Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 20, 2022

CLAIM NO. 201958379

LEONARD MATTINGLY PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

NSU CORP.
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Leonard Mattingly ("Mattingly") seeks review of the December 20, 2021, Opinion and Order of Hon. Grant S. Roark, Administrative Law Judge ("ALJ") dismissing his claim for income and medical benefits against NSU Corp. ("NSU"). In accordance with KRS 342.165(2), the ALJ found Mattingly's willful representations on his application barred his claim for an alleged September 17,

2019, work-related injury. Mattingly also appeals from the January 18, 2022, Order overruling his Petition for Reconsideration.

On appeal, Mattingly argues the ALJ overlooked or misconstrued controlling statutes and precedent in finding NSU satisfied all of the elements of KRS 342.165(2).

BACKGROUND

Mattingly's Form 101, filed June 4, 2021, alleges a September 17, 2019, low back "lumbar and lumbo-sacral" injury occurred while he was grinding metal parts in a bent position causing a strain and injury to his back. On July 14, 2021, NSU filed a Motion to Bifurcate asserting there is a threshold issue regarding the applicability of KRS 342.165(2) because Mattingly falsified his pre-employment and pre-placement job application. On July 30, 2021, the ALJ sustained the motion and bifurcated the claim to first address the applicability of KRS 342.165(2).

The undated Benefit Review Conference Order & Memorandum ("BRC Order") reflects there was a dispute regarding the alleged injury on September 17, 2019, and the contested issues were average weekly wage and "alleged false employment application defense." Under "Other Matters," the BRC Order reflects the hearing would only relate to the bifurcated issue.

Mattingly testified at a July 29, 2021, deposition. At the time of the deposition, Mattingly was two days shy of turning 57 years old. He was hired by NSU on November 5, 2018. Mattingly has an 11th grade education. He testified he was injured on Thursday, September 17, 2019, and his last day of work was Monday, September 23, 2019. Mattingly's job at NSU entailed running an equalizer

and performing spot welding and grinding using a hand grinder. The majority of his workday was spent grinding on the mufflers. He provided a description of that task.

> A: Well, it's an equalizer machinery. It cuts both ends of the pipe off. And I've got to change the blades. And they get dull if I don't it leaves a great big burr around it. And make sure the – make sure the installation is stuffed in and do a spot weld on it.
>
> Q: Okay. Tell me a little bit about the grinding. Now keep in mind, I haven't been there to watch you do it. So you kind of got to give me a word picture here to work with.
>
> A: Well, you go got to gra- to grab them, check both ends, and if it's got a burr on it, you got to take the grinder with one hand and stay bent over and then roll it and grind it down where it's smooth. Both ends.
>
> Q: Okay.
>
> A: And you twist and turn.
>
> Q: And you hold that grinder by hand?
>
> A: Yes, one hand.
>
> Q: Okay.
>
> A: It's a two-handed grinder.
>
> Q: All right. Explain that to me.
>
> A: Well, it's got a handle for two hands on it. We only use one because I got to use my left hand to – to roll the – the muffler.

Mattingly testified he did not rotate to another type of work and performed the same job eight to ten hours a day. He estimated the grinder weighing approximately twelve pounds was the heaviest item he lifted at work. He denied experiencing another serious injury while at NSU. He quit working at NSU because

his "back was killing [him]." He worked a full day on his last day of work. He did not inform NSU he would not be returning to work.

Prior to working for NSU, Mattingly worked for Fuel Total System Corp ("FTSC") from 2010 to 2018. He quit working for FTSC because he believed he was treated unfairly. While with FTSC, he may have twisted his knee. He also hurt his thumb at work but did not report that injury. From 2005 to 2010, Mattingly worked at Ames True Temper Wooden Handles ("Ames"). His only work injury at Ames was a smashed finger which he did not report. Prior to working for Ames, Mattingly worked briefly for Canton Cooperage where his only work injury was to his knee.

Concerning injuries occurring prior to the injury in question, Mattingly testified as follows:

> Q: Okay. Do you think you would recall prior injuries, if you had them?
>
> A: Well, I guess, I think so. But, you know, I been – I been seeing the chiropractor for a long time. So, you know, I'm always getting a sore back or something. Ain't nothing major.
>
> Q: Your low back?
>
> A: Yes.
>
> Q: Okay. When did you first start seeing someone for your low back?
>
> A: In '91.
>
> Q: Okay. Did that low back pain then start from an injury or what caused that pain in '91?
>
> A: I picked up a big tree and tried to move it out on the road.

Q: Okay. And who did you go see for your back?

A: Dr. Palladino from Lebanon.

Q: Can you spell that name for me?

A: Palladino? Your guess would be as good as mine.

…

Q: Okay. Dr. Palladino was a chiropractor?

A: Yes. …

Q: Okay. Do you know the name of his group, his practice group?

A: No.

Q: Did you see any other doctor or doctors for your low back when you first heard [sic] it back in '91?

A: He was the only one.

Q: Okay. Did he refer you out for any tests, any CAT scan –

A: No, he didn't.

Q: -- or MRI, anything like that?

A: No. When I first seen him, when I walked out of the building, I was fine.

Q: After one visit?

A: Yes. Well, I mean, I come back a time or two more probably. But that was the worst.

Q: Okay. And then you were back 100 percent good to go?

A: I've – I've always worked jobs with no work restraints, you know.

Q: Well, I'm being a little more specific. You had two or three visits with Palladino –

A: Yes.

Q: -- you said you were feeling good so –

A: Yeah.

Q: -- that's my question.

A: I was roofing then, right after that.

Q: Okay.

A: But then –

Q: Well, I'm asking –

A: Yes.

Q: -- about your back. You had a few visits with him –

A: Yes.

Q: -- and you said – what I understood you to say that after those few visits, you were good to go with your back?

A: Right.

Q: 100 percent back to normal?

A: Yes.

