Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 13, 2021

CLAIM NO. 199104106

ELLIS POPCORN CO. C/O
MATRIX COMPANIES, TPA — PETITIONER

VS. **APPEAL FROM HON. JOHN MCCRACKEN, ADMINISTRATIVE LAW JUDGE**

ROBERT STOGNER;
DR.ROBERT HAYDEN; DR. STEPHEN COMPTON;
DR. JOHN RUXER/ORTHOPAEDIC INST. W. KY; and
HON. JOHN MCCRACKEN,
ADMINISTRATIVE LAW JUDGE — RESPONDENTS

OPINION
AFFIRMING

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

BORDERS, Member. Ellis Popcorn Co. ("Ellis") appeals from the December 22, 2020 Opinion and Order Denying Medical Dispute and the January 26, 2021 Order on Petition for Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge ("ALJ"). The ALJ determined the treatment Robert Stogner ("Stogner") received following a June 16, 2020 fall was causally related to

the 1990 work injury and thus compensable. On appeal, Ellis argues the ALJ erred in relying upon Dr. Joseph Zerga's August 31, 2017 report in finding Stogner's 2020 fall causally related to his work injury. We affirm.

Stogner sustained a work-related injury on December 26, 1990 when his foot slipped while he was climbing a ladder. He fell headfirst onto a concrete floor and sustained a closed head injury with significant loss of function, including vision and hearing problems, and a low back injury. By Opinion, Order and Award rendered June 30, 1993, Hon. James Kerr, Administrative Law Judge, awarded temporary total disability, permanent total disability, and medical benefits pursuant to KRS 342.020.

On May 23, 2017, Ellis filed a Form 112 and Motion to Reopen the claim to assert a Medical Fee Dispute, challenging the reasonableness/necessity and/or work-relatedness of a left L4-L5 microdiskectomy proposed by Dr. Brandon Strenge.

Stogner testified by deposition on August 18, 2017. He described his residual problems from the 1990 injury as including the following:

> The accident left me with impaired peripheral vision in my left eye, migraine headaches, spastic left leg with the left knee being prone to buckle and causing me to fall. I continue to have loss of foot lift which interferes with my walking on steps or inclines and hinders my entering vehicles. I often get it caught in the door or the floor mats and trip getting in and out of my vehicle at home; acute ringing and hearing loss in my left ear; pronounced weakness on the left side of my body; inability to visualize images in my head and solve math, mechanical and structural problems.

Stogner did not seek medical treatment for every fall he sustained. He testified as follows concerning his more serious falls:

> Every fall I have had that resulted in an emergency room visit was caused by either the foot drop, my left knee and sometimes both left and right knees buckling or the brace malfunctioning. When the brace locks or unlocks at the wrong time, it throws me off balance resulting in a fall. I have only gone to the emergency room when I either had a broken bone, extreme pain or was bleeding and needed stitches.

Dr. Zerga performed an independent medical evaluation ("IME") on August 31, 2017. Ellis filed his report in the May 23, 2017 dispute. Dr. Zerga noted Stogner had a foot drop following the work injury and used a mechanical brace on his left leg. Stogner had spasticity in both limbs. Dr. Zerga noted Stogner was able to ambulate with the brace, but had had several falls. Stogner reported falling 400 to 500 times, which he blamed on the brace. Dr. Zerga stated there were two recent falls of note. Stogner fell on February 8, 2016 when his brace locked and his knee gave out. The second fall occurred on March 7, 2017 when he turned and his brace malfunctioned. Dr. Zerga diagnosed a large left paracentral disc protrusion with inferior migration at L4-L5 compressing the exiting L5 nerve root with some spinal stenosis. Dr. Zerga opined this was related to the 1990 fall. Dr. Zerga noted Stogner had frequent falls since then. The fall on March 7, 2017 resulted from clumsiness from the initial injury. Dr. Zerga noted, "Obviously, he is paraparetic with increased spasticity in his legs, maximal in the left leg with the need for a leg brace." Dr. Zerga believed the neurological deficits caused the frequent falls. Dr. Zerga concluded the current herniated disc is related to a fall, which was caused by his gait ataxia from the 1990 injury. Dr. Zerga also noted it is possible Stogner's seizures caused some of

the falls. Dr. Zerga stated all of Stogner's diagnoses are related to the 1990 work event.

On November 13, 2017, Hon. Jeanie Miller, Administrative Law Judge, ruled against Ellis in the medical dispute, noting Dr. Zerga opined that the surgery was reasonable, necessary, and related to the work injury.

