OPINION ENTERED: December 16, 2011

CLAIM NO. 200975950

WILLIAM N. JOHNSON II PETITIONER

VS. **APPEAL FROM HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE**

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET;
COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS CLAIMS;
RISK MANAGEMENT;
HON. SHERRI BROWN RESPONDENTS

OPINION AFFIRMING

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

COWDEN, Member. William N. Johnson, II, *pro se*, appeals from the May 24, 2011 opinion and order of Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ") dismissing Johnson's claim upon finding no permanent injury or injury as defined by the Act. On appeal, Johnson argues the ALJ erred in finding pre-existing active conditions. Johnson takes issue with the ALJ's finding regarding credibility and asks that the employer be assessed a safety penalty.

Johnson testified by deposition on January 14, 2011 and at the formal hearing held March 25, 2011. He stated he was employed by the Department of Transportation as a Transportation Engineering Technologist III. His work involved road construction. His duties included supervising contractors, assembling materials and testing materials and procedures. His job involved extensive walking over uneven ground and was very physically demanding at times, occasionally requiring him to lift 100 pound sample bags.

Johnson testified he was descending steps to exit an office trailer on May 4, 2009. He put his weight on a hand rail which broke, causing him to fall. Johnson claimed injury to his back, knees, left ankle, right foot and teeth. He initially treated the next day with his family physician, Dr. Bernard Moses.

Johnson testified he sustained a second injury on September 28, 2009 when a step broke while he was ascending steps. He claimed injury to his low back, knees, ankles and possibly his teeth. He sought treatment with Dr. Moses the next day. Johnson acknowledged receiving a notice of termination from the employer on the morning of his second injury. The notice was in connection with an allegation he had taken pipe from a job site. When questioned about a

record from Dr. Dubin's office following the May 5, 2009 injury which indicated no recent injury or trauma to Johnson's knees, although he had a misstep recently and came down on his left ankle jarring the ankle and knee, Johnson stated he did not say that.

Johnson indicated he was 6'2" tall and weighed 375 pounds. At the time of the first injury, he weighed closer to 400 pounds. Johnson testified he no longer has problems with his right foot, but his left ankle and both knees still bother him. He indicated he still has pain and sometimes feels a popping or cracking sensation. He has decreased range of motion in his knees and difficulty climbing steps. He is no longer able to perform activities such as walking, working, yard work, mowing, hunting and fishing. He stated he could not sit or stand for very long. Following the second injury, his right knee was worse and his upper and lower back seemed to be getting worse. Johnson testified he developed numbness radiating down his left leg and a tingling sensation traveling up his back, through his shoulder blade to the left side of his neck. He noted Dr. Beliveau recommended bilateral knee replacement. Johnson testified he could not return to his job in his current state.

Johnson stated he previously injured his knees and left ankle as a result of playing football. He had knee surgery in 1983 and 1984 to repair torn cartilage in each knee. Following those surgeries, he had discomfort and stiffness but no pain in his knees. Johnson stated he broke his ankle in 1986 and required surgery. He denied having regular chronic pain in the six months prior to his first work injury.

Johnson testified he was involved in a lawnmower accident in April 2010. He flipped a riding mower, which landed on top of him, resulting in sixteen broken ribs, two fractured vertebrae, bruising of the lungs, dislocation of his right shoulder, a torn rotator cuff and scratches and bruises. He was treated at Baptist Regional Medical Center and later hospitalized at UK Hospital. He acknowledged having significant lumbar back pain since the lawnmower accident, but stated it affected a different area of his back than did the work injuries.

The Department of Transportation filed personnel records related to two disciplinary actions against Johnson. The records document a two day suspension in April 1992 related to falsely reporting time on payroll documents. The second record documents an investigation of alleged theft of pipe from a worksite. A letter dated

September 25, 2009 informed Johnson the Personnel Cabinet intended to dismiss him as a result of the investigation. A letter dated October 26, 2009 indicated the Cabinet reconsidered dismissing Johnson and would impose a five day suspension. Finally, an October 29, 2009 letter informed Johnson the five day suspension would be imposed upon his return to work, due to his status on workers' compensation. Johnson appealed the suspension. An appellate hearing officer found the Personnel Cabinet lacked jurisdiction because the suspension had not yet been imposed.

Dr. Ronald Dubin, an orthopedic physician, evaluated Johnson on April 23, 2009. Johnson reported pain in his right foot, both knees and left ankle. He indicated his right foot pain bothered him for five or six months. The pain started when he stepped on a rock and felt a bone pop in his foot. He stated he had persistent severe pain since that time. He reported ongoing bilateral knee pain which he attributed to arthritis. He also had chronic pain in his left ankle as a result of a 1986 ankle injury. He stated his left ankle bothered him over the years and seemed to be getting gradually worse.

