Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 20, 2015

CLAIM NO. 200992695

WILLETT HEALTHCARE MANAGEMENT, INC. PETITIONERS
and KEMI

VS. **APPEAL FROM HON. JANE RICE WILLIAMS,**
ADMINISTRATIVE LAW JUDGE

TIFFANY SMITH, CARDINAL HILL HOSPITAL,
UNIVERSITY OF KENTUCKY,
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Willett Healthcare Management, Inc. and Kentucky Employers Mutual Insurance Company jointly appeal the November 21, 2013 Opinion and Order, the January 3, 2014 Order on Petition for Reconsideration, and the October 29, 2014 Final Opinion and Order of Hon. Jane Rice Williams,

Administrative Law Judge ("ALJ"). The ALJ determined Tiffany D. Smith ("Smith") is permanently totally disabled as a result of a work-related motor vehicle accident. On appeal, the Petitioners challenge the ALJ's conclusion the accident was not caused by voluntary intoxication. For the reasons set forth herein, we affirm.

Smith was injured in a car accident on March 20, 2009. She was 22 years old at the time. The medical proof is largely uncontested as to the effect of this accident; tragically, traumatic injury to her spinal column resulted in quadriplegia. Rather, the primary contested issue was whether Smith was voluntarily intoxicated at the time of the accident. The claim was bifurcated on the sole issue of voluntary intoxication. By Opinion and Order dated November 21, 2013, the ALJ concluded the Petitioners had failed in their burden of establishing the accident was proximately caused primarily by Smith's voluntary intoxication.

The evidence established Smith was employed by Willett Heathcare as a nurses' aid in an assisted living facility called Golden Years. Her injuries occurred on the morning of March 20, 2009, when she was driving from Golden Years to Hazard Appalachian Regional Hospital to accompany a patient to an appointment with a physician. The prior day, March 19, 2009, Smith had worked a double shift. According

to her time card, she clocked in to work at 6:27 a.m. on March 19, 2009 and clocked out at 4:45 p.m., taking one thirty minute break, presumably for lunch. She clocked back in at approximately 11:00 p.m. on the evening of March 19, 2009, and worked until 7:00 a.m. the following day. She went to sleep in an empty room of the facility until about 10:30 a.m. At that time, she clocked back in and left the facility to go to the hospital.

Several of Smith's co-workers testified as to her condition on March 19 and 20, 2009. Misty Charles ("Charles") worked with Smith, also as a nurses' aide, on March 19, 2009. Charles reported to work at 11:00 p.m. Around midnight, the pair took a smoke break together. Charles noticed Smith stumbling over her feet as she descended the stairs, having trouble lighting a lighter, and slumping over. Charles also noticed Smith's speech was slow. Smith told Charles she had not slept in two days, but felt alright to continue her shift. Concerned, Charles told her supervisor she suspected Smith was "high", and asked another co-worker to check on Smith. At a later smoke break, Smith showed Charles four pills which she referred to as her "pep-me-up" pills. Smith identified the pills, which were wrapped in cellophane, as Xanax and Methadone. This conversation occurred sometime between 4:30 a.m. and 6:00

a.m. on March 20, 2009. Around this time, Charles also observed Smith attempting to plug in her mobile phone, and having difficulty doing so. She did not see Smith again after this incident.

Mary Meade ("Meade") also worked as a nurses' aide and clocked into work at 6:30 a.m. on March 20, 2009. Smith approached Meade and stated she had not slept in three days, and was very tired. Meade thought Smith seemed like she was "on something" but did not smell of alcohol. Later, around 10:00 a.m., Meade was asked to go wake up Smith, who was taking a nap before she left for the hospital. Smith was awakened and seemed fine, according to Meade.

Sherrie Ann Fugate ("Fugate") worked with Smith on March 20, 2009. She arrived for her shift as a nurses' aide at approximately 4:30 a.m. She observed Smith as extremely tired and unable to stay awake. Smith told Fugate she had been awake for two days. Later, Fugate saw Smith fall asleep as she was leaning on a medicine cart and again as she leaned her head on a crate. Fugate did not observe Smith slurring her speech.

Jerry Jones ("Jones") worked with Smith on March 20, 2009. He saw Smith around 6:30 a.m. on March 20, 2009. She was slumped over in a chair at the nurses' station, sleeping. He tried to awaken her, but was unable to. He

later saw her falling asleep next to a medicine cart, which was knocked over in the process. At one point, he observed her using her hands to find the wall to make her way downstairs. Jones last saw Smith at 10:30 a.m. when she was preparing to leave for the hospital. He advised her not to drive, and opined she was under the influence of some substance.