Q: Okay. Did you have any treatment with any chiropractor or doctors after those few visits in '91?

A: I used to go see the chiropractor in Campbellsville, Dr. Grisham and Dr. Tank.

Q: What was the second one?

A: Dr. Tank.

Q: Paint?

A: Tank, T-A-N-K.

Q: T-A-N-K.

A: Tank.

Q: Okay. Thank you. And can you spell Grisham for me?

A: G-H-R-I-S-O-M or I-M.

Q: Okay. And I'm sorry, where were they located?

A: Campbellsville, Taylor County.

Q: Were they chiropractors?

A: Yes.

Q: Okay. And about when did you treat with them?

A: Probably in '95, '96. Somewhere in there.

Q: Okay. And how long did you treat with them for your back?

A: For a couple of years probably.

Mattingly was unable to remember if he underwent medical treatment during the 10-year period from 1995 to 2005 when he lived in Casey County, but believed he may have received treatment once or twice during that period. He subsequently returned to Dr. Rod Coxon, a chiropractor in Lebanon, for treatment. Mattingly has treated with Dr. Coxon for approximately ten years. He provided the following estimation of when he began receiving regular treatment from Dr. Coxon:

Q: All right. And you think you started treating with him around 2010, 2011?

A: Probably, yeah.

Q: Okay. So you had some treatment back in the early to mid-90s. You don't recall any treatment from about '95 to 2010? About 15 –

A: Maybe I've been a time or two. I mean, that's it. I couldn't tell you for sure.

Q: Okay. When you treated with Dr. Palladino back in the early '90s, did you miss any work due to your back?

A: No. Well, let's see. Hold on a minute. Maybe – I don't know it's been a long time ago. I probably was maybe off a week.

Q: Okay.

A: I used to log and stuff.

Q: Okay. And the doctors in Campbellsville, Grisham and Tank, did they take you off work at any point in time for your back?

A: Not that I remember.

Q: I'm sorry?

A: Not that I remember.

Q: And then how about Dr. Coxon? You started with him about ten years ago. You've [sic] been off work any for your back while treating with him?

A: I think, I was off for about – for a week or two a couple of different times.

Q: Have you ever had any diagnostic test done on your back?

A: No.

Q: CAT scan, MRI, anything like that?

A: No.

Q: Okay. And Dr. Coxon is a chiropractor?

A: Yes.

Mattingly testified that prior to June 17, 2018, he had not seen a physician other than a chiropractor for his back problems. However, approximately twenty years ago he was scheduled to undergo an MRI but refused because of the cost.

Mattingly explained he experienced pain going into his leg when he was hurt in September 2019. He was not sure whether he experienced any other symptoms prior to that time.

His primary care physician has been Dr. Salem George at Lebanon Family Associates. During the time he treated there he saw a nurse practitioner. Mattingly believed he used anti-inflammatories once prior to September 2019, but took no pain medications. He estimated he was treated by a chiropractor two or three times a year. He last saw a chiropractor approximately six months prior to September 2019, when he saw Dr. Coxon. Aside from lifting a tree in the 1990s, he denied sustaining any other back injuries. Although he has been seen by a doctor and multiple nurse practitioners, his visits were not related to back problems. Mattingly testified as follows:

> Q: Okay. And you treated with about three or four different chiropractors, and you said four or five different nurse practitioners?
>
> A: Yes.
>
> Q: And that's it for your prior low back?
>
> A: Wasn't all nurse prac – practitioners. That's medical, I mean, not the working on my back, no. No, they don't do nothing for my back.
>
> Q: Okay. Well, let's go back a little bit. I think, I had asked you about whether or not you had treated with your family doctor for your low back and you mentioned Dr. George?
>
> A: Yes. But, I believe, you asked my family doctor and I told you that's who it was, but I've been through three of four different nurse practitioners. But I don't go to the doctor for it. I go to the chiropractic [sic] for my back.
>
> Q: Okay. Well, that's – that was my earlier question.

A: Okay. Well, I heard –

Q: That's all right. And we'll get it clarified. So my question was: Had you ever treated with your primary care doctor for –

A: No, no.

Q: Let me finish my question, if you would. Had you ever treated with your family doctor of that group for any low back pain at any point in time?

A: No.

Q: Okay. So all of your prior back pain, prior to September '19, was with a treatment with the chiropractor?

A: Yes, sir.

Mattingly testified he has not been treated by a hospital, emergency department, urgent care, or any other medical facility for low back problems. Other than anti-inflammatories and possibly muscle relaxers, he has not taken any medication for low back problems.

Mattingly had been hospitalized for two hernia surgeries, a ruptured appendix, and knee surgery. The knee surgery caused him to miss approximately a month of work. This was the only treatment of a work-related injury causing him to miss work. At Ephraim McDowell Hospital, Mattingly underwent surgery on his right hand and treatment of a fractured ankle. He denied being involved in a prior motor vehicle accident. He currently receives Social Security disability benefits for the following:

Q: Okay. Were the benefits awarded based on your application or did you have to appeal it?

A: No, I didn't have to appeal.

Q: And that was for your low back?

A: Low back. I have vertigo, high blood pressure, several differ [sic] things.

Q: What else besides those three? Vertigo, high blood pressure and low back. Anything else?

A: Low back. I got trouble with my knee too.

Q: Which knee?

A: Right knee.

He had not missed any work due to back issues for a couple of years. When he began working at NSU he had no back problems affecting his ability to perform his work duties. Mattingly believed he performed the hardest job in the plant and noted he had received a letter approximately three weeks prior to his deposition requesting he return to work because NSU had not been able to replace him. He missed no work due to back problems during his employment at FTSC and Ames as any back problems were resolved by a chiropractor. Restrictions have never been imposed on his work activities.

When he was interviewed by Dana Logsdon, APRN ("Logsdon") on November 1, 2018, he was not experiencing back problems.[1] He testified he truthfully answered all questions she posed about his condition at that time. He worked ten months without back problems until the September 17, 2019, injury. He denied providing incorrect information on the day he underwent the pre-employment physical examination.

