OPINION ENTERED: AUGUST 13, 2012

CLAIM NO. 201188748

ZACHARY SCOTT WOLFE PETITIONER

VS. **APPEAL FROM HON. RICHARD JOINER, ADMINISTRATIVE LAW JUDGE**

W. ROGERS COMPANY
and HON. RICHARD JOINER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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

SMITH, Member. Zachary Scott Wolfe ("Wolfe") appeals from the March 27, 2012 Opinion and Award rendered by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ"), and the ALJ's April 17, 2012 Order denying Wolfe's petition for reconsideration. On appeal, Wolfe argues substantial evidence does not support the ALJ's conclusion Wolfe was only entitled to temporary total disability ("TTD") benefits until August 19, 2011 for a work-related injury sustained on

March 10, 2011 in the employment of W. Rogers Company ("Rogers"). Wolfe also argues the ALJ should be required to issue specific findings of fact explaining his reliance upon the opinions of Dr. Jenkinson and Dr. Goodwin over those of Dr. Guberman. We affirm.

Wolfe filed a Form 101 alleging he was injured on March 10, 2011 while pumping water from a hole in which he was working. Wolfe states "Plaintiff was pumping out water from a hole 5 to 10 feet deep. Plaintiff was walking down into the hole and twisted his knee."

Wolfe testified by deposition on January 11, 2012 and at the formal hearing on February 21, 2012. Wolfe was 18 years old when he was hired in March 2011 as a laborer for Rogers on a construction site in the Louisville area. At the formal hearing he explained the injury as follows:

> I was packing a water pump down to a hole. The ground was uneven. As I was walking down to the hole, my leg twisted. I felt something pop in my knee, and I fell to the ground. That was it.

Wolfe was later transported to Norton Healthcare and, on June 21, 2012, he began to treat with Dr. Goodwin who released him to full duty on October 11, 2011. On cross-examination, Wolfe confirmed his medical treatment consisted

of physical therapy and medication. Since then, he has had no further medical treatment.

Wolfe submitted the office visit record of Michael Goodwin, M.D., dated June 21, 2011. Dr. Goodwin noted Wolfe was "trying to put a pump in a whole in the ground on May 10th of this year he turned wrong and his right knee popped. He was in severe pain and unable to bear weight." On physical examination, Dr. Goodwin noted:

> There is some subluxation, negative Lachman's, no varus or valgus instability." It’s hard to check him because of pain with knee flexion. I see no significant problem. Q angle appears to be increased over 15 degrees or close to it. He has no significant effusion.

Dr. Goodwin diagnosed a subluxation episode of the right patella. He determined Wolfe needed physical therapy, a lateral patella brace and should be weaned from crutches.

Dr. Goodwin's August 16, 2011 office note records Wolfe was "still in misery and pain" and did not like physical therapy. He had pain "about the patellofemoral joint". However, Dr. Goodwin did not think there was "much else to do but more physical therapy.”

Dr. Goodwin's September 13, 2011 office note indicates Wolfe had started to see improvement and was feeling better. Dr. Goodwin confirmed a diagnosis of severe patellofemoral

contusion and released Wolfe to work at light-duty. Dr. Goodwin's October 11, 2011 note states:

> He's doing much better with minimal complaints. He has mild tenderness. He has full range of motion and no major effusion. I think he's reached maximum medical improvement. He can return to work without restrictions. I'm releasing him from my care with zero disability.

Rogers submitted the medical report of Bruce Guberman, M.D. who evaluated Wolfe on November 8, 2011. Dr. Guberman recorded a history that Wolfe had twisted his knee as he was walking down an embankment at work and felt pain and a popping sensation. He noted Wolfe had been seen at Norton Immediate Care Center, undergoing an x-ray to his right knee that was normal. He was given a brace, crutches and a prescription for Vicodin and was advised to use cold compresses and elevation. Wolfe next saw Katrina Barker, a nurse practitioner at Kings Daughters Family Care Center in Grayson, Kentucky, who ordered an MRI of the right knee which showed:

> 1. Small contusions involving the medial aspect of the medial tibial condyle and lateral aspect of the lateral tibial condyle and patella. 2. Small to moderate joint effusion.

Dr. Guberman's history reviewed Wolfe's care with Dr. Goodwin, noting Wolfe had been released with no

restrictions. Dr. Guberman diagnosed a work-related chronic posttraumatic strain of the right knee with a history of subluxation of the right patella with residual instability. Dr. Guberman assessed a 3% impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"), 5th Edition. Dr. Guberman noted Wolfe was a construction worker whose duty included working outdoors, standing and walking for eight to ten hours a day, climbing up and down ladders, and lifting objects weighing up to 100 pounds. Dr. Guberman concluded Wolfe retained the physical capacity to return to the type of work he performed at the time of his injury and required no restrictions. Dr. Guberman opined Wolfe reached maximum medical improvement ("MMI") in October, 2011.