Dr. Durbin's P.A. obtained x-rays of the right foot and observed no acute fractures or dislocations. The x-ray report indicated Johnson had no history of trauma. Johnson

was diagnosed with chronic right foot pain. An MRI was ordered and Johnson was to return for follow-up care after the MRI was obtained. Johnson returned for a follow-up on May 5, 2009. The MRI indicated no source for Johnson's right foot pain although he still complained of persistent pain. His primary complaint on May 5, 2009 was chronic pain in his left ankle and bilateral knee pain. It was noted Johnson had undergone arthroscopic surgeries on both knees in the past and had previously torn ligaments and cartilage in his knees as a result of playing sports in college. The P.A. noted Johnson did not report any recent injury or trauma to his knees, although "he did have a misstep recently when he came down rather hard on his left ankle and jarred his ankle and knee and he's had a slight increase in pain since this occurred." X-rays of Johnson's knees showed moderate to severe bilateral arthritis with evidence of joint space narrowing. The P.A. diagnosed bilateral knee arthritis, right greater than left; end-stage osteoarthritis of the left ankle, status-post open reduction, internal fixation; and right foot pain.

Dr. Bernard Moses treated Johnson on February 18, 2008 for pain in his ankles and knees. On May 5, 2009, Dr. Moses treated Johnson for pain in his ankles, neck and back. Johnson reported he landed on steps "real hard" at

work the day before. Dr. Moses diagnosed muscle strain and osteoarthritis. Dr. Moses saw Johnson for a follow-up on May 11, 2009. Johnson reported pain in his back, neck, knees and left ankle. Dr. Moses took Johnson off work. On May 18, 2009, Johnson reported complaints concerning his left ankle, right foot, bilateral knees, back, arms and teeth. On July 6, 2009, Dr. Moses diagnosed multiple segment muscle strain and osteoarthritis.

Johnson returned on September 29, 2009 reporting he had broken through steps and fell the previous evening. He reported pain in his left ankle and knee, right foot, right knee and back. Dr. Moses diagnosed status-post fall and recommended MRIs of the cervical and lumbar spine as well as the right ankle, left foot and bilateral knees.

Dr. Patrice Beliveau began treating Johnson on June 29, 2009 on referral from Dr. Moses. Johnson reported left ankle, bilateral knee and right foot pain occurring after a work injury on May 4, 2009. Dr. Beliveau noted Johnson had right knee surgery in 1983, left ankle ORIF in 1986 and left knee surgery in 1994. Johnson was noted to be 6’2” and weighed 420 pounds. After examining Johnson, Dr. Beliveau diagnosed bilateral knee pain and left ankle pain due to osteoarthritis and right foot pain. Dr. Beliveau opined Johnson sustained a new injury to very fragile

joints causing his pain to be increasingly more intense and perhaps longer lasting than typical joint pain. Dr. Beliveau did not recommend surgery and released Johnson to regular duty work as of July 13, 2009.

Johnson returned to Dr. Beliveau on October 28, 2009 reporting a new injury with the return of pain in his extremities. Weight bearing x-rays of the knees revealed a severe tri-compartmental osteoarthritis with complete lateral and medial collapse. Dr. Beliveau observed bone on bone degenerative changes in both knees and severe patellofemoral changes. Dr. Beliveau diagnosed bilateral severe tri-compartmental knee OA and right knee instability. On October 25, 2009, Dr. Beliveau noted Johnson had a long history of bilateral knee problems. Dr. Beliveau requested an MRI of the right knee but indicated such a scan would not provide any more information since treatment for severe osteoarthritis of the knee is joint replacement. Dr. Beliveau noted Johnson was not able to work due to his knee problems as well as a back injury sustained the previous summer. Dr. Beliveau noted Johnson had severe osteoarthritis of his right knee as a pre-existing condition from previous trauma to the knee in high school while playing football. Dr. Beliveau then stated, “So the patient probably exacerbate[d] that condition with

a trauma at work[,] [b]ut had a baseline severe OA." Dr. Beliveau recommended bilateral total knee replacement.

On December 9, 2009 Dr. Beliveau responded to a question from Leigh Mooneyhan, an R.N. with Axis who inquired whether the osteoarthritis in the right knee discussed in the November 25, 2009 note caused the need for the total knee replacement or whether the work injury was responsible. Dr. Beliveau noted, "Mainly indicated because of pre-existing OA - recent trauma made the symptoms worse. But OA was pre-existing." A letter from Dr. Beliveau on that same date states Johnson had severe right knee osteoarthritis necessitating a total knee arthroplasty. Dr. Beliveau stated the severe osteoarthritis was mainly due to a pre-existing condition including previous trauma to both knees in high school as well as Johnson's morbid obesity. Dr. Beliveau stated the recent trauma at work was responsible for the worsening of his symptoms and his inability to continue working.