On April 2, 2020, Ellis filed a medical dispute challenging the compensability of L4-5 epidural steroid injections recommended by Dr. John Ruxer. On July 23, 2020, Hon. Greg Harvey, Administrative Law Judge ("ALJ Harvey") ruled in Stogner's favor, finding the injections compensable. He noted, "Stogner suffered a closed head injury with significant loss of function, including vision and hearing problems, as well as injuries to his low back. The head injury compromised Stogner's balance and has resulted in numerous falls, one of which ruptured his L4-5 disc and required a laminectomy."

On August 10, 2020, Ellis filed the current medical dispute to contest certain medications. On September 2, 2020, Ellis amended the dispute to contest ongoing treatment for Stogner's left knee, left hip, left ankle, and right shoulder following a fall on June 16, 2020. The ALJ's ruling concerning these medications is not at issue on appeal, therefore we will not summarize the evidence concerning the challenged medications.

Ellis supported its Motion to Amend with the report of Dr. Avrom Gart who performed a medical records peer review on August 5, 2020. Dr. Gart opined the 1990 injury did not cause the left knee, left hip, left ankle, and right shoulder complaints. Instead, Dr. Gart attributed the complaints to a fall just prior

to a June 17, 2020 office visit with Dr. Stephen Compton. Dr. Gart opined that fall was causally related to development of knee osteoarthritis 30 years following the work injury. Dr. Gart noted Stogner received bilateral knee injections and right shoulder injections secondary to osteoarthritis for several years prior to June 17, 2020.

Stogner filed multiple statements in response to the reopening. Stogner stated the fall occurred due to his left knee failing to "lock" on the forward motion of his left leg and buckling, causing him to fall hard on his left side. In a September 7, 2020 statement, Stogner noted a review of the past medical disputes supports the assertion that the injuries and medical fees are compensable. He noted Dr. Gart failed to consider that Ellis has had to pay for several injuries caused by falls. The medical history proves he is a high fall risk because injuries sustained in the fall at work compromised the functioning of his left leg/knee. The original injury caused nerve damage in the left leg and knee and impaired balance due to ataxia related to the brain injury. Stogner reported suffering hundreds of falls during the 29 plus years since the work injury. Stogner asserted his right shoulder injections are necessary because of shoulder dislocations sustained in falls related to the work injury. He stated his treatment with Dr. Compton for his knees resulted from numerous falls over the years.

In a September 25, 2020 letter, Stogner noted the head injury caused ataxia, an unsteady gait, and a spastic left leg and knee that will suddenly buckle, causing him to fall. In an October 19, 2020 statement, he indicated he has fallen 400 to 500 times over the years, resulting in numerous sprained ankles, wrists, thumbs,

and fingers. He also sustained bloody knees, elbows, and shins, a laceration of his head, and two shoulder dislocations. Stogner attached a June 10, 2020 note of Robert A. Hayden, PA from Mercy Health that notes a diagnosis of seizures (HCC) and Stogner is at high risk for falls.

The ALJ's findings relevant to this appeal are as follows, *verbatim*:

> Defendant states that all treatment to the right shoulder, left knee, left hip and left ankle, since June 16, 2020, has been caused by Stogner's fall when his left knee buckled. Dr. Gart states in his August 5, 2020 Utilization Review report that this fall, and the subsequent treatment to the shoulders, left hip, left ankle and left knee are unrelated to his 1990 work injury. Defendant asserts that any ongoing treatment to these body parts is unrelated to the original work accident.
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> Stogner states that he has had hundreds of falls since his 1990 work injury. He states he is at high risk of falls. The ALJ notes that in a prior medical dispute, Defendant filed the report of Dr. Joseph Zerga in regards to a lumbar surgery that was caused by a 2017 fall. Dr. Zerga stated that the fall was caused by conditions from his original injury. He also stated that in his opinion Stogner's neurological deficits cause him to frequently fall. ALJ Williams ruled against Defendant on a medical dispute challenging that surgery as not being related to the 1990 work injury.
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> For the fall in question for the subject medical dispute, Stogner stated in his statements to the ALJ that the fall occurred due to his left knee failing to "lock" on the forward motion of his left leg and buckling, causing him to fall hard on his left side.
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> The ALJ relies on Stogner statements and Dr. Zerga's 2017 report to find that the June 16, 2020 fall was a natural consequence of the severe head and neurological injury he sustained on December 26, 1990. The ALJ relies on Stogner's statements and Dr. Zerga to find that the injuries to his right shoulder, left knee, left hip and left ankle, and the treatment to those body parts, were a natural consequence of his fall on June 16, 2020. The

> ALJ rules against Defendant on the amended medical dispute and finds the treatment to Stogner's right shoulder, left knee, left hip and left ankle compensable. Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Ellis filed a Petition for Reconsideration making the same arguments it raises on appeal. The ALJ denied the petition, ruling as follows, *verbatim*:

> The courts have held that, upon a motion to reopen, the Board may examine the evidence from the original record. "The statute supra vests the Board with large discretion in the determination of such motions, and that it may and should look to the record made at a former hearing, or hearings, had before it with reference to the same accident." W.E. Caldwell v. Borders, 193 S.W.2d 453 (Ky. 1943); Clear Fork Coal Co. v. Gaylor, 286 S.W.2d 519 (Ky.1956).
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> In an unpublished decision, the Court of Appeals provided an excellent analysis regarding the designation of evidence and what the ALJ may review in a reopening. St. Joseph Hospital v. Littleton Goodan, 2007 WL 2285810, 2007-CA-000633-WC, (August 2007). The Court referenced prior regulations addressing the designation of evidence. The current regulation, 803 KAR 25:010 Section 6(5)(a)(6), states "A motion to reopen shall be accompanied by as many of the following items as may be applicable: 6) A designation of evidence from the original record specifically identifying the relevant items of proof that are to be considered as part of the record during reopening."
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> The Court in Littleton-Goodan, supra, stated as follows:
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> > "The foregoing regulations plainly contemplate that the movant in a reopening case will sift through the record and, in good faith, designate those portions relevant to the issues raised upon rehearing. If causation is an issue, and a particular item of evidence in the original record relates to causation, including a Form 107 introduced into the original

record by the nonmoving party, the duty is upon the movant to detect the evidence and designate it into the rehearing record. St. Joseph appears to suggest that it was entitled to pick and choose the evidence it wished placed into the reopening record, and then shift the burden to Littleton-Goodan to do her independent review and designate the evidence she wanted placed before the ALJ. We believe that interpretation is contrary to the plain language, and intent, of the regulations.

In any event, in determining whether an award should be reopened, the ALJ may look to the record made at a former hearing or hearings had before it with reference to same accident. W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453, 455 (Ky. 1946). The Form 107 was in the record of the original proceedings, and, it follows, the ALJ properly looked to this relevant item of evidence in reaching its decision.

St. Joseph, however, suggests that it was, in effect, blind-sided by the ALJ's reliance upon the Form 107. However, as previously noted, St. Joseph had a duty to have examined the complete original record itself in connection with refiling its reopening motion, and compliance with this duty would have disclosed the form. Moreover, it was a party to the original proceedings and, as such, would be charged with at least constructive notice of the contents of the original litigation file. In short, with minimum diligence, St. Joseph could have made itself aware of the Form 107, and if it disagreed with the conclusions contained therein, it could have preemptively challenged the evidence, thereby assuring that its position on the verity of the report was placed before the ALJ." St. Joseph Hospital v.

> Littleton Goodan, 2007 WL 2285810, 2007- CA-000633-WC, (August 2007).
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> The ALJ was more persuaded by Dr. Zerga than Dr. Gart. Plaintiff states that he has fallen numberous times due to his work injury and Dr. Zerga provides a reasonable explanation for the falls which is consistent with Plaintiff's current statements. The ALJ was entitled to rely on Dr. Zerga's prior report that was filed into the record by Defendant on September 15, 2017. The ALJ was not persuaded by Dr. Avrom Gart's opinions. Dr. Gart never examined Plaintiff. The ALJ denies Defendant's assertion that its due process rights were violated.

On appeal, Ellis argues the ALJ erred in considering Dr. Zerga's August 31, 2017 report because neither party designated it as evidence in the current dispute. Additionally, Ellis argues the ALJ erred in relying on Dr. Zerga's 2017 report as a basis for concluding a fall in 2020 was causally related to the work injury. Ellis notes the burden of proof as to work-relatedness remained with Stogner. Dr. Zerga's 1997 report could not address a fall that had yet to occur. Ellis contends the report has no probative value. Ellis notes Dr. Gart concluded the fall in 2020 was related to osteoarthritis of the knee and not the effects of a neurological condition. Ellis argues the question of causation necessitated a medical opinion. Ellis contends no medical evidence in the record supports work-related causation of the 2020 fall.

We find no error in the ALJ's consideration of Dr. Zerga's 1997 report. Designation of evidence by the moving party is mandatory. 803 KAR 25:010 section 6(5)(a) states a motion to reopen shall be accompanied by a designation of evidence from the original record specifically identifying the relevant items of proof that are to be considered as part of the record during reopening. However, (6)(b)

provides a response **may** contain a designation of evidence. Ellis correctly notes (5)(b)2 states the burden of completeness of the record shall rest with the parties to include so much of the original record, up to and including the award or order on reopening, as is necessary to permit the administrative law judge to compare the relevant evidence that existed in the original record with all subsequent evidence submitted by the parties. Nothing in the regulation prohibits the ALJ's independent consideration of anything in the record. We find no error in the ALJ's consideration and application of the analysis from the unpublished Court of Appeals decision in St. Joseph Hospital v. Littleton Goodan, 2007 WL 2285810, 2007-CA-000633-WC, (August 2007).

