

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 30, 2018

CLAIM NO. 201779448

DAVID HAAS

PETITIONER

VS.

APPEAL FROM HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

PHILLIPS PET FOOD SUPPLY and
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. David Haas (“Haas”) appeals from the Opinion and Order rendered August 16, 2018, by Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”). The ALJ dismissed his right knee injury claim finding the condition was not caused by the alleged May 12, 2017 work incident. Haas also appeals from the September 13, 2018 Order denying his petition for reconsideration.

On appeal, Haas argues the ALJ committed reversible error by dismissing his claim, and a contrary result is compelled. Because we find the ALJ's determination that the right knee condition was not caused by the May 12, 2017 work incident is supported by substantial evidence, and a contrary result not compelled, we affirm.

Haas filed a Form 101 alleging on May 12, 2017, he injured his right knee from lifting. Haas also alleged a safety violation by his employer, Phillips Pet Food Supply ("Phillips"), due to improper loading of the delivery truck he was driving. In the Form 104 filed in support of the claim, Haas indicated his previous work history consisted of driving delivery trucks, working in shipping and receiving, and stacking lumber.

Haas testified by deposition on February 6, 2018, and at the final hearing held June 19, 2018. He was born on August 20, 1973, and is a resident of New Albany, Indiana. Haas testified he is a high school graduate, and completed some college courses. He has a Class B CDL, and he has some training in AutoCAD. His work history includes co-managing a lumber company, working in AutoCAD, as a factory line worker, package handler for UPS, dishwasher/busboy, stocker, shipping and receiving, warehouse manager, and delivery driver. He was working as a delivery driver for Wolverton when it was purchased by Phillips in 2013, and began delivering pet food and supplies for them. He used a lift gate, pallet jack and dolly to deliver items from his truck. He occasionally had to re-stack items, or climb through the back of the truck to obtain specific delivery items.

Haas previously injured his right knee in 2007 while dancing. He underwent ACL surgery for that injury in 2008 or 2009. On May 2, 2017, ten days prior to the work incident, he saw Dr. Frank Bonnarens for right knee pain of two days duration. On May 12, 2017, he moved a pallet of product for delivery, when the stack behind it shifted. As he pushed the stack backward to keep it from falling over, he experienced a pop and pain in the right knee. He reported the incident when he returned to the warehouse. He testified he alleged a safety violation against Phillips due to improper loading and palletizing.

Haas went to Baptistworx, and was placed on light duty. Phillips provided an assistant to help him, who quit after two weeks. He returned to Dr. Bonnarens, but eventually treated with Dr. Steve Smith who performed the surgery for the 2007 injury. He has had right knee surgery, physical therapy, pain management, and does home exercises since the May 12, 2017 incident. Haas advised he has stiffness, tightness and swelling, difficulty with bending and climbing in and out of the truck, and he cannot squat. Phillips terminated him in September 2017 due to a safety violation. He eventually received unemployment benefits. Haas later went to work for Lowe's where he delivers appliances with a co-worker.

In support of his claim, Haas submitted medical records from an unnamed source. The records dated May 15, 2017 are handwritten, and largely illegible. The records reflect Haas complained he had experienced knee pain and swelling for three days. Haas also submitted a Form SVC alleging a safety violation against Phillips pursuant to 29 CFR 1910.176(b), citing storage of material created a hazard.

Phillips filed a Form 111 on January 12, 2018, denying the claim. It also alleged a safety violation against Haas, and filed a Form SVE alleging he failed to employ a proper protocol in disassembling a pallet, thereby causing the injury.

Haas filed Dr. Jules Barefoot's April 12, 2018 report. Dr. Barefoot noted Haas' previous right ACL surgery in 2009, and his treatment with Dr. Bonnarens on May 2, 2017. When he evaluated Haas, he observed right knee effusion with no evidence of muscle wasting or atrophy. He noted the June 12, 2017 MRI revealed possible tears of the medial and lateral meniscus, along with tri-compartmental arthritis. He also noted Dr. Smith performed right knee surgery on October 31, 2017 consisting of ACL reconstruction, partial lateral and medial meniscectomies, and chondroplasty of the patella femoral and medial compartments. Dr. Barefoot noted Haas was status post the surgeries outlined above, and has severe traumatically induced right knee degenerative arthritis. He assessed a 9% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides). He restricted Haas from repetitive squatting, kneeling, crouching, or crawling, and advised him to lift no more than seventy-five pounds occasionally, nor greater than fifty pounds frequently. He advised Haas to avoid working on ladders, scaffolding or unprotected heights, and to rest the knee as needed. He determined Haas had reached maximum medical improvement ("MMI").