On January 13, 2010, Dr. Beliveau indicated physical therapy would help Johnson get back into some form of activity, but he needed arthroplasty for the left knee and probably the right knee as well. On January 24, 2010, Dr. Beliveau completed a questionnaire indicating knee replacement was related partially to the injury Johnson

sustained on May 4, 2009. Dr. Beliveau indicated convalescence would be six months for a bilateral knee replacement and three months for the right knee only.

Dr. William Lester evaluated Johnson on February 18, 2010. Based on his examination and review of medical records, Dr. Lester diagnosed chronic bilateral knee pain and ankle problems. He opined Johnson sustained only a temporary lumbar strain as a result of the September 2009 work event. He stated Johnson did not suffer a permanent injury as a result of either the May 4, 2009 or the September 28, 2009 work events. Dr. Lester stated he could not assign an impairment rating.

Dr. Phillip Corbett evaluated Johnson on March 2, 2010. Dr. Corbett diagnosed degenerative disc disease of the cervical, thoracic and lumbar spine, exogenous morbid obesity, advanced degenerative joint disease of both knees, status-post old surgical procedures and probable anterior cruciate ligament disruption 25 years earlier. He also diagnosed status-post ankle fracture, left with a mal-union and post-traumatic arthrosis, severe. Dr. Corbett indicated these diagnoses were not related to the alleged work injuries and concluded Johnson’s problems consisted of post-traumatic arthritis in the face of advanced obesity. Dr. Corbett agreed Johnson would require total right knee

arthroplasty and perhaps on the left at a later date. He opined these procedures were necessitated by Johnson's non work-related pre-existing conditions. Dr. Corbett indicated the work events produced no pathologic change to the human organism reflected in Johnson's examination or medical records. Thus, he assessed no impairment rating.

Dr. Robert K. Johnson evaluated Johnson on December 29, 2010. Dr. Johnson stated Johnson had a prior active impairment which he excluded from the 23% rating he assigned as a direct result of the work injuries. Dr. Johnson also excluded any impairment that may have resulted from the lawnmower incident. Dr. Johnson indicated Johnson was incapable of substantial gainful work activity until he undergoes bilateral total knee replacement.

The Department of Transportation introduced the March 18, 2011 report of Dr. Christopher Brigham who reviewed Dr. Johnson's evaluation. Dr. Brigham stated Dr. Johnson's approach to apportionment regarding the pre-existing active condition was not consistent with the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Brigham noted there were inconsistent reported clinical examination findings among three examiners. The inconsistency did not support ratable impairments with regard to the knees, left ankle and foot.

Dr. Brigham stated Dr. Johnson's rating based on arthritis of the knees was not consistent with the criteria outlined in the Guides. Dr. Brigham stated the objective evidence did not support a finding the L2 compression fracture resulted from work injuries and it was more likely the result of the subsequent non-industrial injury. Dr. Brigham reviewed Dr. Johnson's impairment rating and stated the proper rating using the AMA Guides was 0%. Dr. Brigham stated there was no causal relationship between Johnson's current condition and the alleged work injuries.

After reviewing the evidence, the ALJ noted the objective medical findings were conflicting. The ALJ observed Johnson reported his symptoms arose from a work injury the previous day when seen at the office of Dr. Moses on May 5, 2009. However, at Dr. Dubin's office on May 5, 2009, Johnson did not mention a work injury. The ALJ observed Johnson had complained of the same symptoms in the same body parts on April 23, 2009, two weeks before the first alleged work injury, as reported in Dr. Dubin's notes. Further, the ALJ noted the second work accident allegedly occurred on the same day Johnson was informed his employment was to be terminated. The ALJ indicated the inconsistent reporting raised serious credibility questions. The ALJ found less than convincing Johnson's

explanations of the events surrounding the alleged injuries. The ALJ then stated that, after considering all the evidence, the opinions of Drs. Lester and Corbett were more convincing and concluded Johnson sustained no permanent impairment related to the alleged work accidents. The ALJ determined Johnson sustained a lumbar strain which had resolved. Based upon the opinions of Dr. Lester, the ALJ found Johnson required no additional or future medical treatment for his resolved soft tissue injury arising from either accident. The ALJ concluded Johnson sustained no permanent injury or injury as defined by the Act as a result of the alleged work accidents and dismissed Johnson's claim.

