OPINION ENTERED: March 9, 2012

CLAIM NO. 200991616

VIRGINIA L. DUEBEL PETITIONER

VS. **APPEAL FROM HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE**

KROGER
and HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Virginia Duebel ("Duebel") seeks review of the decision rendered September 9, 2011 by Hon. James L. Kerr, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits and medical benefits for a limited period from March 1, 2009 through May 24, 2009, and dismissing her claim for additional income and medical benefits against Kroger. Duebel also appeals from the

order entered December 16, 2011 denying her petition for reconsideration.

On appeal, Duebel argues the ALJ erred in refusing to allow her to amend her claim asserting the issue of a head injury was tried by implied consent. Duebel also argues the ALJ erred in finding her fall was caused by a heart problem. Finally, Duebel argues evidence she sustained a head injury due to a work-related fall is uncontested. We affirm.

On February 22, 2011, Duebel filed a Form 101 alleging an injury only to her left knee. Attached to the Form 101 were numerous medical records including those from Commonwealth Orthopaedics, Wellington Orthopaedics, Florence Urgent Care, and St. Luke Hospital East. Most of the records attached to the Form 101 address the injury to the left knee, and further reflect the accident occurred on February 23, 2009, although she did not seek treatment nor did she report it until March 1, 2009. The only record attached to the Form 101 which does not concern the left knee is a record from Florence Urgent Care dated June 16, 2009, reflecting removal of sutures from the back of her head.

Duebel testified by deposition on May 24 2011, and at the hearing held July 27, 2011. Duebel is a

resident of Cold Spring, Kentucky, who was born on September 12, 1951. She has worked for Kroger since 2004, as a clerk in the meat department and continues in that department with no restrictions.

Duebel testified she had no problem with either knee prior to February 23, 2009. On that date, she reached to obtain a label, and as she stepped forward with her left foot, her left leg slipped forward causing pain in her left knee. She did not fall nor did she strike her knee. She did not report the incident and did not work the next day. She returned to work the following day and continued to work the remainder of the week. Duebel did not work during the weekend, but when she returned to work on Monday, March 1, 2009, she reported the accident to her supervisor. She then sought treatment at Florence Urgent Care and was prescribed an ACE bandage.

As she was exiting a van at home after treating at Florence Urgent Care, her left knee popped, causing immediate pain. She then sought treatment at St. Luke Hospital. Duebel missed approximately two months from work and returned in late April or May 2009.

Duebel filed a Form 101 on February 22, 2011 alleging only an injury to her left knee. At her deposition, Duebel testified:

> Q. Okay. And now as far as this workers' compensation claim goes, just to be clear, could you tell me what bodily regions you claim to have injured as a result of the incident?
>
> A. My knee.
>
> Q. And that's your left knee, correct?
>
> A. Yes.

Duebel testified her treatment for the left knee consisted of performing exercises and being off work for two months. She has had no surgery. She was under no active treatment regimen for her left knee and returned to full duty work on April 28, 2009.

Duebel also testified at her deposition she fell and struck her head in June 2009. She was apparently cleaning a display case at work when she may have fainted causing her to strike her head. She was unsure why she fell. She subsequently had dizziness, which shortly resolved, and she had stitches in the back of her head. She testified:

> Q. So after that you haven't had any problems with dizziness or your neck or anything like that?
>
> A. No.

Duebel testified she had no previous workers' compensation claims, and neither her left knee nor head injury have affected her ability to work.

The records filed with the Form 101 establish she first sought treatment for her left knee on March 1, 2009. She was initially advised she had strained her left knee. Her knee then popped, and she sought treatment at St. Luke Hospital emergency room. An MRI was performed on Duebel's left knee. Records from Commonwealth Orthopaedics Centers, P.S.C. and Wellington Orthopaedic and Sports Medicine note she had a torn medial meniscus with pre-existing chondromalacia and degenerative changes. On June 7, 2009, in an unrelated incident, she fell in her yard and injured her left foot, including a fracture of her fifth toe.