[1] At the request of NSU, Logsdon, an APRN, conducted an interview and performed a pre-employment physical examination of Mattingly on that date.

Following the injury, Mattingly underwent back surgery performed by Dr. Christopher Shields at Norton Hospital. Dr. Shields has released him from his care. The entity providing physical therapy released Mattingly from its care in March 2021.

At the hearing, Mattingly reiterated his previous testimony indicating he was not experiencing back pain when he completed the Patient History and Exam Form.[2] He denied experiencing any previous work-related back injuries. While working at FTSC, he worked in the blow molds tearing the flash off the tag. Many of the workers performing this job experienced back and shoulder injuries. The job entailed "lifting and moving." Although his job at FTSC required two employees to perform the work, many times he performed the work alone. He did not believe he saw a doctor or missed any work during his employment with FTSC due to back problems. Mattingly denied experiencing a back injury from the date he started with NSU until he was injured on September 17, 2019.

Concerning his interview with Logsdon, Mattingly testified, in relevant part:

> Q: Okay. And then, the records also reflect, which Mr. Ashlock referred to earlier, that after you did the job application, you were sent out to a physical, and you went through a medical history questionnaire and other history questions with Dana Logsdon on November 1, 2018. Do you recall that?
>
> A: Yes.
>
> …

[2] This multi-page document signed by Mattingly was filed along with Logsdon's August 8, 2020, letter.

> Q: Okay. And on the patient history and exam form that Ms. Logsdon reviewed with you, there is a question that says, and I quote, do you have any of the following, and one of the areas listed there is back pain, and you indicated, "No." Do you recall that?
>
> A: No.
>
> Q: Okay. If the record shows that, do you have any reason to disagree with it?
>
> A: Well, I mean, I don't remember that day. It's been a while back.
>
> …
>
> Q: Okay. And there is an additional question, and Ms. Logsdon has testified in this case, Mr. Mattingly, that in addition to the questionnaire you completed where you check yes or no, that she also interviewed you and took a history from you in which she's documented on a form. Do you recall that?
>
> A: No.
>
> Q: Okay. If her record indicates she did that, would you have any reason to disagree with that?
>
> A: No.

Mattingly testified he always felt better after receiving an adjustment from a chiropractor and the treatment always permitted him to return to work. Mattingly did not recall the history and nature of the back problems he reported to Dr. Coxon set forth in Dr. Coxon's records.

Regarding his prior chiropractic treatment, Mattingly offered the following:

> Q: Well, let me just ask you this: If you were to describe to the Judge when you would go to the chiropractor what it was for and then how you would feel and react afterwards –

A: Well, I mean, my back gets to hurting. I go to the chiropractor, and it relieves me for a while, but then usually I'll have to go back again. But nothing to keep me working a permanent job. But, I mean, I don't remember being off none for my back, but …

Q: And it looked – I think the last date from 2018 that Mr. Jones referenced was July the 8th, which was I guess some – looks like it was a little over three months prior to the interview at Industrial Choice Health.

A: Yeah.

Q: Let me just ask you this: Do you recall in those three or four months preceding whether you were having any back issues that were giving you any problems at your job?

A: The physical therapy didn't do my back no good. I mean, when I quit going, my back was better.

Q: Okay.

A: It hurt my back more than it helped me.

Q: If you didn't go to the chiropractor for several months prior to going to Industrial Choice, is that indicative that your back wasn't bothering you –

A: Right. If it hurts, I go to the chiropractor, which is not every day.

Q: It doesn't hurt – back then it didn't hurt every day?

A: No.

…

Q: -- did your back hurt every day?

A: No.

Virginia (Ginny) Settles ("Settles"), in Human Resources and Accounting at NSU, testified at a September 21, 2021, deposition. She is involved in hiring, firing, employee complaints, workers' compensation, safety issues,

disciplinary actions, and employee changes to personnel information. NSU's records reflect Mattingly's start date was November 5, 2018. A copy of Mattingly's 72-page file was introduced in the record. A pre-employment physical was performed by Logsdon with Industrial Choice Health Care. After obtaining information from Mattingly and performing a physical examination, Logsdon indicated Mattingly was a candidate in good health and could work without restrictions. Based upon the results of the drug screen and the pre-placement physical examination, Mattingly was offered a job. Settles offered the following concerning the significance of Logsdon's written report:

> Q: And then was her physical determination original assessment on November 1, '18, which did not include the medical history that has been reviewed in Ms. Logsdon's narrative report, was that a substantial factor in NSU making the decision to hire Mr. Mattingly?
>
> A: Yes, it was.

On cross-examination, the following exchange took place:

> Q: So I was looking at the job description okay? The only issue – well, I don't want to get into some medical thing, but we, kind of, have. Can you point out to me on this job description what issue someone might have for this production associate if they had some back pain?
>
> …
>
> A: I don't see anything.
>
> Q: So there's nothing that back pain would have in the job that he was in, yet you say that you wouldn't have hired him knowing he had back pain?
>
> …
>
> A: Yes.

> Q: If you don't think back pain has anything really to do with the job description, why are you saying that you wouldn't have hired Mr. Mattingly if he had some back pain?
>
> A: I don't know.
>
> Q: All right. Now that we know what his job description was there the whole time, and it appears from that – correct me if I'm wrong, that he never had to lift over 10 pounds. That's what it looks like to me; is that correct?
>
> A: That's correct.
>
> …
>
> Q: Okay. Hypothetical. If Ms. Logsdon conducted a physical examination that had Mr. Mattingly lifting 10 pounds from, it looks like, under the – sorry, I'm kind of, toddling back and forth – if he was able to lift 10 pounds unassisted – let me go back. I don't know if the job description required it above employment. I think it just says he would be required to lift 10 pounds occasionally and probably carry that 10 pounds occasionally. If he were able to physically do that in a pre-employment physical, that would qualify him for the position?
>
> …
>
> A: Yes, it would.