Rogers submitted the report of David Jenkinson, M.D. who evaluated Wolfe on August 19, 2011. Dr. Jenkinson noted Wolfe was then nineteen years old, unmarried with no children, and a high school graduate. Wolfe advised that, on May 10, 2011 as he was helping pour concrete, his right foot slipped into a hole in the ground causing him to twist his leg. He was taken to Norton Immediate Care Clinic where he was treated and advised to stay off work and follow-up with an orthopedic surgeon.

Wolfe complained of constant pain in his right knee "under the kneecap". He described the pain to Dr. Jenkinson as worsening with movement up to "10 out of 10". Wolfe indicated the pain was so intense during physical therapy that he "was in tears".

Dr. Jenkinson performed a physical examination noting Wolfe was 5'11" weighing 165 pounds. He was able to sit comfortably in a chair with a knee brace. He had no physical abnormality, and there was no joint effusion. Wolfe complained of pain throughout the examination and it was not possible to perform a McMurry's test or to assess patellar stability or patellar grinding. Measurement of Wolfe's quadricep muscles revealed no difference between the right and left. There was no apparent abnormality on examination of his lower legs or feet.

Dr. Jenkinson diagnosed a history of possible minor sprain or strain of the right knee but with typical signs of self-limiting behavior. He determined there was no objective abnormality to explain Wolfe's continued complaints. He determined Wolfe needed no ongoing treatment for his right knee. When asked to give a recommendation for ongoing treatment, Dr. Jenkinson responded:

> None, it is my opinion that all of this man's complaints are a manifestation of voluntary self-limiting behavior with no

> objective basis. He exhibits typical signs for excessive pain behavior. There are several inconsistencies. In the sitting position he held his knee flexed and would not extend beyond 90 degrees whereas he then lay down supine and fully extended his knee but would not allow flexion. It is my opinion that there is no significant abnormality in this man's knee and therefore further attempts at treatment would be futile.

Dr. Jenkinson determined Wolfe was at MMI and could return to his job as a full-time laborer. He further concluded Wolfe had a 0% permanent impairment based upon the AMA Guides.

The ALJ made the following findings of fact relevant to Wolfe's claim:

> **Was there an injury as defined by the Act?** The threshold issue is whether Zachary Scott Wolfe had an injury as defined in the Workers' Compensation Act. Under the Kentucky Workers' Compensation Act, "injury" means, in part:
>
> > … 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. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the

> disease is increased by the nature of the employment.…

Here, the plaintiff was "packing" a water pump down to a hole when his knee "popped." An MRI of the knee later revealed small contusions involving the medial aspect of the medial tibia condyle and lateral aspect of the lateral tibial condyle and patella. There was also small to moderate joint effusion. I believe these small contusions provide objective medical evidence of an injury as required by the definition of injury above. I find that Zachary Scott Wolfe did sustain an injury as defined in the Workers' Compensation Act.

What is the appropriate period of Temporary Total Disability? Temporary total disability is defined in the Act as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). The employer concedes temporary total disability from May 11, 2011 through August 19, 2011. Mr. Wolfe achieved maximum medical improvement as of the date of the examination by Dr. Jenkinson on August 19, 2011. I conclude that during the time from May 11, 2011 through August 19, 2011, Zachary Scott Wolfe had not reached maximum medical improvement and had not reached a level of improvement that would permit a return to employment. Where an employee has not reached maximum medical improvement and faces restrictions that preclude the employee from returning to his customary work or work that the employee was performing at the time of injury, it is permissible to find a temporary total

disability for the duration of those conditions. Central Kentucky Steel v. Wise, 19 S.W. 3d 657 (Ky.,2000).

What is the extent of Permanent Partial Disability? Inasmuch as I have not found Zachary Scott Wolfe to be totally disabled, I must consider whether there is a permanent partial disability. Permanent partial disability is the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work. A permanent disability rating is the permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730(1)(b) and a permanent impairment rating means the percentage of whole body impairment caused by the injury or the occupational disease as determined by "Guides to the Evaluation of Permanent Impairment, American Medical Association." Zachary Scott Wolfe has an impairment rating. It is either 0% based on the report of Dr. Goodwin or the report of Dr. Jenkinson, or 3% under the report of Dr. Guberman.

Based on the reports of Dr. Goodwin and Dr. Jenkinson, I conclude that Zachary Scott Wolfe has a 0% whole body impairment in accordance with the *Guides*.

