation proceeding. New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004). Thus, as a general proposition, any purported error by the fact-finder must be reviewed under the abuse of discretion standard. Abuse of discretion by definition "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945).

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). However, we note Birge filed both a reopening of the 1998 claim, and a new claim alleging a left knee injury due to repetitive trauma resulting from his continued work activities at Dollar General. It is clear the parties agreed to bifurcate the

issues for a decision on the compensability of the proposed knee replacement surgery and a period of TTD benefits.

Clearly issues were preserved for decision for which no evidence was introduced or developed. The July 25, 2013 decision rendered by the ALJ only resolved the compensability of the surgery, and a period of TTD benefits. Other issues were preserved, and remain to be resolved. We therefore deem the dismissal of Birge's case was premature and an unwarranted abuse of discretion by the ALJ. We vacate the order dismissing Birge's claim, and remand the claim to the ALJ for entry of an order granting the parties the opportunity to introduce evidence on the remaining issues, and conduct an additional BRC and hearing. After review of the entirety of the evidence, the ALJ may render a decision he deems appropriate. While this Board may not and does not direct any particular result, we direct the ALJ to the holding of the Kentucky Supreme Court in Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008) to determine whether it has any bearing on his ultimate decision in this claim.

Based upon the foregoing, the October 21, 2014 Order of Dismissal by Hon. Steven G. Bolton, Administrative Law Judge, and the Order on Reconsideration issued October

21, 2014 are hereby **VACATED**. This claim is **REMANDED** to the ALJ for additional proceedings as outlined above.

ALL CONCUR.

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**ADMINISTRATIVE LAW JUDGE:**

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