Settles did not contact FTSC and had no information revealing Mattingly had missed work there due to a medical condition. Settles acknowledged the question, "Have you had a history of back pain?" does not encompass whether Mattingly ever experienced back pain or had chronic back pain. Regarding the significance of Logsdon's recommendation and her statements in the August 19, 2020, letter, Settles offered the following testimony:

> Q: And in this case, Ms. Logsdon made a recommendation for duty that you hire Mr. Mattingly, but then later reviewed and learned of his full and

> complete medical history, which he didn't tell her about, and put in her report she would not have recommended him for hire had she known all that?
>
> A: Correct.
>
> Q: And had she known all that and recommended him for hire originally – or not for hire originally. Had she'd [sic] gotten the full history and known about all the stuff she said that would have led her not to make a recommendation, you would have relied on it, right, if she didn't recommend?
>
> A: That's correct.
>
> Q: Okay. In this case you relied on her recommendation that was based on an incomplete medical history that Mr. Mattingly gave her, correct?
>
> A: Correct.
>
> Q: And that was a substantial factor in your making a decision to make that hire, correct?
>
> A: Correct.

NSU filed the records of Coxon Chiropractic spanning the period from May 13, 2008, through October 2, 2019, the records of Internal Medicine of Lebanon spanning the period from December 26, 2012, through May 28, 2019, and Dr. Russell Travis' December 7, 2020, Independent Medical Evaluation report. It also introduced Logsdon's August 19, 2020, letter, the November 1, 2018, Patient History and Exam Form she completed based on her interview with Mattingly, signed by Mattingly, and her Physical Determination form.

After summarizing the evidence, the ALJ provided the following findings of fact and conclusions of law which are set forth *verbatim*:

> As indicated above, this matter has been bifurcated to first determine whether plaintiff's claim is barred by KRS 342.165(2) for giving false information on his

employment application. The defendant argues plaintiff failed to disclose his long history of back pain and treatment and denied any history of such in his health questionnaire and in his interview with APRN Logsdon, who performed the pre-employment physical. It further argues it would not have hired plaintiff had he disclosed his prior back problems and that plaintiff's lower back pain after September 17, 2019 is causally related to his undisclosed prior history of back problems.

For his part, plaintiff argues the questions asked on the questionnaire were vague and did not specify whether he had ever had back pain or whether he was having back pain at the time of this exam. He also argues that APRN Logsdon is a third party hired by the employer to conduct the examination and she cannot be considered the employer and, as such, her questionnaire and examination are outside the scope of KRS 342.165(2). Finally, plaintiff maintains the defendant would still have hired plaintiff even if the full extent of his medical history was known.

The statute at issue, KRS 342.165(2), provides 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 physical condition or medical history, if all of the following factors are present:
>
> (a) The employee has knowingly and willfully made a false representation as to his 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 the present case, it must first be determined whether plaintiff made a knowing and wilfull misrepresentation in writing on his employment application. KRS 342.165(2)(a). As part of this analysis, it is necessary to address plaintiff's argument that the questions he answered as part of his preemployment physical were too vague and that he did not, therefore, knowingly misrepresent his prior low back condition. He maintains he was not having any back pain at the time of his application and examination and, as such, he truthfully denied back pain at that time. However, APRN Logsdon's narrative report indicates she was the one who asked plaintiff the questions on the form and wrote down the answers, after which he signed the questionnaire as completed. Logsdon reported that in completing the documentation, she specifically asked plaintiff if he had, or had ever had, back pain, and plaintiff denied ever having had back pain. While this question was not explicitly written on the questionnaire, it did include questions as to any current back pain and any history of low back injury or any medical conditions which the applicant may have from which the applicant recovered. Certainly, a forthright answer to these questions would have revealed the prior history of chronic back pain and treatment, the last being approximately 60 days prior to the application. Dr. Coxon's records from August 29, 2018, document plaintiff again presented for lower back pain which was an eight out of 10 on the pain scale, in which he reported was getting worse, consistent with Dr. Coxon's treatment records prior to that date. Again, an honest and forthright response to the medical questionnaire questions would have revealed this prior treatment. Likewise, the Administrative Law Judge concludes plaintiff's denial of any prior back problems were treatment represented a knowing and willful misrepresentation of his medical history.

Plaintiff also argues the medical questionnaire cannot be used to support the KRS 342.165(2) defense because APRN Logsdon was a third party provider hired by the defendant employer and, as such, any statements to her as part of her examination do not constitute statements made to the company as part of the employment application process. However, Kentucky law does not support this argument. Because it is determined plaintiff

provided false information on the medical history of his preemployment physical examination, that is considered part of the employment application under Kentucky law. *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 examination, 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 that she verbally told the examining physicians about some of prior problems but there was no such disclosure in written questionnaire. The Administrative Law Judge dismissed the claim on the basis of the claimant's false representations, and the decision was 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. Accordingly, plaintiff's misrepresentations to APRN Logsdon constitute false statements as part of his employment application.

The next part of the analysis under subsection (b) is whether the employer relied on plaintiff's misrepresentations on his employment application in hiring plaintiff. Although plaintiff speculates otherwise, the only real evidence on this issue is the sworn testimony of Ginny Settles, HR Director for the defendant, who personally conducted plaintiff's job interview. She testified she relied on APRN Logsdon's fitness for duty determination as a "substantial factor" in NSU's decision to hire plaintiff. However, in her August 19, 2020, report, APRN Logsdon unequivocally stated that had she known of the true nature and extent of plaintiff's pre-existing back problems, she would not have recommended him for hire by NSU. The ALJ finds no other contrary evidence in the record to reject such testimony and, as such, it is determined the defendant relied on plaintiff's false representations of his medical

history in hiring him for the position in which he was allegedly injured.

