Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 9, 2018

CLAIM NO. 201790345

HEARTHSTONE PLACE PETITIONER

VS. **APPEAL FROM HON. RICHARD E. NEAL, ADMINISTRATIVE LAW JUDGE**

TABATHA HARPER
and HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

STIVERS, Member. Hearthstone Place ("Hearthstone") appeals from the June 8, 2018, Opinion, Order, and Award and the July 10, 2018, Order denying both parties' petitions for reconsideration of Hon. Richard E. Neal, Administrative Law Judge ("ALJ"). The ALJ awarded Tabatha Harper ("Harper") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for her work-related lumbar sprain.

On appeal, Hearthstone asserts the ALJ erred in allowing the supplemental report of Dr. Anthony McEldowney to be filed in evidence.

The Form 101 alleges Harper, on March 8, 2017, sustained work-related injuries to multiple body parts in the following manner: "Plaintiff was assisting patient to the restroom, the patient's legs gave way and Plaintiff broke the patients [sic] fall because she was behind the patient supporting him. Plaintiff fell and injured her right hip and low back."

Harper filed the September 25, 2017, Independent Medical Examination report of Dr. McEldowney generated after performing a physical examination and medical records review. Dr. McEldowney diagnosed a "lumbar sprain/strain" and opined the work-related events of March 8, 2017, caused the lumbar sprain/strain. He assessed a 7% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"). Dr. McEldowney further opined Harper had not yet reached maximum medical improvement ("MMI"), as she was in physical therapy and a candidate for a trial of injections.

On March 2, 2018, Harper filed a motion requesting the ALJ extend her rebuttal time through March 17, 2018. By order dated March 12, 2018, Harper's motion was granted.

The April 11, 2018, Benefit Review Conference ("BRC") Order and Memorandum lists the following contested issues: work-related injury/causation, permanent income benefits per KRS 342.730, duration of TTD benefits, and proper use of the AMA Guides.

On April 20, 2018, Harper filed Dr. McEldowney's April 20, 2018, supplemental report in which he opined Harper reached MMI in December 2017 when her physical therapy was finished. Although he had previously assessed a 7% impairment rating, in this report, Dr. McEldowney assessed a 6% impairment rating pursuant to the AMA Guides.

On April 23, 2018, Hearthstone filed an "Objection to Plaintiff's Notice of Filing Records From Elkton Clinic, Ortho Plus, and Dr. McEldowney."

At the April 23, 2018, Hearing, the ALJ stated that he would allow into evidence the supplemental report of Dr. McEldowney over Hearthstone's objection and leave proof time open until May 23, 2018, to allow Hearthstone to respond to the report.

In the June 8, 2018, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

> A. INJURY UNDER THE ACT / CAUSATION
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> The parties technically preserved injury under the Act and causation as an issue in this claim. However, it appears that all parties at this point agree the Plaintiff sustained a lumbar strain/sprain. In fact, both evaluating physicians have diagnosed the Plaintiff with a work-related lumbar sprain/strain. The dispute in this claim is whether the lumbar stain/sprain is permanent and resulted in impairment, which will be handled in the extent and duration section. Accordingly, the ALJ finds that the Plaintiff sustained a work-related lumbar sprain/strain.
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> B. TEMPORARY TOTAL DISABILITY BENEFITS
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> KRS 342.0011(11)(a) defines "temporary total disability" 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." The Court has adopted a two-prong test to determine whether an employee is entitled

to temporary total disability benefits. TTD benefits are payable only where both prongs are satisfied, i.e. where (1) the employee has not reached maximum medical improvement, and (2) the employee has not reached a level of improvement that would permit a return "to his job, or some other employment, of which he is capable, which is available in the local labor market." *W.L. Harper Constr. Co., Inc. v. Baker*, 858 S.W.2d 202 (Ky. App. 1993).

The Plaintiff received temporary total disability benefits from the time she stopped working on March 14, 2017, through January 29, 2018. During this time, she was either off work or on work restrictions that would not allow her to return to her customary work or other work for which she was capable. However, Dr. McEldowney found the Plaintiff had reached maximum medical improvement at the time she completed physical therapy in December of 2017. The ALJ finds Dr. McEldowney's opinion on MMI most credible and it is adopted. However, it is not clear from the record the exact date in December of 2017 that the Plaintiff completed physical therapy. Ms. Guess indicated in a treatment note that the Plaintiff was still in physical therapy on December 15, 2017. Given the fact that it is the Plaintiff who has the burden of proof as to the entitlement of TTD, the ALJ finds that she was only entitled to TTD through December 15, 2017, the earliest date that Dr. McEldowney could be referencing. Accordingly, there was an overpayment of TTD from December 16, 2017, through January 29, 2018, and the Defendant is entitled to a credit for this overpayment, which was paid at a rate of $295.83 per week. The credit is to be taken from past due benefits only.