Duebel also supported her claim with the report of Dr. Keith Wilkey, an orthopedic surgeon from St. Louis, who evaluated her on February 19, 2010. Dr. Wilkey noted her chief complaint was left knee pain. The head injury was not mentioned. She advised she felt a pop and pain in her left knee while working in the meat department at Kroger. She experienced a second pop in her knee while walking on March 1, 2009. Dr. Wilkey diagnosed an acute medial meniscus tear, pre-existing mild patellofemoral and medial compartmental arthritis, and a Grade II MCL sprain

which had resolved. Dr. Wilkey assessed a 2% impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides") due to the left knee injury. Dr. Wilkey assigned no restrictions to her activities.

Kroger filed a record from Florence Urgent Care dated March 1, 2009 reflecting a left knee injury occurring "six days ago." Kroger also filed the March 1, 2009 record from St. Luke Hospital reflecting Duebel twisted her left knee on Monday causing pain. Kroger also filed records from Dr. Cellin, an orthopedic surgeon, who allowed Duebel to return to full duty work on April 29, 2009.

Dr. Mark Gladstein, an orthopedic surgeon, evaluated Duebel at Kroger's request on May 31, 2011. In his report dated June 5, 2011, Dr. Gladstein noted she had experienced seizures as well as a subarachnoid hemorrhage. She complained of slight aching in the left knee with change of weather. He noted she had no laxity or effusion in the left knee. Dr. Gladstein assessed no restrictions and no impairment. He stated, "This patient had pre-existing degenerative joint disease in the left knee that was temporarily aggravated by the twisting injury of February 23, 2009." He noted she was at maximum medical improvement ("MMI").

Kroger also filed statements signed by Dr. John Bever, one of her treating orthopedic surgeons, who stated he reviewed the MRI scan performed March 3, 2009, which he interpreted as demonstrating mild arthritis. He did not believe the condition required surgery. He recommended rest and physical therapy. Dr. Bever assessed 0% impairment pursuant to the AMA Guides. Dr. Bever further stated he recommended six weeks of temporary restrictions followed by a return to full duty work.

Duebel did not allege a head injury of June 2009 in the Form 101. She did not move to amend her claim to include an allegation of the head injury at any point during the proof time set forth in the scheduling order issued March 16, 2011 assigning the claim to the ALJ. Other than the medical record filed with the Form 101 indicating the removal of stitches, no medical evidence was introduced regarding the allegation of a head injury. Duebel specifically testified at her deposition her claim was for her left knee only. In her proposed stipulations filed July 6, 2011, Duebel only mentioned the injury of February 23, 2009. In the Witness List filed July 6, 2009, Duebel stated, "On June 6, 2009, Ms. Duebel fell while at work and sustained head injuries requiring sutures."

At the Benefit Review Conference ("BRC"), Duebel orally moved to amend her claim to include the head injury occurring in June 2009. Duebel asserted the head injury had been tried by implied consent. The BRC order and memorandum reflects the following:

> ∏'s oral motion to consider an injury on 6/6/09 as part of the pending claim is overruled. Plaintiff shall file any written petition for reconsideration within 10 days. DE's motion to strike 7/8/11 notice of filing of Dr. Herfel's records is passed pending a written response by Plaintiff.

Duebel filed a written petition for reconsideration which was denied by the ALJ.

Since the sole issue on appeal pertaining to whether the ALJ erred in refusing to allow Duebel to amend her claim, only that portion of the opinion and order shall be reviewed. In the decision rendered September 9, 2011, the ALJ found as follows:

> 14. The undersigned feels compelled to address issues in respect to the event of June 6, 2009. The Administrative Law Judge notes that the plaintiff originally alleged only a left knee injury on February 23, 2009. The plaintiff then made an oral motion at the Benefit Review Conference on July 14, 2011 to allege a second injury on June 6, 2009 and that motion was overruled. The plaintiff has filed a motion for reconsideration of the ALJ's ruling on July 18, 2011. That motion