The last element of the false employment application defense to be considered is whether there is a causal link between the falsely represented condition and the alleged work injury. The ALJ first notes that the Kentucky Supreme Court reasoned in an unpublished decision that medical evidence establishing a causal connection between the false representation and the subsequent injury is helpful but it is not per se necessary for purposes of KRS 5342.165(2). In the unpublished decision of *Daniels v. B.R & D. Enterprises, Inc.*, No. 2005-SC-0652-WC, 2006 WL 734407 (Ky, 2006), the Court pointed out that it is significant when the false representation and the subsequent injury both involve the same portion of the body. This reasoning, although not binding, is persuasive. Regardless, in this case Dr. Travis' opinion provides medical support for a causal nexus. He stated, "Yes, there is causal connection between the false representation made during the pre-employment physical examination and the alleged low back injury of 9/17/19." He explained, "Given the nature and extent of the patient's pre-existing chronic low back condition and treatment after 9/17/19 (the date of the alleged work injury), it simply represents a continuation of his chronic low back problem…" Dr. Travis noted, "On 8/20/2019, Mr. Mattingly returned to Dr. Coxon complaining of low back pain as 8/10. This is less than two months before the history and physical form of 11/1/2018 when Mr. Mattingly denied any previous history of low back pain."

Dr. Travis' opinions as to a causal nexus between the employment application misrepresentations and the alleged work injury are not refuted and are otherwise credible. Accordingly, the ALJ also finds a causal nexus exists between the employment application misrepresentations and the alleged work injury.

Because all the elements of KRS 342.165(2) have been satisfied, plaintiff's claim is barred due to his willful misrepresentations on his employment application with the defendant. Accordingly, his claim is dismissed.

Mattingly filed a Petition for Reconsideration pointing out he was not placed on work restrictions when he was hired and had never had previous back surgery. He also observed he had performed jobs requiring heavy manual labor for twenty years without interruption prior to his job at NSU. Mattingly noted his records reflect he had not undergone an MRI scan or used narcotic pain medication for admitted chronic low back issues which waxed and waned. Rather, the records reveal he sought chiropractic adjustments to alleviate his back problem which allowed him to work. Mattingly requested the ALJ reconsider the dismissal of his claim and find NSU had "failed to satisfy its burden to prove an affirmative defense for a violation of KRS 342.165(2)." Finding Mattingly had not referenced any patent errors to justify the remedy he sought, the ALJ overruled his Petition for Reconsideration.

On appeal, Mattingly contends NSU did not satisfy all of the elements of KRS 342.165(2). He maintains that when he was hired by NSU he was not on any physical restrictions, had not undergone previous back surgery, and had worked heavy labor jobs for twenty years. Mattingly observes his medical records do not reflect he has undergone an MRI scan or received narcotic pain medication for chronic low back issues. He emphasizes chiropractic adjustments alleviated any back problems allowing him to work.

Mattingly insists the facts in Gutermuth v. Excel, 43 S.W.3d 270 (Ky. 2001) can be distinguished from the case *sub judice* because Gutermuth had undisclosed documented medical treatment including multiple surgeries. He also argues "the use of an independent contractor, Logsdon, to conduct the physical does

not satisfy the statute in both the way the testing was performed and the information that was requested." He notes the statute requires the representation be in writing; however, in this case, the questionnaire was completed by an independent contractor whom NSU did not call as a witness. Mattingly maintains he does not remember the portions of the forms he filled out. Based on a comparison of his writing with Logsdon's writing, he posits she apparently filled out the forms. He asserts there is no question Logsdon filled out the "Current Medical Conditions" and "Past Medical Conditions" forms since she is the one who wrote "denies." In Mattingly's view, this is important because without Logsdon's testimony one cannot determine the way she phrased the questions to him about his medical condition. He also asserts there is a fatal flaw in the vagueness and lack of specificity in the questionnaire. Mattingly asserts the question, "Do you have the following: Back pain" is a vague question as there is no reference as to when he experienced the back pain. Since Logsdon did not testify, Mattingly maintains his testimony is unrebutted. Mattingly also emphasizes his medical records reveal he received no chiropractic treatment between August 29, 2018, and April 29, 2019. He posits that if he had active back problems, he would have gone to the chiropractor at some point during that period.

Mattingly concludes with the following:

> NSU admitted it would not have fired someone for going to the chiropractor. (Settles depo, p. 36) NSU wouldn't fire someone for going to [sic] chiropractor but wouldn't hire someone that went to the chiropractor? That doesn't make sense. Neither does the fact that NSU wouldn't have hired Mr. Mattingly if they knew he had been to the chiropractor just six (6) time [sic], arguably clearly sporadically, in the two (2) years preceding his employment and had been less than two (2) months removed from a laborers job he held down for eight (8)

> years right before working for them. There can be no weight given to any NSU witness testimony to satisfy subpart (b) of KRS 342.165(2).

Mattingly requests the Board reverse the decision and remand the claim with directions to find NSU had not established the elements set forth in KRS 342.165(2).

ANALYSIS

KRS 342.165(2) reads 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 willfully 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.

This statute was analyzed by the Kentucky Supreme Court in Gutermuth v. Excel, supra. The ALJ dismissed the claim after providing findings that Gutermuth had falsely represented her physical condition on a written questionnaire, in hiring her Excel substantially relied upon those misrepresentations, and that her subsequent injury was causally related to the misrepresentations.

The record revealed Excel's hiring procedure required Gutermuth to undergo a pre-employment physical examination. At the time of the examination,

Gutermuth was required to complete a written questionnaire. Gutermuth denied missing work due to a work-related injury, denied having ever received a full or partial disability, and denied being forced to give up a job for health reasons. Although she admitted experiencing joint pains and wrist or hand problems, there is no indication she revealed the full extent of the problems with her arms. The questionnaire contained a note in a different handwriting indicating Gutermuth had carpal tunnel surgery on both wrists a year and a half before and there was no obvious problem. However, Gutermuth developed work-related gradual injuries to her arms and underwent six related surgical procedures. Further, Dr. Tsai restricted her from lifting more than 20 pounds or more than 10 pounds on a frequent basis. Dr. Tsai also instructed her to avoid repetitive use of her hands, overhead work, ladders, and unprotected heights. Gutermuth settled her claim based upon a 17.5% occupational disability.