C. EXTENT & DURATION / PROPER USE OF THE AMA GUIDES

Both Dr. McEldowney and Dr. O'Brien agree that the correct method to rate the Plaintiff is the DRE method under Table 15-3 of the AMA Guides. The physicians disagree, however, about which category to place the Plaintiff. Dr. McEldowney has opined the Plaintiff should be placed in DRE Lumbar Category II with a 6% whole person impairment. Conversely, Dr. O'Brien places the Plaintiff in DRE Lumbar Category I with a 0% whole person impairment.

The treatment records in this claim clearly document the Plaintiff's consistent report of radicular pain down her right lower extremity. In fact, the Plaintiff's treating nurse practitioner, who treated the Plaintiff on at least 18 occasions after the injury, consistently diagnosed the Plaintiff with lumbar radiculopathy. The ALJ finds that the medical records appeared to support a finding that the Plaintiff has "non-verifiable radicular complaints, defined as complaints of radicular pain without objective findings." As such, the ALJ find Dr. McEldowney's opinion to be most persuasive, and finds that the Plaintiff has a 6% whole person impairment due to her work injury.

Concerning the multipliers, KRS 342.730(1)(c)1 provides, "[i]f, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection . . . ." A worker's post-injury physical capacity and ability to perform the same type of work as at the time of injury are matters of fact to be determined by the ALJ. *Ford Motor Company v. Forman*, 142 S.W.3d 141, 144 (Ky. 2004). The Kentucky Supreme Court has construed, "the type of work that the employee performed at the time of injury" to mean the actual jobs that the individual performed. *Id*. at 145. The phrase also has been construed to refer broadly to the various jobs or tasks that the worker performed for the employer at the time of injury rather than to refer narrowly to the job or task being performed when the injury occurred. *Miller v. Square D. Company*, 254 S.W.3d 810, 814 (Ky. 2008).

The Plaintiff testified that she continues to have low back pain that radiates into her right hip. The Plaintiff's current reported symptoms appear to be credible, especially given the fact that she has acknowledged that many of her symptoms have now resolved. The Plaintiff's job duties for the Defendant involved being on her feet for significant amount of time, as well as bending, twisting, and lifting. The Plaintiff testified she could not return to her former job due to her low back condition. Dr. McEldowney has opined the Plaintiff lacks the physical capacity to return to her prior job. The ALJ finds the

> Plaintiff's testimony and Dr. McEldowney's opinion to be credible, and specifically finds the Plaintiff lacks the physical capacity to return to the job she performed at the time of her injury. The Plaintiff worked for the Defendant as a CNA for approximately 10 years prior to her work injury. The ALJ believe that, given the Plaintiff's significant experience, she would return to that occupation if she could. Instead, she is only applying for jobs that are more sedentary in nature, and for which she has little or no experience. Lastly, it is uncontroverted that the Plaintiff now earns less than she earned at the time of her work injury. As such, she is entitled to have her benefits enhanced by the three multiplier, which calculates as follows:
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> $295.81 x 6% x .85 (grid) x 3 (multiplier) = $45.26 per week.

In her petition for reconsideration, Harper asserted the ALJ erred by utilizing a 6% impairment rating instead of a 7% impairment rating when calculating his PPD benefits. In Hearthstone's petition for reconsideration, it asserted the same argument it now asserts on appeal. Hearthstone also asserted the ALJ erred by selecting December 15, 2017, as the date Harper reached MMI. Finally, Hearthstone requested the ALJ to reconsider his application of the three multiplier.

In the July 10, 2018, Order, the ALJ denied both petitions for reconsideration and set forth the following additional findings:

ANALYSIS

> Concerning the Plaintiff's Petition, the Plaintiff argues that the 6% whole person impairment assessed by Dr. McEldowney in his second IME report was a typographical error, and that the impairment rating should have been 7% as stated in the initial IME report. However, it would involve too much speculation for this ALJ to find that Dr. McEldowney actually meant to say 7% in his second IME report, especially when considering that Dr. McEldowney re-evaluated the Plaintiff a second time, she had completed physical therapy after the first evaluation, and there had been a significant passage of

time between the evaluations. As such, the Plaintiff's Petition is denied.