> for reconsideration is **DENIED**. In so concluding, the Administrative Law Judge notes that while the event of June 6, 2009 was discussed at the plaintiff's discovery deposition, there is simply no medical evidence to suggest that the event of June 9[sic], 2009 constituted a work-related injury as defined by KRS 342.0011(1). The plaintiff herself testified in her deposition that she was cleaning the glass (presumably of a display case) at work and she was on the floor.
>
> 15. The Administrative Law Judge has considered whether this constitutes an explained fall, an unexplained fall or an idiopathic fall but concludes that it is none of the three. Review of the St. Elizabeth Hospital West medical record indicates a history wherein was noted that the plaintiff passed out at work. It was apparent from Dr. Herful's emergency room check-up that he believed that it was her heart as evidenced by the CAT scan of her chest as well as to EKGs. The undersigned believed at the Benefit Review Conference that there was not enough evidence for plaintiff to state a prima facie case of a work-related injury and her request to amend the claim was denied.

In his order on reconsideration, the ALJ stated:

> This matter comes before the Administrative Law Judge following remand by the Workers' Compensation Board for consideration of a pending petition for reconsideration filed by the plaintiff. After review of the petition for reconsideration, it appears that the petition merely reargues the merits of the claim and does not address patent errors, as is required by KRS 342.281. Wherefore,

the petition for reconsideration is **DENIED**.

It is well established the claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his or her cause of action before the ALJ, including the fact she provided due and timely notice of the work-related injury to her employer. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Where the claimant is unsuccessful with regard to that burden, the question on appeal is whether the evidence compels a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The extent of an ALJ's discretion and authority in deciding disputed issues in workers' compensation proceedings is both wide ranging and well established. In rendering a decision, KRS 342.275 and KRS 342.285 grant 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). The 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that 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, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Clearly, Duebel was aware of the incident occurring June 6, 2009 when she fell and struck her head at work, yet failed to allege it in her Form 101. Other than

the note from Florence Urgent Care filed with the Form 101 outlining the suture removal on June 16, 2009, no other medical records were introduced into the record during the proof time allotted by the scheduling order. Duebel specifically testified at her deposition in response to a direct inquiry she was only pursuing a claim for he left knee injury. In her proposed stipulations, Duebel indicated only the left knee injury in February 2009. The first indication she may be pursuing the June 2009 head injury was in the witness list she filed on July 6, 2011, and she did not move to amend her claim until the BRC held July 14, 2011.

CR 15.02 permits a motion to amend the pleadings in order to conform to the evidence to be made by "any party at any time, even after judgment." ***See*** CR 15.02; Kroger Co. v. Jones, 125 S.W.3d 241 (Ky. 2004); Nucor Corp. v. General Electric Co., 812 S.W.2d 136 (Ky. 1991); Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). CR 15.02 states, in relevant part, as follows:

> Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues **may** be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.
> (emphasis added)

The Kentucky Supreme Court further held that whether an issue has been tried by consent is within the sound discretion of the trial court and such a finding will not be reversed absent clear abuse. Nucor at 145. The court went on to state in order to preserve an objection of deficient pleading is by way of objecting to the introduction of evidence on an unpleaded issue. *Id*. The court further stated,

> "[t]he theory of implied consent does not turn on actual consent but on actual prejudice. The concept of actual prejudice is not related to winning or losing, but to being unable to present a defense which would have been otherwise unavailable."
>
> *Id*. at 146.

In this instance, the claim was litigated regarding the left knee only. Duebel could have filed the head injury as part of the Form 101, but declined to do so. She could have stated in response to direct inquiry at her deposition she intended to pursue the head injury. However she clearly testified she was pursuing a claim for the left knee only. It was not until after all proof time had expired that she moved to amend her claim.

Allowing an additional cause of action to be tried by consent is discretionary. We do not believe the ALJ erred in refusing to allow Duebel to amend her claim. Contrary to her assertions, we do not believe the issue of the head injury was tried by consent. Even if the ALJ had allowed her to amend her claim to include the allegation of the head injury, we do not believe sufficient evidence existed for Duebel to prevail on the merits.

Based upon the foregoing, we find no error in the ALJ's refusal to allow Duebel to amend her claim at the BRC to include a claim for a head injury. Accordingly, the decision by Hon. James L. Kerr, Administrative Law Judge, rendered September 9, 2011, and the order on reconsideration issued December 16, 2011 are hereby **AFFIRMED**.

ALL CONCUR.

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