Phillips filed the May 2, 2017 note from Dr. Bonnarens. Dr. Bonnarens noted Haas complained of right knee pain of two days duration from

knee popping. Haas complained the knee felt as if it was trying to shift. He noted the previous ACL reconstruction to the right knee.

Phillips also filed Dr. Thomas Loeb's April 10, 2018 report. Haas complained of right knee pain with clicking, popping and giving way. He reported that on May 12, 2017 he was working as a delivery driver, moving product in the back of a truck when a pallet shifted, causing a twisting injury to the right knee. Dr. Loeb noted a few days before May 12, 2017, Haas treated with Dr. Bonnarens for the same complaints. He noted the previous right ACL reconstruction performed by Dr. Smith in 2008.

Dr. Loeb diagnosed Haas with persistent right knee pain and end-stage tri-compartmental osteoarthritis with bone marrow edema in the medial femoral condyle of the right knee, with attenuated ACL revision graft and anterolateral instability. He believed Haas had a recurrent injury pattern which progressed over time, and was a ratable condition at the time of the May 12, 2017 incident. He found Haas had a 15% impairment rating pursuant to the AMA Guides attributable to the 2007 injury and 2008 repair. He would restrict Haas from repetitive climbing and deep knee bending. Dr. Loeb noted all symptoms Haas attributed to the May 12, 2017 incident were present when he saw Dr. Bonnarens on May 2, 2017. He found Haas had reached MMI, and his arthritis problems stem from his previous injury. He stated Haas could do the job he was performing on May 12, 2017.

Craig Berrier ("Berrier"), Phillip's director of risk management, testified by deposition on June 18, 2018. Berrier oversees the workers' compensation program for Phillips, and was familiar with Haas' claim. He has worked in

occupational safety and health for over 28 years. He noted Haas was a route driver who alleged a May 12, 2017 work injury. He testified OSHA regulations are inapplicable, and the regulations from the Department of Transportation apply to this situation. Berrier testified Phillips was not cited by OSHA.

A Benefit Review Conference (“BRC”) was held on May 11, 2018. The BRC order and memorandum reflects the issues preserved included whether Haas retains the physical capacity to return to the type of work performed on the date of the injury, work-relatedness/causation, benefits per KRS 342.730, credit for unemployment benefits, injury as defined by the Act, temporary total disability, pre-existing active, medical benefits, extent and duration, and safety penalties pursuant to KRS 342.165(1) alleged by both parties.

The ALJ rendered the Opinion and Order dismissing on August 16, 2018. The ALJ outlined the evidence, and stated that although Haas very may well have been involved in a work incident on May 12, 2017, “[T]he more pressing question is whether that incident caused a change to his right knee or whether the pathology therein occurred over the course of time or on the Friday before his visit to Dr. Bonnarens on May 2, 2017.” The ALJ found Dr. Loeb’s opinions regarding causation were more persuasive, and he set forth his reasoning for this determination.

Haas filed a petition for reconsideration essentially arguing a contrary result is compelled. In an order issued on September 13, 2018, the ALJ denied the petition for reconsideration as an impermissible re-argument of the case.

On appeal, Haas argues the ALJ erred in dismissing his claim, and the evidence compels a contrary result. As the claimant in a workers' compensation proceeding, Haas had the burden of proving each of the essential elements of his claim, including work-relatedness/causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Haas was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. 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 by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v.

Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp an ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences could otherwise have been drawn from the record. Whittaker v. Rowland, supra. As 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, supra.

After careful review, we find the ALJ accurately summarized the evidence and had a complete understanding of the issues before him. In the opinion, the ALJ relied upon Haas' testimony, the treatment records of Dr. Bonnarens, and the report of Dr. Loeb in finding Haas had not sustained his burden of proof regarding the causal relationship between his right knee condition and the incident of May 12, 2017. Dr. Loeb's opinion, in conjunction with Dr. Bonnaren's treatment records, constitute substantial evidence supporting the determination Haas failed to prove his right knee condition, for which he underwent surgery on October 31, 2017, was caused by the May 12, 2017 work incident. We find the ALJ acted within the scope of the deference afforded to him, and a contrary result is not compelled.

We acknowledge Haas is able to point to conflicting evidence supporting his position on appeal. However, the ALJ as fact-finder determines the credibility of the evidence. The ALJ may also choose whom and what to believe

when faced with conflicting evidence. It was the ALJ's prerogative to rely on Dr. Loeb's opinions. Because we find substantial evidence supports the ALJ's determination regarding causation/work-relatedness, and no contrary result is compelled, we affirm.

Therefore, the August 16, 2018 Opinion and Order, and the September 13, 2018 Order on petition for reconsideration, rendered by Hon. W. Greg Harvey, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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