Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 20, 2014

CLAIM NO. 200901393

UNINSURED EMPLOYERS' FUND PETITIONER

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

BOB RYAN AUTO SALES
TERRY WERNER
and HON. OTTO DANIEL WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. The Uninsured Employers' Fund ("UEF") appeals from the January 7, 2014, Opinion, Order, and Award on Remand rendered by Hon. Otto Daniel Wolff, Administrative Law Judge ("ALJ") finding Terry Werner ("Werner") sustained a work-related left knee injury and awarding permanent total disability benefits and medical

benefits. The UEF also appeals from the February 12, 2014, Order overruling its petition for reconsideration.

In our August 21, 2013, Opinion Vacating and Remanding, we described the facts surrounding Werner's left knee injury as follows:

> 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

[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.

> 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 ALJ's February 18, 2013, Opinion and Order initially dismissing Werner's claim 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:
>
> . . .

In that same Opinion and Order, the ALJ summarized the various significant inconsistencies alluded to above and determined as follows:

> 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.

On appeal, Werner raised two issues. However, in our August 21, 2013, Opinion, we vacated the ALJ's decision for reasons not raised on appeal stating as follows:

> 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.

In the January 7, 2014, Opinion, Order, and Award on Remand, the ALJ identified his task as follows:

> Most of the basic facts of this claim are set forth in the Opinion rendered February 18, 2013, and reference is made to that document for such.

The February 2013 Opinion dismissed Plaintiff's claim. The stated reason for the dismissal was, "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."(Opinion, p. 14).

In the 2013 Opinion, prior to determining Plaintiff did not present sufficient persuasive evidence showing the MVA was the proximate cause of Plaintiff's alleged left knee injury, the undersigned wrote, "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." (Opinion, p. 11).

Commenting on this paragraph of the Opinion, the Board wrote in its OVR, "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." (OVR, p. 13).

The Board continued, "Further, the ALJ's statement Werner must prove an (sic) 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." (OVR, p. 14).

The Board continued, "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." (OVR, p. 15).

On the last page of the OVR (p. 15), the Board wrote, "The real issue was whether the MVA caused the left knee condition", and, in a subsequent paragraph, the Board instructed, "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."

A re-reading of the Opinion, coupled with the Board's comments, does reveal how one could be confused with the undersigned's selection and placement of certain words, particularly the word "injury." For instance in the second paragraph on page 11 of the Opinion it was written: "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."

It was not the undersigned's intent to have the word injury interpreted to mean the word "injury" as defined in KRS 342.0011 (1). At that point in the Opinion, the undersigned was operating under the belief that additional facts needed to be considered before it could be determined Plaintiff sustained an

> "injury" as that word is defined under the Act.
>
> Upon review of the troublesome sentences and words, and with the Board's input, it is understandable how confusion could be caused by the undersigned's use and placement of certain words.
>
> That being said, the ALJ has been instructed by the Board to again 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.

As to whether Werner sustained a work-related left knee injury as a result of the January 5, 2008, motor vehicle accident ("MVA"), the ALJ summarized relevant portions of the medical evidence and determined as follows:

> Based upon Plaintiff's testimony, the input of Drs. Henderson, Nobile, Oster, and Barefoot, and the indefiniteness of Dr. Gleis' input, it is determined Plaintiff sustained a January 5, 2008 work-related injury to his left knee. The harmful change done to Plaintiff, as evidenced by objective medical findings (MRI), is a left knee medial meniscus tear. Since Plaintiff did not have any type of pre-existing condition involving his left knee.
>
> Though Dr. Gleis did write on p. 37 of his IME letter, "Left knee could have been a pre-existing condition before January 5, 2008. Legs giving-way were also a pre-existing condition," Dr. Gleis is merely guessing. He indicated, as his reason for opining that prior to the MVA, Plaintiff experienced "legs giving-way," to his observation that on July 11, 2007, Dr. Nobile wrote, "LBP

was severe and right leg weakness gives-out frequently." A right leg is one leg, not legs.

In the decision rendered February 18, 2013 substantial weight was given to what appeared to be numerous inconsistences in Plaintiff's presentation. In retrospect, too much weight was given to Plaintiff's apparent inconsistencies when addressing the issue of whether Plaintiff sustained an "injury" as a result of his work-related MVA. Medical causation is an issue for the involved medical experts to address, particularly in claims, such as this one, where the causal relationship is not apparent to laymen. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. 1981).

In the initial review of this claim the expert medical witnesses' opinions should have been afforded greater weight regarding this issue of causation. Plaintiff's seeming inconsistencies, mainly involving collateral points, should not have been given as much weight as the opinions of the medical experts on the issue of causation.

