

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 26, 2020

CLAIM NO. 201978252

DESHAWN THOMPSON

PETITIONER

VS.

APPEAL FROM HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE

GE HAIER
HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

BORDERS, Member. DeShawn Thompson (“Thompson”) appeals from a decision rendered by Hon. Grant Roark, Administrative Law Judge (“ALJ”) on January 21, 2020. The ALJ dismissed Thompson’s claim against GE Haier (“GE”) for benefits arising from a work-related incident occurring on April 16, 2019, as barred by KRS 342.165(2). The ALJ determined Thompson falsified his employment application

with GE in violation of KRS 342.165(2), therefore barring his claim and resulting in its dismissal. Neither party filed a petition for reconsideration. For reasons to be set forth herein, we affirm.

Thompson testified by deposition, taken in a prior workers' compensation claim, against a different employer. Of significance to this appeal, Thompson testified he suffered a work-related injury to his left shoulder requiring surgery, occurring on July 6, 2016, while employed by Marcone. He also alleged he suffered a mid-back and right shoulder injury on July 5, 2017, also while employed at Marcone. Thompson sought permanent workers' compensation benefits for both injuries.

Thompson testified at the final hearing in this claim. He allegedly sustained a right shoulder injury at work for GE on April 16, 2019 while pulling on a cart weighing 150 pounds. He said he was working on the assembly line, and while pushing an empty cart out of the way it caught on a crater-like hole in the floor, causing it to abruptly stop. He heard a pop in his right shoulder and had the onset of pain. He admitted to a previous right shoulder injury in 1990 or 1991, and to breaking his collarbone in the eighth grade. He denied any other right shoulder injuries. He admitted to the two previous workers' compensation claims; one for a left shoulder injury and one for what he described as a low back injury.

Thompson testified he filled out an application for the job at GE online and went to the plant for a live interview. He interviewed with a man that he claims advised him to leave out information about his prior medical problems when asked about them. Thompson insisted he informed the individual when asked about

his prior medical issues. As part of the application, Thompson sat through an interview to complete a medical questionnaire with the assistance of a staff member from Fit For Work, a contractor hired by GE to assist with the hiring process. The staff member asked him a series of questions regarding prior medical issues, work accidents, other accidents, or any significant medical issues. He said he answered the questions truthfully and was forthcoming in his responses regarding all of his prior medical issues. A copy of the completed questionnaire was submitted into the record. Thompson testified he responded “yes” to many questions where “no” answers were indicated on the form. Thompson admitted he did not review the questionnaire answers for accuracy prior to signing it. However, the document indicates he made sure the questionnaire included information about a prior motor vehicle accident he was in years ago causing a spleen injury. Yet his response in the questionnaire to whether he was ever in a wreck was marked “no”.

Betsy Gardner (“Gardner”) testified by deposition. She is the area manager for Fit For Work and oversees employment testing services onsite for GE. She testified the medical questionnaire is emailed to all candidates and they are asked to complete it prior to arrival at the plant. Candidates are required to personally fill out the questionnaire either prior to the interview or in front of a Fit For Work employee at the plant at the time of their interview. The Fit For Work employee asks the candidate medical questions from a document called “work steps medical history interview” and compares the answers to the employee questionnaire to discuss any discrepancies. Gardner testified that during this process Thompson

did not advise of any injuries, accidents, or traumas, except for noting a collarbone dislocation occurring around 1990.

Shannon Smith (“Smith”) testified by deposition. Smith is a nurse practitioner and nurse manager in GE’s occupational medicine department. She works in the occupational medicine department for GE. She supervises the nurses for all GE Appliances in Alabama, Georgia, Tennessee, and Kentucky. She testified that if Thompson had indicated in his questionnaire a history of prior shoulder problems, personnel would have looked more closely into the medical history and possibly ordered more testing, or placed him in a different job in the plant if restrictions were needed.

Jessica Butcher (“Butcher”) testified by deposition. She is a new hire case manager for Premier Health and is contracted to the GE plant. Butcher testified the actual physicals, testing, medical questionnaire, and other forms are completed by the Fit For Work team and the results forwarded to her for review. Her job is to determine if the candidate has any medical concerns with them safely performing the job. After she reviews the paperwork, it is sent to the HR department at GE for final determination on hiring.