Is the defendant liable for certain medical expenses? The plaintiff has conceded that there are no outstanding medical expenses due. Therefore, this issue is moot at the present time.

The ALJ then concluded Wolfe sustained a work-related injury on May 10, 2011 and gave timely notice of the injury. The ALJ further determined Wolfe was temporarily totally disabled from May 11, 2011 through August 19, 2011 and had a permanent disability rating of 0% pursuant to the AMA Guides.

Wolfe filed a motion for "Specific Findings of Fact and Petition to Reconsider" stating:

> The plaintiff would specifically ask for a finding as to the basis for deciding that plaintiff was at maximum medical improvement in August when he was still in physical therapy and still treating with Dr. Michael Goodwin at the time. Dr. Goodwin had not even indicated that he had reached maximum medical improvement at that time.
>
> Also, the Plaintiff would request a specific finding as to why the Administrative Law Judge found [sic] Dr. Jenkinson's and Dr. Goodwin's zero (0%) percent impairment rating over Dr. Bruce Guberman. Dr. Guberman was the only physician who did evaluation testing and measured range of motion.

Rogers also filed a petition for reconsideration challenging the ALJ's award of medical benefits. The ALJ summarily denied both petitions.

On appeal Wolfe argues there is no substantial evidence to support the ALJ's conclusion he was only entitled to TTD benefits until August 19, 2011. Wolfe argues that, although

Dr. Jenkinson placed him at MMI on August 19, 2011, the evidence is undisputed that he was in physical therapy until September 7, 2011. Dr. Jenkinson was not able to examine Wolfe because of his lack of range of motion. Accordingly, the ALJ should have determined Wolfe did not reached MMI until the later date of October 11, 2011, when Dr. Goodwin placed him at MMI.

Wolfe also argues he is entitled to specific findings of fact justifying the ALJ's reliance on the opinions of Dr. Jenkinson and Dr. Goodwin over those of Dr. Guberman. Wolfe argues:

> [S]ince Dr. Jenkinson clearly did not base his opinion on tests and examinations (since Petitioner could not do these) and since Dr. Goodwin also did no testing or even range of motion tests that their opinions are not valid. That is why Petitioner asks for specific findings of fact as to why Dr. Guberman was not more persuasive than the other two doctors. Since this request was denied the Petitioner is entitled to a remand on this issue.

As the claimant in a workers' compensation proceeding, Wolfe had the burden of proving each of the essential elements of his cause of action, including the duration of his entitlement to TTD benefits. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since he was unsuccessful regarding entitlement to additional TTD benefits until

October 11, 2011, 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 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).

In rendering a decision, KRS 342.285 grants 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson

Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 200). 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 79 (Ky. 1999).

While Wolfe points to evidence upon which the ALJ could have relied to find in his favor, conflicting evidence alone does not require reversal on appeal. Whittaker v. Rowland, *supra*. In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.0011(11)(a) defines "temporary total disability" as follows:

> "Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. (Emphasis added)

Temporary total disability is a factual finding requiring analysis of the evidence presented, and a determination of when an individual who is temporarily totally disabled as a result of an injury has reached MMI

and has attained a level of improvement such that he is capable of returning to customary employment. Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000); W.L. Harper Construction Company vs. Baker, 658 S.W.2d 202, 204 (Ky. App. 1993).

Here, substantial evidence supports the ALJ's finding. Dr. Jenkinson conducted a physical examination and determined there was no objective abnormality that could explain Wolfe's continued complaints. Furthermore, in his opinion, much of Wolfe's complaints were a manifestation of voluntary self-limiting behavior with no objective basis. Dr. Jenkinson concluded Wolfe was at MMI on the date of the examination, August 19, 2011. Dr. Goodwin's opinion that Wolfe reached MMI two months later represents nothing more than conflicting evidence before the ALJ. When there is a conflict in the evidence, it is for the ALJ to resolve that conflict. Millers Lane Concrete Co., Inc., vs. Dennis, 599 SW2d 464 (Ky. App. 1980).

Wolfe's arguments on appeal are essentially an attempt to have the Board re-weigh the evidence and direct a finding contrary to the ALJ's decision. We may not do so. The ALJ adequately set out the reasons for finding Dr. Jenkinson's opinions more credible. To summarize, the ALJ properly considered all evidence of record, weighed that evidence,

and reached a decision supported by substantial evidence and in conformity with the law. Thus, we are without authority to direct a different result.

Accordingly, the March 27, 2012 Opinion and Award and the April 17, 2012 Order denying Wolfe's petition for reconsideration rendered by Hon. Richard M. Joiner, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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