It is determined Plaintiff sustained an "injury" as that term is defined in KRS 342.0011(1). The facts relied upon in making this determination include the expert medical input of Drs. Henderson, Nobile, Oster, Barefoot and, as indicated, Nurse Practitioner Gina Kirchner. These expert witnesses opined Plaintiff's work-related MVA was the cause of his injury. Plaintiff's injury included a 5mm radial-type meniscal tear posterior horn of the medial meniscus. This tear was evidenced by objective medical findings, being MRI(s).

> Plaintiff's input is also relied upon in making this determination.

The ALJ arrived at an average weekly wage ("AWW"), found due and timely notice was given, and after performing the appropriate analysis concluded Werner was permanently totally occupationally disabled.

In its petition for reconsideration, relying on Bowerman v. Black Equipment Company, 297 S.W.3d 858 (Ky. 2009), the UEF argued the ALJ could not reweigh the facts and the parties were bound by the ALJ's findings in the original opinion. It asserted the ALJ had already found Werner had not presented persuasive evidence establishing his left knee problems were proximately caused by the MVA. The UEF argued absent new evidence, fraud, or mistake, "the ALJ may not reverse dispositive interlocutory factual findings on the merits in a subsequent final opinion."

Citing the Board's instructions in the August 21, 2013, Opinion Vacating and Remanding, the ALJ concluded the UEF's petition for reconsideration had no merit and overruled it.[2]

On appeal, the UEF asserts the Board's opinion instructed the ALJ to rectify alleged contradictory statements in his original opinion dismissing the claim.

[2] See the ALJ's February 12, 2014, Order.

It contends the alleged contradiction concerned the ALJ's finding Werner suffered a work-related traumatic event but the MVA was not the proximate cause of his left knee injury. The UEF concedes Werner suffered an injury as a result of the subject MVA. However, it argues the emergency room records establish Werner's complaints to the physician concern body parts other than his left knee. The UEF states as follows:

> Concerning the alleged confusion, on remand, the ALJ explained that it was not his intent to have the word injury interpreted as it is defined in KRS 342.0011(1), even going to [sic] far as to noting the sentence in the original opinion that apparently confused the Board, '[p]laintiff sustained a work-related injury.' (Opinion, Order and Award on Remand, p. 3). Such a statement is technically true even though the ALJ found that the Plaintiff did not suffer a left knee injury as a result of the MVA. The only real qualifier necessary was to either remove the offending sentence or to note that the Plaintiff failed to make a claim for his other injuries. However, on remand, the ALJ proceeded to re-weigh the evidence, finding the Plaintiff was entitled to compensation, but the controlling precedent in Kentucky clearly forbids him from re-weighing the evidence and the ALJ and the parties are bound by his findings in the original opinion.

Citing to portions of Bowerman, supra, the UEF argues as follows:

> From the holdings in *Bowerman*, it is clear that the ALJ may not re-weigh the evidence and/or his findings in the matter. He is bound by his original finding in this instance that Plaintiff 'has not presented persuasive evidence [that] his left knee problems were proximately caused by the MVA', (Opinion and Order, P. 11).

It requests the Board vacate the ALJ's decision and remand for an opinion consistent with his original findings. We affirm.

In our August 21, 2013, Opinion, we noted that in the February 18, 2013, Opinion and Order, the ALJ had made a specific finding that Werner had sustained a work-related injury and had shown a work-related traumatic event occurred while performing an errand for Bob Ryan Auto Sales. He stated this constituted a finding the work-related traumatic event produced a harmful change in Werner's knee as evidenced by objective medical findings. Thus, the ALJ's subsequent finding that Werner had not presented sufficient persuasive evidence showing the MVA was the proximate cause of his alleged left knee injury was contradictory with his earlier findings. We noted the medical evidence established there was a harmful change in Werner's left knee and the real issue was whether the MVA caused the left knee condition. Therefore, we vacated the ALJ's decision and remanded with directions for the ALJ to

review the evidence and determine whether Werner sustained a work-related injury to the knee as a result of the MVA. The ALJ was to unambiguously support his decision with the appropriate findings of fact. We expressed no opinion as to the outcome on remand.

On remand, the ALJ did as instructed. After analyzing the relevant evidence, he concluded Werner had sustained a work-related injury to his left knee meriting a 4% whole person impairment rating. On appeal, the UEF does not take issue with the ALJ's determination regarding Werner's AWW or the sufficiency of his analysis regarding Werner's occupational disability. Rather, it insists the ALJ must again determine Werner did not sustain a work-related injury as a result of the MVA. We disagree.

In Bowerman, supra, the Court of Appeals stated:

> The primary issue before us is whether an ALJ, as finder of fact, may reverse a dispositive interlocutory factual finding on the merits in a subsequent final opinion, absent a showing of new evidence, fraud, or mistake.

Id. at 867.