KRS 342.0011(1) defines injury as, "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." "[T]he language 'in the course of. . . employment' refers to the time, place, and circumstances of the accident, and the words 'arising out of . . . employment' relate to the cause or source of the accident." Masonic Widows and Orphans Home v. Lewis, 330 S.W.2d 103, 104 (Ky. 1959). There the Court explained, "The cause must have had its origin in a risk connected with the employment and the injury have flowed from that source as a rational consequence." Id. at 104. Black's Law Dictionary, 10th Edition, defines proximate cause as, "a cause that directly produces an event and without which the event would not have occurred."

Consistent with the doctrine of proximate cause, our courts have long recognized the general rule that workers' compensation benefits must be allowed for all the injurious consequences flowing from a work-related injury. Beech Creek Coal Co. v. Cox, 314 Ky. 743, 237 S.W.2d 56 (Ky. 1951). For purposes of the Act, "injury" has been held to include all direct and natural consequences of the original injury that are not attributable to an independent, intervening cause. In Addington Resources, Inc. v. Perkins, 947 S.W.2d 421, 423 (Ky. App. 1997), the Court explained the "direct and natural consequence rule" as follows:

> The applicable rule has been referred to as the direct and natural consequence rule and is explained in Larson, Workmen's Compensation Law, § 13.11 (1996), as follows:
>
> > The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury is compensable if it is the direct and natural result of a compensable primary injury. See also Dutton v. Industrial Comm'n of Arizona, 140 Ariz. 448, 682 P.2d 453 (Ct. App. 1984); and Beech Creek Coal Co. v. Cox, 314 Ky. 743, 237 S.W.2d 56 (1951).

The evidence establishes Stogner has ongoing, long-standing neurological problems with his left leg, including foot drop and failure of the knee to lock. Dr. Zerga, 27 years after the work injury, attributed Stogner's numerous falls to conditions that resulted from the work injury. He also cited seizures related to the work injury as a possible cause of the falls. Dr. Zerga's opinions certainly constitute substantial evidence of the permanency of the work-related effects that caused numerous falls. Stogner indicated the mechanism of the fall in 2020 was consistent

with his past falls. The failure of the knee to lock caused the 2017 fall that was determined to be a result of the 1990 injury. In the earlier 2020 medical fee dispute decision, ALJ Harvey noted, "Stogner suffered a closed head injury with significant loss of function, including vision and hearing problems, as well as injuries to his low back. The head injury compromised Stogner's balance and has resulted in numerous falls, one of which ruptured his L4-5 disc and required a laminectomy." Clearly, the prior record established the effects of the 1990 injury that persisted resulted in numerous falls. The medical evidence introduced prior to this dispute, along with Stogner's testimony, and reasonable inferences drawn therefrom support the ALJ's determination that the 2020 fall was a direct and natural consequence of the 1990 injury.

The ALJ found Dr. Gart was not persuasive, noting he never examined Stogner. It is not clear from Dr. Gart's report that he had an accurate history regarding the number of falls caused by conditions related to the original work injury. Dr. Gart only lists Dr. Compton's medical records from June 17, 2020 as records he reviewed. He indicated he had a peer discussion with Dr. Compton. Dr. Gart did not discuss the cause of the osteoarthritis, other than stating the 1990 incident was not the cause. He did not discuss whether hundreds of falls caused by the effects of the work-related injury would have caused or contributed to the osteoarthritis. He did not address how the buckling of the knee in 2020 would have a different cause than the buckling of the knee in 2017 that was determined to be the result of the 1990 injury. The ALJ was well within his role as fact-finder in determining Dr. Gart's opinions were not persuasive.

While Ellis has identified evidence supporting a different conclusion, there is substantial evidence presented to the contrary. As such, the ALJ acted within his discretion in determining which evidence upon which to rely, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the December 22, 2020 Opinion and Order Denying Medical Dispute and the January 26, 2021 Order on Petition for Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON MATTHEW ZANETTI **LMS**
614 W. MAIN ST, STE 5500
LOUISVILLE, KY 40202

RESPONDENT, PRO SE:

ROBERT STOGNER **USPS**
1312 ROBERTSON ST
MURRAY, KY 42071

RESPONDENTS:

DR. JOHN RUXER **USPS**
ORTHOPAEDIC INSTITUTE OF W. KY
4787 ALBEN BARKLEY DR
PADUCAH, KY 42003

DR. ROBERT HAYDEN **USPS**
225 MEDICAL CENTER DR, STE 201
PADUCAH, KY 42003

DR. STEPHEN COMPTON **USPS**
300 SOUTH 8TH ST, STE 284 W
MURRAY, KY 42071

HON JOHN MCCRACKEN **LMS**
ADMINISTRATIVE LAW JUDGE
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601