In answering the relevant questionnaire, Gutermuth denied having recurring back, knee, or shoulder problems despite the fact she had sustained a knee injury in the early 1980s for which a workers' compensation claim was filed. She also had a longstanding history of cervical spine problems since 1993 when an MRI revealed degenerative disc disease throughout much of the cervical spine, at least moderate spinal stenosis, and a herniated cervical disc for which a period of halter cervical traction was prescribed. In 1996, Gutermuth complained of burning pain in her chest, upper back, shoulders, and neck and was told it was due to osteoarthritis and cervical disc disease. Four days before her pre-employment physical, Gutermuth's physician again diagnosed chronic musculoskeletal pain related to both

the repetitive motion injuries and cervical degenerative disc disease. Shortly after her examination, Gutermuth was cleared by an examining physician to work without restrictions and began work as a packer and later became an order picker. Approximately two months later, she injured her neck at work.

When she was deposed, Gutermuth denied having any significant neck problems before the incident at work but admitted to a burning sensation in the back of her head. She did not remember discussing neck surgery with Dr. Tsai in 1993 nor Dr. Tsai placing her on restrictions following the arm surgeries. Gutermuth admitted she did not tell the doctor who performed the pre-employment physical about her prior neck condition or her restrictions.

The hearing revealed Gutermuth underwent surgical fusion at C5-6, had not yet been released to return to work, and continued to suffer from burning pain when she lifted her arms. She admitted she failed to list the arm surgeries in the medical history questionnaire because she did not think the surgeries were relevant and she had informed the examining physician of the carpal tunnel surgery. When confronted with the fact that she had received compensation for previous workers' compensation claims yet listed no serious injury on the questionnaire, Gutermuth explained she did not view the arm and knee injuries as being serious because she had later been able to return to work. She testified she had a slight amount of arthritis in her neck before the work incident but had been told it would not keep her from working.

Excel's general manager testified he was not aware of Gutermuth's prior arm surgeries or of her work restrictions. He indicated Gutermuth's initial

duties as a packer was a physically demanding job and had he known of Gutermuth's restrictions he would not have hired her without a medical clearance to do the work. He also testified he was never told of the herniated cervical disc and did not know Gutermuth had seen a physician for major complaints of neck pain after filing her application but before undergoing the physical examination, and that this information would have affected his decision to hire her.

In dismissing the claim, the ALJ determined Gutermuth had knowingly and willfully made a false representation about her physical condition on the medical history questionnaire, that Excel had relied on the false representation, and Excel's reliance was a substantial factor in the hiring. The ALJ also determined there was a causal connection between the false representation and the injury for which compensation was being claimed. In affirming the ALJ, the Board, and the Kentucky Court of Appeals, the Kentucky Supreme Court held as follows:

> … Despite her protestations, however, it is clear that when completing the questionnaire and undergoing the physical examination she failed to reveal the full extent of the injuries to her arms or to reveal the restrictions imposed by Dr. Tsai. Likewise, she failed to reveal the longstanding history of problems with her neck, back, and shoulders. Those failures are particularly significant because this claim concerns an injury to her neck with complaints of arm pain. The claimant's false representations concealed her true physical condition from the physician who examined her, led the physician to conclude that she could work without restrictions, and defeated the very purpose of the examination. Mr. Beattie made it clear that the claimant's work was physically demanding and that he would not have hired her had he known of her restrictions.
>
> The claimant has argued that the clinical findings and opinions of the university evaluator must be given presumptive weight and that they required a finding that

> her neck condition was aggravated by the jolt she received in the incident at work. This argument misses the mark, however, because KRS 342.165(2)(c) prohibits compensation if there is a causal connection between the false representation and the injury for which compensation is claimed. The ALJ concluded that there was such a causal connection, and nothing in the university evaluator's testimony would tend to indicate that the finding was unreasonable. *See Special Fund v. Francis,* Ky., 708 S.W.2d 641, 643 (1986).
>
> It is clear that the ALJ made all of the findings required by KRS 342.165(2). Although the claimant has pointed to evidence which might have permitted different findings of fact, she has failed to demonstrate that any of the findings which were made was so unreasonable that it must be viewed as erroneous as a matter of law. Likewise, the claimant has failed to demonstrate that the ALJ misapplied KRS 342.165(2) when deciding to dismiss the claim.

Id. at 273-274.

The relevant statute was also addressed in Baptist Hospital East v. Possanza, 298 S.W.3d 459 (Ky. 2009). Possanza had a prior lumbar injury that required surgery on two occasions prior to his work injury. The condition also resulted in significant permanent restrictions. Possanza failed to disclose his prior lumbar injury or the restrictions imposed due to that injury. Possanza lifted a heavy patient and sustained a neck injury. The employer argued it would not have hired Possanza had he revealed his prior injury and restrictions, and he would not have been lifting a heavy patient which exceeded his lifting restrictions and ultimately caused the injury. The Supreme Court noted KRS 342.165(2) provided 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 represented in writing his physical condition or medical history if

three factors were present. Those factors include the employee knowingly and willfully making a false representation as to his/her physical condition or medical history; the employer relying upon the false representation and this reliance was a substantial factor in the hiring; and there is a causal connection between the false representation and the injury for which compensation has been claimed. The Supreme Court explained the application of the three factors as follows:

> We presume that by listing three separate factors and by stating that all must be present, the legislature intended for KRS 342.165(2) to create three distinct requirements. [footnote omitted] If subsection (c) requires only proof that the injury would not have occurred because the worker would not have been hired, an employer will always win simply by showing that it relied on a misrepresentation and would not have hired the worker had it known the truth. KRS 342.165(2)(c) requires "a causal connection between the false representation and the injury for which compensation has been claimed." The hospital states correctly that the claimant failed to disclose his lifting restriction; that he exceeded the restriction by lifting a heavy patient; and that he injured his neck as a consequence of lifting the patient. We do not agree that these facts supported a finding under KRS 342.165(2)(c) because we view whether exceeding the lumbar lifting restriction helped to cause the claimant's neck injury to be a medical question.