Bonnie Mosley ("Mosley") is an administrator at Golden Years. Smith was still at the facility when Mosley arrived on March 20, 2009 at 8:00 a.m. Smith came into her office with her time card, and appeared extremely tired. She did not believe Smith was intoxicated, just very fatigued. Mosley told Smith to go lay down and rest until it was time to go to the hospital. The transportation driver came at 9:45 a.m. but could not awaken Smith. Mosley also tried unsuccessfully to arouse Smith. Mosley sent the transportation driver on alone with the patient, however the hospital called around 10:30 a.m. indicating the patient wanted an escort. At that time, Mosley sent Meade to awaken Smith. She woke up and did not appear sleepy. Mosley repeatedly questioned Smith to see if she was alright, and Smith insisted she was fine.

Johnnie Samons ("Samons") is a driver for Appalachian Transportation who arrived at Golden Years on

March 20, 2009 to transport a patient to the hospital. He had known Smith for approximately two months prior to the accident. He attempted to awaken her to leave for the hospital. Smith stood up, but then lay back down. Samons left without her. He was unable to provide an opinion as to whether she appeared intoxicated.

The accident occurred about one mile from the residential facility. EMS records indicate drug paraphernalia was found at the accident scene. Smith was unconscious and unresponsive. She improved to awake and alert, though confused, after .4 mg of Narcan was administered. Smith was taken to St. Mary's Medical Center. A urine drug screen was positive for benzodiazepines, methadone, opiates, and oxycodone. Her alcohol level was zero.

Dr. George C. Rodgers, Jr. is a professor of pediatrics and pharmacology/toxicology at the University of Louisville, and associate medical director at Kentucky Regional Poison Center. He reviewed the records of St. Mary's Hospital and the EMS, as well as the statements of Smith's co-workers.

Dr. Rodgers ultimately concluded "it is impossible to tell whether drugs may have contributed to [Smith's] accident." He further deemed it "highly probable" her sleep

deprivation contributed to the accident. Dr. Rodgers based these conclusions on a number of circumstances. He noted the co-workers' testimony that Smith appeared extremely tired, and the fact she had worked a double shift in the 24 hours preceding the accident.

Dr. Rodgers also cast doubt on the evidence tending to indicate Smith was intoxicated. Though Smith responded to Narcan, a drug used to "reverse" the effects of narcotics, it is not a "reliable indicator of narcotic excess" because it can be a non-specific arousal agent. The urine drug screen performed at St. Mary's Hospital is also not conclusive proof of intoxication at the time of the accident, as such tests have a significant false positive rate. Also, even a true positive test will remain positive for hours or even days after the clinical effect of the drug has worn off. Finally, Dr. Rodgers noted the lack of any direct proof Smith took narcotic pills in the hours before the accident.

Dr. Saeed Jortani is a forensic pathologist who prepared a report at the request of the Petitioners. Dr. Jortani concluded the primary cause of Smith's car accident was intoxication. He took into account the testimony of Smith's co-workers that she was extremely fatigued, at times unable to stay awake or perform her job duties, in the hours

before the accident. This behavior is consistent with the ingestion of methadone and alprolazam. This conclusion is further supported by the fact Smith responded to Narcan, had a positive urine screen for these narcotics, and had shown these same pills to Charles earlier in the evening.

At a later deposition, Dr. Jortani acknowledged the urine drug screen confirms prior exposure, but not specific times, amounts, or clinical effects. He also conceded no confirmation of the drug screen was conducted, and that Smith's response to Narcan at the scene of the crime could be due to trauma as opposed to intoxication. However, Dr. Jortani remained steadfast in his conclusion Smith's accident was the result of intoxication. He reiterated this conclusion is based not on a single piece of evidence or drug screen result, but on the totality of all the circumstantial evidence of intoxication.

Dr. George R. Nichols, a forensic pathologist, prepared a report of his opinion which was introduced by both parties. He concluded Smith's accident was caused "as a direct result of chemical intoxication and not exhaustion/sleep deprivation." Like Dr. Jortani, Dr. Nichols primarily relied on Smith's reaction to Narcan and the urine drug screen results to reach this conclusion. He

also noted Smith's admission to Charles that she planned to ingest methadone and Xanax.