The Court of Appeals held:

> Reason, logic, and sound principles of justice dictate that findings regarding questions of fact, once fully litigated by the parties and properly adjudicated by the fact-finder, should not be subject to change absent new evidence,

> fraud, or mistake, regardless of whether rendered in an interlocutory order or a final decision. *See Garrett Mining,* 122 S.W.3d at 522.

Id. at 871.

In the case *sub judice*, Werner appealed the ALJ's decision and the Board determined the ALJ's opinion contained contradictory findings which must be resolved on remand and directed the ALJ to review the evidence and clearly and unambiguously determine whether Werner sustained a work-related left knee injury as a result of a MVA. Unlike in Bowerman, supra, in the case *sub judice*, the ALJ did not unilaterally without direction reverse his previous decision. Rather, this Board vacated his decision and determined the parameters of his analysis on remand.

ABS Global, Inc. v. Draper, 2012-CA-001146-WC, rendered December 21, 2012, Designated Not To Be Published, is applicable to the case *sub judice*. The Court of Appeals summarized the facts relevant to the appeal as follows:

> As to the cervical injury, the ALJ determined that Draper did not demonstrate a causal connection between her employment and the cervical condition. Specifically, the ALJ found the testimony of defense evaluator Dr. Timothy Kriss to be more persuasive than the medical opinion of Dr. Taleghani. Draper's Petition for Reconsideration was overruled, and she appealed to the Board.

> On August 12, 2011, the Board remanded the matter back to the ALJ for the entry of additional findings of fact to support his dismissal of Draper's cervical injury claim. On remand, ALJ Justice reversed his opinion as it related to the cervical injury upon concluding that the medical evidence and expert opinions of Drs. Taleghani and Kriss supported a determination that Draper's cervical injury resulted from her employment. In so doing, the ALJ found the cervical injury to be fully compensable. ABS's Petition for Reconsideration was denied, and ABS appealed to the Board.
>
> In an Opinion Affirming rendered June 4, 2012, the Board sustained ALJ Justice's finding that Draper's cervical injury was causally connected to her employment with ABS. The Board found in relevant part that there was sufficient evidence in the record to support ALJ Justice's determination that Draper's cervical pathology was work-related. It also rejected ABS's claim that ABS could not be held responsible for the apparent injury Draper suffered during physical therapy as it was not aware that Draper was alleging a work-related condition or undergoing physical therapy and thus had no control or direction over the treatment. This appeal followed.

Slip Op. at 4-5.

In affirming the decision on remand and the Board, the Court of Appeals held:

> As to the first issue, we are not persuaded that ALJ Justice exceeded the scope of his authority on remand by finding the testimony and medical evidence of Drs. Taleghani and Kriss to

> support a finding of causality. The Board remanded the matter to ALJ Justice because
>
> > nowhere in the order denying in pertinent part the Petition for Reconsideration did the ALJ address Draper's request for additional findings in regard to Dr. Kriss' opinion concerning the possible causal relationship between Draper's work, her muscular aches and pains to her neck, the May 2009 physical therapy session, the cervical disc herniation and the need for cervical surgery.
>
> As such, on remand ALJ Justice was directed to reconsider the work-relatedness of Draper's cervical conditions, if any, and the degree to which Dr. Kriss's testimony affected that determination. This is precisely what he did. The ALJ's first Opinion was vacated by the Board, rendering it void. *Skelton v. Roberts*, 673 S.W.2d 733 (Ky. App. 1984). Additionally, when this issue was appealed to the Board, it expressly noted that ALJ Justice did not exceed the scope of his authority by reconsidering the issue of causality on remand. We therefore find no error on the limited issue of whether ALJ Justice erred in reconsidering the import of Dr. Kriss's testimony and its effect, if any, on the finding of work-relatedness.

Slip Op. at 5.

In our August 21, 2013, Opinion, we vacated the ALJ’s Opinion and Order dismissing Werner’s claim and

specifically instructed the ALJ to determine whether Werner sustained a work-related left knee injury as a result of the MVA. We did not remand with directions the ALJ support his decision to dismiss Werner's claim with sufficient findings of fact. Rather, we stated the ALJ had made contradictory findings which must be resolved. In accordance with our opinion, the ALJ engaged in the appropriate analysis and determined Werner had sustained a work-related injury as a result of the January 5, 2008, MVA. As noted in ABS Global, Inc. v. Draper, supra, our opinion rendered void the February 18, 2013, Opinion and Order. Since there was no appeal of this Board's decision, it is the law of the case. Therefore, the ALJ was bound by this Board's instruction that he clearly and unambiguously determine whether Werner sustained a work-related injury to his left knee as a result of the MVA. Since the ALJ complied with the Board's instructions and the UEF does not take issue with any other aspect of the ALJ's decision, the ALJ's decision must be affirmed.

Accordingly, the ALJ's January 7, 2014, Opinion, Order, and Award on Remand and the February 12, 2014, Order overruling the UEF's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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