Id. at 463.

The Supreme Court found that the case did not involve lumbar weakness or symptoms that contributed to the mechanism of the injury, nor was it a case in which the claimant's lumbar condition increased his susceptibility to the type of harm that occurred. The Supreme Court held there was no medical evidence indicating the prior lumbar surgeries or exceeding a lumbar lifting restriction would cause a neck injury. Thus, KRS 342.165(2) did not serve as a bar to recovery.

In the case *sub judice*, the August 19, 2020, letter of Logsdon and the Patient History and Exam Form, presumably filled out in part by Logsdon and Mattingly and signed by Mattingly, reveal he denied experiencing ongoing back pain and a previous low back condition from which he had recovered. Mattingly responded "no" to the following question: "Do you have any of the following: Back pain?" However, the following questions were answered:

> Have you ever had a car accident, loss of consciousness, heart attack, loss of vision, abnormal heart rhythm, seizure, panic attacks, head injury, stroke, paralysis, back injury, psychiatric disorder?
>
> Current medical conditions – Those that you are currently experiencing and/or receiving treatment for such as diabetes, high blood pressure, migraines:
>
> Denies
>
> Past Medical Conditions – Those that you have had in the past but have recovered from (such as childhood asthma, gestational diabetes):
>
> Denies
>
> Surgeries/Hospitalizations – List type of surgery (such as gallbladder) or condition for which you were hospitalized (such as pneumonia):
>
> Appendectomy 8 yrs ago
> Inguinal hernia repair
>
> When was your last visit to the emergency room? Blank
> For what symptom/condition? Blank
>
> The form dated November 1, 2018, was signed by Mattingly.

The ALJ specifically addressed the lack of specificity in the questionnaire and that Mattingly had been asked about current back pain, a history of a low back injury, or any medical conditions from which he may have recovered.

The ALJ determined that if Mattingly had answered the question in a forthright manner, it would have revealed the prior history of chronic back pain and treatment, the last being approximately sixty days prior to the application. Further, the ALJ concluded Mattingly's denial of any prior back problems and treatment represented a knowing and willful misrepresentation of his medical history. For the following reasons, we believe the ALJ's findings are supported by the record.

We first note Dr. Coxon's records reveal Mattingly was treated for low back complaints ten times in 2008, twenty times in 2012, three times in 2013, sixteen times in 2014, twenty-two times in 2015, nine times in 2016, four times in 2017, and six times in 2018. Moreover, in July 2019, approximately two months prior to his employment, Mattingly was seen on three different occasions by Dr. Coxon. On July 1, 2019, Mattingly reported he was having low back pain "maybe" caused by cutting trees. He estimated his back pain was constant and rated it as 10 on a scale of 0-10. He also indicated there were times when the symptoms worsened. The symptoms were alleviated by chiropractic care. Dr. Coxon noted there was left and right lumbar tightness. Mattingly was again seen on July 9, 2019, due to a recent flare up. Dr. Coxon noted the pain had gradually worsened since July 1, 2019. The pain was frequent. Mattingly was seen on July 24, 2019, due to another flare up. Dr. Coxon again noted the pain was gradually worsening since the prior visit and noted Mattingly was achy, stiff, and the pain was frequent. The pain was rated as a 7 out of 10.[3] Contrary to Mattingly's testimony, Dr. Coxon's records reveal he took

[3] In reviewing Dr. Coxon's records, we gave Mattingly the benefit of the doubt regarding the times he complained of low back pain because some of the notations on certain dates are illegible.

Mattingly off work for periods of time in November 2008, October 2012, March and December 2014, February 2015, and September 2019.

Although the ALJ did not rely upon Dr. Shields' medical records, the October 17, 2019, record attached to Mattingly's Form 101, contains the following history:

> I have been asked to see this patient in neurosurgical consultation by Dana Logsdon, APN.
>
> This 55 y/o male comes to the office today complaining of low back pain. He states that this pain began about 25 years ago, and was worsened by a work injury on 9/17/17 in which he was operating heavy machinery.

Further, in the report under the heading "Medical Decision Making," is the following:

> He states that this pain began about 25 years ago, and was worsened by a work injury on 9/17/17 in which he was operating heavy machinery. He began to experience increased pain after heavy lifting and twisting of the back while operating a machine at work.

The records of Drs. Coxon and Shields support the ALJ's determination Mattingly's denial of prior back problems represented a knowing and willful false representation of his medical history. Dr. Coxon's records reflect a medical history of continued back problems beginning in 2008 and extending through July 2019, two months before the injury. They also reveal Mattingly's low back problems were severe enough at times to require being placed off work by Dr. Coxon. Dr. Shields' records firmly establish Mattingly acknowledged experiencing

continued back pain which began 25 years ago and were worsened by the injury. Thus, the ALJ correctly determined subsection (a) of KRS 342.165(2) is applicable.[4]