In a workers' compensation case, the claimant bears the burden of proof and risk of non-persuasion with regard to every element of his claim. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). Since Johnson had the burden of proof before the ALJ and was unsuccessful, the question on appeal is whether the evidence compels a finding in his 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). So long as any evidence of

substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here, Johnson did not file a petition for reconsideration. Instead, he appealed, *pro se*, directly to the Board. Essentially, Johnson asks the Board to re-weigh the evidence and substitute its findings for those rendered by the ALJ. This Board will not engage in fact-finding and weighing of the evidence, as requested by Johnson. This is especially true since Johnson failed to file a petition for reconsideration following the May 24, 2011 opinion and order dismissing his claim. Pursuant to KRS 342.285, the absence of a petition for reconsideration means the ALJ's order "shall be conclusive and binding as to all questions of fact" as long as substantial evidence exists in the record to support the ALJ's conclusion. As the Supreme Court of Kentucky announced in Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985), if the ALJ's conclusions are supported by substantial evidence in the record, even a "failure to make findings of an essential fact" cannot be reversed and remanded to the ALJ unless the failure was first brought to the attention of the ALJ. Eaton Axle Corp. v. Nally, supra. Consequently, a decision resolving purely factual questions cannot be reversed if substantial

evidence exists in the record to support the ALJ's ultimate conclusion.

Here, the ALJ acknowledged the record contained conflicting evidence. The ALJ weighed the evidence and was unconvinced by Johnson's account of the events surrounding the alleged injuries. He indicated he was more convinced by the opinions of Drs. Lester and Corbett that Johnson sustained no permanent impairment related to the two alleged work accidents. The ALJ was well within his role as fact-finder in finding those opinions more persuasive. The ALJ determined Johnson sustained only a lumbar strain which had resolved. That finding is supported by medical opinions of record and may not be disturbed on appeal. The ALJ also found there was no need for continuing medical care related to the alleged incidents, a finding which is supported by the opinion of Dr. Brigham who found no causal relationship between Johnson's current condition and the work injuries and Dr. Lester who opined Johnson did not suffer a permanent injury as a result of the work events.

In his brief to the Board, Johnson notes the ALJ's opinion and order stated, "Dr. Beliveau did not say whether the knee replacements were due to arthritis or due to work injuries." Johnson states he feels the ALJ may have overlooked Dr. Beliveau's notes wherein it is clearly

stated the knee injuries could have been caused by the work-related injury. However, we note the ALJ's statement referred to by Johnson occurs in the ALJ's summary of Johnson's testimony regarding whether Dr. Beliveau told him at the time his work caused the knee condition. The ALJ's summary of Dr. Beliveau's testimony is accurate and complete and the ALJ was aware of statements Dr. Beliveau made regarding the cause of or contribution to the condition by the work-related incidents.

Johnson also alleges there was error with regard to the date of his left knee surgery which the ALJ stated was in 1994. Johnson states this is incorrect and the surgery was actually in 1984. We note the ALJ's statement regarding left knee surgery being performed in 1994 is actually contained in the summary of evidence from a medical report of Dr. Beliveau which does state Johnson had a history of left knee surgery in 1994.

Johnson also appears concerned the ALJ found him lacking in credibility based upon an incorrect understanding of personnel records in the file. However, the ALJ's opinion expressly states his determination regarding credibility is based upon varying histories given on the day following the first alleged work injury and the occurrence of the second alleged work injury on the date

Johnson received notice his employment was being terminated. The ALJ found the opinions of Dr. Lester and Dr. Corbett more persuasive as to whether Johnson sustained a permanent injury related to the two work incidents. The ALJ was well within his authority as fact-finder in choosing to find those opinions more persuasive than Johnson's accounts of those incidents. There being substantial evidence to support the ALJ's findings, we may not rule otherwise.

Finally, with regard to requesting any and all possible safety violations and/or penalties be assessed and awarded is concerned, the statute only provides for safety penalties where income benefits have been awarded. Here, the ALJ found no injury for which income benefits could be awarded and hence no safety penalty may be assessed.

Accordingly, the decision of Hon. Lawrence F. Smith, Administrative Law Judge, is hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART AND FILES A SEPARATE OPINION.

STIVERS, MEMBER. I concur with the majority's opinion affirming the ALJ's determination Johnson is not entitled to permanent partial disability benefits and future medical benefits. I disagree with that portion of the opinion

affirming the ALJ's dismissal of Johnson's claim with prejudice, because I believe the ALJ's finding, based on the opinions of Drs. Lester and Corbett, that Johnson sustained a lumbar strain which had resolved merits an award of medical benefits for the life of the lumbar strain. Further, if Johnson missed any work as a result of the lumbar strain, he is also entitled to temporary total disability benefits. Accordingly, I would remand for an award of the appropriate medical benefits and possible temporary total disability benefits.

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