The parties submitted medical proof that was considered by the ALJ but is not germane to this appeal as the parties agree Thompson suffered a right shoulder injury. The point of contention concerns whether Thompson’s case is barred by KRS 342.165(2).

The case proceeded to a Benefit Review Conference where the parties agreed for the claims to be bifurcated with the sole issue for consideration being

whether this claim is barred by Thompson submitting a false application in violation of KRS 342.165(2).

In an Opinion and Order dated January 21, 2020 the ALJ found *verbatim* as follows:

**ANALYSIS, FINDINGS OF FACT,
AND CONCLUSIONS OF LAW**

As indicated above, the only issue to be decided at this time is whether plaintiff's claim is barred by his alleged false employment application with the defendant employer. The defendant maintains plaintiff provided false information on his employment application which serves as a complete bar to recovery under KRS 342.165(2), which states:

No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his or her physical condition or medical history, if all of the following factors are present:

- (a) The employee has knowingly and willingly made a false representation as to his or her physical condition or medical history;
- (b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and
- (c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

As applied to this case, the defendant maintains plaintiff failed to disclose his previous right shoulder strain and

his previous left shoulder surgery on both the questionnaire the plaintiff completed and during the WorkSTEPS interview on-site at GEA as part of a contingent job offer. In records from the plaintiff's prior workers' compensation claims which were ongoing at the time, he applied for employment with the defendant herein, plaintiff is shown to have a recent history of a left shoulder injury which required surgical repair. In addition, as part of those other workers' compensation claims which were ongoing at the time, plaintiff was hired with the defendant employer, plaintiff was examined by Dr. Kakel on June 21, 2018, during which time plaintiff reported right shoulder symptoms and a left shoulder surgery as result of injuries that occurred prior to plaintiff's employment with GE Haier. Therefore, there can be no dispute that the plaintiff had a left shoulder injury with surgery, complaints of right shoulder pain, and limited range of motion at the time he applied for employment with the defendant employer. The defendant further points out the various times on the application documents where plaintiff was asked whether he had any prior surgeries, shoulder problems, or work injuries, to which plaintiff repeatedly answered no and failed to disclose any information about prior right or left shoulder injuries.

Kentucky law regards the plaintiff's pre-employment physical examination as part of the overall application for employment process. *Gutermuth v. Excel*, 43 S.W.3d 270 (Ky. 2001). In *Gutermuth*, the claimant underwent a pre-employment physical administered by a third party physician. As part of the physical, she was asked to complete a written questionnaire regarding her past medical history. In response to questions concerning any prior injuries or surgeries, the claimant failed to identify and list multiple injuries and surgeries. The claimant later alleged she verbally told the examining physicians about some of prior problems, but there was no such disclosure in written questionnaire. The claim was dismissed on the basis of the claimant's false representations and upheld by the Kentucky Supreme Court. The Court explained that by concealing her prior injuries and surgeries, the claimant's false representations on the pre-employment physical written questionnaire concealed her true physical condition

from the evaluating physician and led both the physician and the employer to believe that she was physically capable of performing the physical nature of the work, thereby defeating the very purpose of the examination. *Id.* at 273.

In the present case, plaintiff argues he did disclose his prior shoulder injuries to the employer and the nurse as they filled out the questionnaires, but that they did not record them on the questionnaires. He acknowledges the forms show he reported a prior collarbone dislocation and a prior surgery for wisdom teeth removal, which he added to the form when he reviewed it after the nurse completed the form in response to his answers during the interview. Plaintiff maintains the employer was aware of his left shoulder surgery because he both reported it verbally and because it would have been apparent during his physical examination, during which he had to remove clothing down to his underwear. But these kinds of excuses were rejected by the Kentucky Supreme Court in *Gutermuth*. The Supreme Court noted that verbal notification does not remedy written false representations and omissions, the presence of which precludes any meaningful physical examination. *Id.* The entire process is invalidated. *Id.* Moreover, the Administrative Law Judge is not persuaded that whoever completed the forms in the plaintiff's presence as he provided answers simply failed to make note of the prior shoulder problems he now claims he reported. In addition, as the defendant also points out, even if such prior shoulder problems were verbally reported that simply not listed by the persons filling out the forms, plaintiff still had the opportunity and responsibility to review the forms for accuracy before he signed them. This is evidenced by the fact that plaintiff did go back and add information about his prior collarbone separation, prior spleen surgery, and wisdom teeth surgery. It simply defies belief that plaintiff would have reviewed the application documents and corrected these omissions, but somehow did not have the opportunity to correct the application questionnaires to report his prior shoulder problems and surgery. From the totality of evidence available, the ALJ is persuaded plaintiff knowingly and willfully provided false representations about his medical history and physical condition.