The ALJ determined the Petitioners had not met their burden of proof in establishing Smith's accident was the result of voluntary intoxication. Petitioners filed a petition for reconsideration, which was denied. On appeal, the Petitioners essentially challenge the sufficiency of the evidence to support the ALJ's conclusion. In doing so, they argue the ALJ applied an incorrect standard of proof.

KRS 342.610(3) relieves the employer from liability if a worker's injury is "proximately caused primarily by voluntary intoxication as defined in KRS 501.010." The claimant in a workers' compensation proceeding has the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.3d 276 (Ky. App. 1979). However, the employer bears the burden of proof for any affirmative defense raised, including voluntary intoxication. Whittaker v. Hardin, 32 S.W.3d 497 (Ky. 2000)(considering entitlement to subrogation credit). In order to sustain that burden, the employer must go forward with substantial evidence sufficient to convince reasonable people. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The ALJ thoroughly and accurately summarized the conflicting proof in this case. We have no reservation in concluding the ultimate determination is based on substantial evidence. Dr. Rodgers' report, concluding Smith's accident was proximately caused by sleep deprivation, constitutes the requisite proof to support the ALJ's decision. Furthermore, the evidence was not so overwhelming as to compel a particular result. The medical opinions were conflicting as to the cause of Smith's accident, and the urine drug screen did not conclusively indicate her level of intoxication or impairment at the time of the work injury. Moreover, the testimony of Smith's co-workers did not support a singular conclusion. While some co-workers suspected she was intoxicated, others simply observed Smith as extremely fatigued. For this reason, the ALJ's conclusion is not so unreasonable under the evidence that it must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

We also conclude the ALJ sufficiently articulated the reasons for her decision. She identified certain deficiencies in the Petitioners' proof which she found troubling, such as the lack of conclusive results of the drug screen. The ALJ also noted the substantial testimonial and circumstantial evidence that Smith was extremely

fatigued from her work schedule. In addition, the ALJ emphasized that even Dr. Jortani based his conclusion of the totality of the evidence as he interpreted it, but that the circumstances might have been interpreted differently. Finally, the ALJ was persuaded by the testimony of Mosley, who saw Smith just before she left Golden Years and stated she did not seem tired. The ALJ's opinion adequately sets forth her consideration of the evidence and the facts upon which the ultimate conclusion is based. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

Finally, Petitioners assert the ALJ applied an improper burden of proof to the case. To support this contention, the Petitioners point to the following passage in the Opinion and Order. After correctly noting that the burden of proving an affirmative defense rests with the employer, the ALJ stated:

> [T]his case presents an extremely difficult set of facts. The defenses are obvious and the medical opinions are well reasoned. If the burden of proof were different (i.e. if the Plaintiff had the burden of proof) the outcome might be different. However, in order to rule in favor of Defendant Employer the following assumptions would have to be made:
>
> Assume Misty Charles told the truth.
> Assume Misty Charles' memory was accurate, i.e. color of pills.

> Assume the pink and white pills were opioids.
> Assume Tiffany took the opioids.
> Assume she took them at a time they would impair her condition when she drove.
> Assume she was impaired due to voluntary intoxication and not due to sleep deprivation.
> Assume the accident was caused by her driver error.
> Assume the drug use was the cause of Tiffany's impaired condition leading to the EMT administering Narcan.
> Assume Tiffany's response to Narcan was due to have ingested narcotics.
> Assume there was not a false positive result in the drug testing.
> Assume drug test meant there was enough ingested to impair.

Petitioners argue it is an abuse of discretion for the ALJ "to impose a burden as stringent as requiring each and every one of the above eleven (11) assumptions to be resolved in Petitioners' favor before a ruling in its favor can be made." We disagree that the ALJ improperly shifted the burden of proof, or imposed a higher burden of proof on Petitioners. Twice in her Opinion and Order, the ALJ properly noted the burden of proof rested with the Petitioners. By listing the above-recited "necessary assumptions", there is no indication the ALJ was imposing a higher standard. Rather, it appears the ALJ was merely recounting the necessary evidentiary "leaps" one would have

to make in order to accept the Petitioners' theory of the case.

As stated above, the ALJ's ultimate conclusion is based on substantial evidence. As such, this Board is without authority to re-weigh the evidence and draw alternative conclusions. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Therefore, the November 21, 2013 Opinion and Order, the January 3, 2014 Order on Petition for Reconsideration, and the October 29, 2014 Final Opinion and Order of Hon. Jane Rice Williams, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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