Concerning the Defendant's Petition, the Defendant first requests that the ALJ reconsider his allowance of extra proof time so that the Plaintiff could file the second IME report from Dr. McEldowney. The ALJ would note that, at the time of the Plaintiff's first IME, Dr. McEldowney did not believe the Plaintiff had reached MMI. Had the Plaintiff not obtained a second IME, and had the second IME not been allowed, the Defendant's 0% impairment rating from Dr. O'Brien would have arguably gone unrebutted depending on that date that the ALJ ultimately determined MMI was reached. Given these circumstances, the ALJ finds that there was good cause shown to allow an extension of proof so that the Plaintiff could file his second IME report, and in fairness the ALJ allowed the second IME report from Dr. McEldowney into evidence. While the second IME report provided no material surprises, the ALJ allowed the Defendant additional proof time to file a supplemental report that addressed the new IME report from Dr. McEldowney, which they did on May 3, 2018. The ALJ is convinced that this was a fair procedure for all involved. The Plaintiff's oral motion to have the second IME report considered into evidence was properly granted because there was good cause shown. As such, the Defendant's request that Dr. McEldowney's second IME report be stricken is again denied.

The Defendant next argues the ALJ's placement on the Plaintiff at MMI on December 15, 2017, was in error and without support. The ALJ finds that there was more than ample evidence to support this date. The filed physical therapy records show that the Plaintiff was attending physical therapy in September of 2017. Further, the treatment records from Elkton Clinic show that the Plaintiff was in physical therapy at the time of her office visit on November 1, 2017, and December 15, 2017. Lastly, Dr. McEldowney reasonably found the Plaintiff had reached maximum medical improvement at the time she completed physical therapy in December of 2017. In consideration of these records in conjunction, and in consideration of the fact that the Plaintiff had the burden of proof on TTD, the ALJ finds that MMI was reached on December 15, 2017 – the earliest date that Dr.

> McEldowney could have been referencing. The ALJ would note that, in contrast, Dr. O'Brien placed the Plaintiff at MMI on April 1, 2017 – just a few weeks after the work-injury, and long before she had even started to attend what would be an extended period of physical therapy. Dr. McEldowney's opinion as to MMI is most reasonable and supportable under these circumstances.
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> Lastly, the Defendant argues that the ALJ's award of the three multiplier was erroneous. Again, the ALJ has relied on the opinion of Dr. McEldowney and the Plaintiff's testimony in reaching this conclusion, both of which independently constitute substantial evidence.

On appeal, Hearthstone asserts the ALJ erred by admitting Dr. McEldowney's supplemental report which Harper filed in the record after the BRC, as Harper failed to file a written motion to submit additional proof pursuant to 803 KAR 25:010, Section 13(13). Hearthstone requests the Board to vacate the June 8, 2018, Opinion, Order, and Award with instructions to strike Dr. McEldowney's supplemental report and rely only upon the evidence submitted at the time of the BRC. We affirm.

Long accepted is the premise the ALJ, as fact-finder, has the authority to control the taking and presentation of proof, and it is not unreasonable for an ALJ to either direct additional proof to be presented or prohibit evidence in order to maintain a reasonable element of due process. *See* Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Scearce & Scearce v. Three Point Coal Co., 134 S.W.2d 228 (Ky. 1939). Moreover, one of the fundamental purposes of the Act is to facilitate the efficient resolution of claims, and the ALJ is charged with the duty to determine all disputes in an efficient manner. Scearce & Scearce v. Three Point Coal Co. at 231.

That said, the ALJ's power to control a party's presentation of proof is not without limits. In discharging rulings as both gatekeeper of the record and fact-finder, an ALJ may not act in an arbitrary or unreasonable manner such as to indicate an abuse of discretion. Yocum v. Butcher at 844. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances." *See* Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 191 S.W.2d 214 (Ky. 1945).

803 KAR 25:010, Section 13 (13) states as follows: "Upon motion with good cause shown, the administrative law judge may order that additional discovery or proof be taken between the benefit review conference and the date of the hearing and may limit the number of witnesses to be presented at the hearing. The fundamental question that must be resolved in assessing whether the ALJ's admission of Dr. McEldowney's supplemental report is "arbitrary or capricious" and, consequently, an abuse of discretion is whether the legislature required a written motion showing good cause in 803 KAR 25:010, Section 13 (13), before an ALJ can admit additional proof between the BRC and hearing.

In its appeal brief, Hearthstone asserts the Court of Appeals, in Roach v. Owensboro Health Regional Hospital, 518 S.W.3d 786 (Ky. 2017), held that the entirety of 803 KAR 25:010, Section 13, is "compulsory in nature." Consequently, as asserted by Hearthstone, the ALJ does not have the discretion to extend proof time beyond the BRC without a written motion establishing good cause. However, this Board finds no language in Roach supporting the conclusion that the specific

subsection of Section 13 implicated in this appeal, Section 13 (13), requires a written motion.