Having concluded plaintiff provided false information on his employment application regarding his medical history and physical condition, the next part of the analysis becomes whether plaintiff's misrepresentations were substantial factor in his being hired for his position. On this point, the only evidence comes from Shannon Smith, a nurse practitioner with the defendant employer. She testified that if certain physical conditions are shown on the questionnaire or WorkSTEPS, steps are taken to get additional information about the prior physical condition, including obtaining additional medical records and getting a physician to specifically check such condition and clear that applicant to be able to work. She further testified that if there were any notation of a prior musculoskeletal disorder, the company would review and decide whether to have a company physician check them out and possibly obtain an MRI or possibly reach out to the treating physician and ask if the applicant was capable of performing the physical requirements of the job. With regard to plaintiff's omitted information, Smith testified if the company were aware of plaintiff's prior workers' compensation claims for prior shoulder problems, it would have at least obtained prior treatment records and may also have obtained an MRI. She further explained this position by pointing out that the job into which plaintiff was placed, which required moving cards weighing up to 150 pounds on non-level flooring had previously caused rotator cuff injuries to other employees. Therefore, if plaintiff had disclosed prior shoulder problems, there would have been much more scrutiny by the defendant, including possibly placing him in a different position. Based on Smith's uncontradicted testimony, the ALJ is persuaded plaintiff's misrepresentations were substantial factor in him being hired for the position he held.

The next statutory element to be considered is whether there was any causal nexus between plaintiff's physical misrepresentation on his application and his alleged work injury. Again, Shannon Smith's testimony on this point is unrefuted. She explained that plaintiff's position was one which was known to have caused rotator cuff injuries to prior employees because of the motion of

pulling heavy carts on uneven surfaces. Plaintiff's alleged mechanism of injury was that he injured his right shoulder while pulling one of these heavy carts. This evidence persuades the ALJ that plaintiff's misrepresentations about his prior shoulder problems led the employer to place plaintiff in a position which had been known to have an increased risk for causing rotator cuff injuries due to pulling the heavy carts. As such, plaintiff would not have been injured in a manner already known by the employer to be problematic for shoulders had plaintiff accurately reported his prior history of shoulder problems.

For these reasons, the ALJ is persuaded the defendant has carried his burden of proving that plaintiff's claim for compensation is barred by KRS 342.165 (2) due to plaintiff's false employment application about his physical condition and medical history. His claim for benefits is, therefore, dismissed with, prejudice.

No petition for reconsideration was filed and this appeal followed.

Thompson argues on appeal that the testimony regarding falsifying the application is conflicting. However, the physical examination performed in this case clearly indicated Thompson had scars on his shoulders and somehow the failure of GE's medical examiner to compare the scars to the pre-employment application should be an equitable bar as a matter of law to the defense of submitting a false application. We disagree.

As the claimant in a workers' compensation proceeding, Thompson had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Thompson 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). 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 inadequate 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 the 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 which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ’s

ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, *supra*.

In addition, Thompson did not file a petition for reconsideration from the January 21, 2020 Opinion and Order dismissing his claim. In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether substantial evidence in the record supports the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, on appeal, we must determine whether substantial evidence supports the ALJ's decision.