In Roach, the claimant introduced certain unpaid medical bills for the first time during re-direct at the final hearing, despite not having listed unpaid medical bills as a contested issue at the BRC or bringing these bills to the BRC. The Court of Appeals opined Roach was not able to ignore the "mandatory components" of 803 KAR 25:010, Section 13, pointing to the legislature's use of the word "shall" in the applicable subsections:

> Subsection (9) of that regulation provides the plaintiff/employee "***shall*** bring to the BRC copies of known unpaid medical bills not previously provided and documentation of out-of-pocket expenses[.]" 803 KAR 25:010 § 13(9)(a) (emphasis added). This regulation is framed using the word shall. Concisely stated, "[s]hall means shall." *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 296 (Ky. 2010). It is a word of command not subject to disregard. *Id.* Despite the regulation's compulsory nature, Roach did not identify any of the bills at issue as exhibits or bring copies of them to the BRC. She simply made no mention of the bills at all.
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> The BRC's purpose to expedite the processing of workers' compensation claims, to avoid the need for a formal hearing by resolving controversies and, if a hearing is unavoidable, to narrow and define the contested issues. 803 KAR 25:010 § 13(1), (11), (12). Roach thwarted these purposes by utterly failing to comply with the regulation's mandates.
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> These are not the only subsections with which Roach chose not to comply. 803 KAR 25:010 § 13 also provides:
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> > (11) If at the conclusion of the BRC the parties have not reached agreement on all the issues, the administrative law judge ***shall***:

> (a) Prepare a final BRC memorandum and order including stipulations and identification of all issues, which shall be signed by all parties or if represented, their counsel, and the administrative law judge; and
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> (b) Schedule a final hearing.
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> (12) Only contested issues ***shall*** be the subject of further proceedings.

> *Id.* (Emphasis added). "At the hearing, the parties shall present proof concerning ***contested*** issues." 803 KAR 25:010 § 19(1) (emphasis added). Roach did not identify in the BRC order "unpaid or contested medical expenses" as a contested issue to be resolved by the ALJ at the formal hearing, but nonetheless raised and presented proof of the disputed medical bills at the hearing. We agree with the Board that Roach was not at liberty to evade the regulation's mandatory components.

Id. at 790-791. (emphasis in original).

In Roach, the Court of Appeals determined the ALJ committed an abuse of discretion by admitting the unpaid medical bills into evidence, as the relevant subsections of Section 13 Roach violated were undoubtedly mandatory in nature.

In 803 KAR 25:010, Section 13 (13), the legislature failed to specify the motion showing good cause should be a written motion. "The seminal duty of a court in construing a statute is to effectuate the intent of the legislature." Commonwealth v. Plowman, 86 S.W.3d 47, 49 (Ky. 2002) (*citing* Commonwealth v. Harrelson, 14 S.W.3d 541 (Ky. 2000)). In doing so, statutes "must be read as a whole and in context with other parts of the law." Lewis v. Jackson Energy Co–Op Corp., 189 S.W.3d 87, 92 (Ky. 2005). If a statute is clear and unambiguous and expresses the legislature's intent, the statute must be applied as written. Griffin v. City of Bowling Green, 458

S.W.2d 456, 457 (Ky. 1970). Therefore, according to the principles of statutory construction, it appears the legislature does not require a *written* motion showing good cause before an ALJ can extend proof time beyond the BRC pursuant to 803 KAR 25:010, Section 13(13), and we reject Hearthstone's assertion that "the ability to allow proof between the BRC and the Hearing is not discretionary with the ALJ" without one.

Hearthstone further asserts the Court of Appeals, in Skinner v. Hale Contr., Inc. 2005-SC-0513-WC, unpublished, and Bell v. GE, 2006-CA-001058-WC, unpublished, held that, without a motion establishing good cause, an ALJ cannot allow additional proof beyond the BRC. However, these cases can be distinguished.

In Skinner v. Hale, the claimant not only failed to assert his right to file proof beyond the BRC when the BRC order was rendered, but also when the hearing order was rendered. In Bell v. GE, the claimant first presented the medical report at issue at the BRC, and the ALJ struck the report. The Court of Appeals in Bell noted the medical report "was the only evidence submitted in support of [Bell's] repetitive trauma injury claim." Bell at 4. In the case *sub judice*, Harper filed Dr. McEldowney's supplemental report three days before April 23, 2018, hearing and entry of the hearing order. Also, the supplemental report of Dr. McEldowney certainly does not constitute the *only* medical proof submitted by Harper in support of her claim.

Harper was not required to file a written motion requesting the ALJ for an extension of proof time beyond the BRC, the ALJ was well within his discretion to admit Dr. McEldowney's supplemental report into evidence. It is clear the ALJ determined Harper established good cause before admitting Dr. McEldowney's

supplemental report into evidence, and it is well within his discretionary powers to do so. There can be no prejudice to Hearthstone here, as the ALJ allowed Hearthstone four weeks to file responsible proof. Hearthstone's failure to do so does not diminish the ALJ's discretionary ability to admit Dr. McEldowney's supplemental report and ultimately rely on it. Therefore, we affirm.

The June 8, 2018, Opinion, Order, and Award and the July 10, 2018, Order are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION: **METHOD**

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