As a starting point in our analysis, we begin with KRS 342.165(2) which states as follows:

No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his or her physical condition or medical history, if all of the following factors are present:

- (a) The employee has knowingly and willingly made a false representation as to his or her physical condition or medical history;
- (b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and

(c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

There is no question Thompson suffered work-related left shoulder and right shoulder injuries prior to being hired by GE. In fact, two prior workers' compensation claims were ongoing when Thompson was hired by GE. In addition, Thompson was evaluated by Dr. Rafid Kakel on June 21, 2018 reporting right shoulder symptoms and had undergone left shoulder surgery, all prior to being hired by GE. Therefore, there is no dispute Thompson suffered prior work injuries to both shoulders that he failed to disclose to GE prior to his hiring.

Thompson admits the questionnaire did not accurately reflect his pre-existing medical conditions, but says he verbally advised GE about his prior conditions and that, coupled with his obvious scars on his left shoulder, indicates GE should have discovered the existence of his pre-existing conditions in spite of his failure to disclose them.

A similar fact scenario was addressed by the Kentucky Supreme Court in Gutermuth v. Excel, 43 S.W.3d 270 (Ky. 2001). In Gutermuth, the claimant underwent a pre-employment physical performed by a third party physician. As part of the physical, Gutermuth was asked to complete a written questionnaire regarding her past medical history and failed to identify and list multiple prior injuries and surgeries. Gutermuth, like Thompson, argued she verbally told the examining physician about her prior problems but it was not reflected in the written questionnaire. The claim in Gutermuth was dismissed by the ALJ on the basis of

claimant's false representation and was upheld by the Supreme Court. The Court reasoned that by concealing her prior injuries and surgeries, the claimant's false representations on the pre-employment questionnaire concealed her true physical condition from the evaluating physician and led both the physician and employer to believe she was physically capable of performing the physical nature of the work, thereby defeating the very purpose of the examination. In addition, the Court held verbal notifications does not remedy written false representations and omissions, the presence of which precludes any meaningful physical examination. The entire process is invalidated.

In this instance, the ALJ determined the questionnaire completed by Thompson contained false representations and omissions and was not persuaded by Thompson's arguments that he provided the information and the examiner simply failed to make note of prior shoulder problems. In addition, the ALJ felt that even if such prior problems were verbally reported and not listed by the examiner, he still had the opportunity and responsibility to review the form for accuracy before he signed them and simply chose not to do so. Therefore, the ALJ determined Thompson knowingly and willfully provided false representations about his medical history and physical condition, which was clearly supported by substantial evidence.

Having determined Thompson made a false representation about his medical history, the ALJ then moved on to the remaining two steps of the analysis mandated by KRS 342.165(2). The first step is whether Thompson's false representations were a substantial factor in his being hired for the position. The ALJ determined, based on Smith's undisputed testimony, that Thompson's

misrepresentations were a substantial factor in him being hired for the position. She explained that if Thompson had been forthright in his disclosures, they would have reviewed his placement with more scrutiny and would have required him to be specifically medically cleared for the job. The job he was hired for had caused prior shoulder injuries, and his disclosure could have led him to be placed in a position less strenuous on his shoulders. Therefore, the ALJ determined the misrepresentations were a substantial factor in his being hired into his position. This finding is supported by substantial evidence and will not be disturbed on appeal.

The second step is whether there was any causal nexus between Thompson's physical misrepresentations on his application and his alleged work injury. The ALJ once again relied on the undisputed evidence from Shannon Smith, who testified the position Thompson was being considered for was known to have caused rotator cuff injuries to prior employees due to the motion of pulling heavy carts on uneven surfaces: the exact mechanism that caused Thompson's injuries in this case. As a result, the ALJ determined Thompson's misrepresentations about his prior shoulder problems led the employer to place him in a position which had been known to have an increased risk for causing rotator cuff injuries. The ALJ further determined Thompson would not have been injured performing a job already known by the employer to be problematic for shoulders had he accurately reported his prior history of shoulder problems. This determination is likewise supported by substantial evidence and will not be disturbed on appeal.

Accordingly, the Opinion and Award rendered by the Hon. Grant Roark, Administrative Law Judge on January 21, 2020 is hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON. CHED JENNINGS
401 W MAIN ST, STE 1910
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

LMS

HON. STEVEN GOODRUM
771 CORPORATE DR, STE 101
LEXINGTON, KY 40503

ADMINISTRATIVE LAW JUDGE:

LMS

HON. GRANT ROARK
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601