In determining KRS 342.165(2)(b) was applicable, that NSU had relied upon a false representation, and this reliance with a substantial factor in its hiring of Mattingly, the ALJ cited Settles' testimony. Settles testified she relied upon Logsdon's determination of Mattingly's fitness for duty and it was a substantial factor in the decision to hire him. In the August 9, 2020, letter, Logsdon stated that if she had known of Mattingly's chronic back pain and treatment from and after May 31, 2008, through August 29, 2018, she would not have recommended him for the position at NSU. Logsdon's letter reveals that after finding Mattingly was in good health and recommending he work without restrictions and be hired, she learned of the nature and extent of Mattingly's chronic back pain complaints and treatment. Her letter was reasonably interpreted by the ALJ as establishing that had Logsdon reviewed the contents of Dr. Coxon's records, she would not have recommended Mattingly be hired. Settles' testimony established she relied upon Logsdon's analysis and statement without the benefit of having Dr. Coxon's records in determining to hire Mattingly. Consequently, Settles testified Logsdon's initial determination, without being aware of Mattingly's medical history, was a substantial factor in NSU hiring him. Settles relied upon Logsdon's recommendation which was based on an incomplete medical history. In light of Logsdon's statement that she would not have

[4] The ALJ chose not to address this; however, we note that although Mattingly denied consuming any alcohol each day in the questionnaire he signed, the records of Internal Medicine of Lebanon reveal Mattingly was diagnosed with alcohol abuse during the period from December 12, 2012, through May 28, 2019.

recommended NSU hire Mattingly if she had known of Mattingly's prior chronic back pain and treatment and Settles' testimony, she relied upon Logsdon's recommendation based on incomplete and falsified information, the ALJ correctly determined substantial evidence supported the finding NSU had satisfied the requirement of KRS 342.165(2)(b). Mattingly asserts Logsdon's letter and the Patient History and Exam Form attached to the letter are of no import since she did not testify. Since Mattingly did not object to the introduction of the letter and the forms signed by Mattingly, this argument is meritless.

In finding subsection (c) of the statute was met and that there is a causal connection between the false representation and the injury for which compensation was claimed, the ALJ relied upon Dr. Travis' opinions. Dr. Travis' report reveals he obtained Mattingly's medical history and conducted a physical examination. Based on the history he obtained and his examination, Dr. Travis opined as follows:

> … Mr. Mattingly freely admits that he has a long history of low back pain. In fact, Mr. Mattingly related to me in the history that he had low back pain as far back as 1991. Although Mr. Mattingly states his low back pain got worse by an incident at work on 9/17/2019, the medical records do not bear out that statement. Mr. Mattingly told me he has had low back pain since 1991. He hurt it at home lifting on a tree. It was not a work-related injury. He began chiropractic treatments in 1991. Mr. Mattingly continued chiropractic treatments for his low back pain. In fact, Mr. Mattingly had chiropractic treatments on 7/1/2019, 7/9/2019 and 7/24/2019, less than two months before the alleged incident of 9/7/2019 at work. On 7/1/2019 he was seeing his treatment providers, Dr. Coxon, chiropractor, having low back pain and "says it may be caused from cutting some trees." It affected both sides and was getting worse. Pain level was 8/10. On 7/24/2019, Dr. Coxon

> noted low back pain severe as 9/10. He described it as the worse flareup.
>
> The medical records would appear to confirm that Leonard Mattingly did not have a significant injury on 9/17/2019 because on 9/18/2019 he saw his chiropractor, Dr. Coxon, and said he was having a flareup. "Patient does not know what caused his pain to flare up in his lower back." Again, on 9/19/2019, Mr. Mattingly saw Dr. Coxon. Again, "patient does not know what caused his low back pain to flare up." His pain level then was only a 2/10, the lowest pain level in any of these medical records. His pain level throughout the medical records from 2008 have never been as low as a 2/10. Again, on 9/20/2019, Dr. Coxon recorded, "Patient does not know what caused his low back pain to flare up." He also noted "no radiation." It wasn't until 9/23/2019, almost a week after the 9/17/2019 alleged injury, that Mr. Mattingly went to Industrial Choice Healthcare with Dana Logsdon, APRN, with low back pain radiating to the left leg. He now claimed that he was in an awkward position for 10 hours. He claimed he was SP work-related injury on 9/17/2019. However, Mr. Mattingly did not report to Industrial Choice Healthcare until almost a week after the 9/17/2019 alleged injury and on three occasions prior to that told his treating physician, Dr. Coxon, that he did not know what caused his flareup.

Dr. Travis noted Mattingly has a long history of low back pain dating back to at least 2008. On November 19, 2008, Dr. Coxon noted Mattingly's pain was a 10/10. Concerning the proximate cause of Mattingly's diagnosed condition, Dr. Travis concluded as follows:

> The lumbar MRI on Mr. Mattingly acquired on 10/8/2019 shows significant degenerative changes at L4-5 and L5-S1 with a disk osteophyte complex at L4-5 on the left. There is also mild degenerative listhesis of L4 posterior on L5. There are longstanding degenerative changes which are responsible for Mr. Mattingly's low back pain for which he received treatment on multiple occasions in 2008, 2012, 2013, 2014, 2015, 2016, and 2018. In fact, he was seen by his chiropractor on

> 8/29/2018, less than three months prior to his physical exam at Industrial Choice Healthcare on 11/1/2018. His MRI shows a disk osteophyte complex with degenerative changes of both L4-5 and L5-S1 and facet and ligamentum hypertrophy throughout the lumbar spine, worse at L4-5 and L5-S1.

Dr. Travis assessed a 10% impairment rating pursuant to DRE lumbar category III of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") which he refused to relate to the injury in question. He elaborated as follows:

> Mr. Mattingly's impairment would be a DRE lumbar category III 10%. However, I do not relate that impairment to the injury of 9/17/2019. Considering Mr. Mattingly's prior of [sic] low back pain since 2008 and being seen by a chiropractor every year – 2013, 2014, 2015, 2016 and 2017 – in fact, just a few months before the alleged injury of 9/17/2019, I would not relate that impairment to the injury of 9/17/2019.

Dr. Travis concluded Mattingly had a condition pre-existing the September 17, 2019, event warranting an impairment rating per the AMA Guides.

> In reviewing past records, Mr. Mattingly did have complaints of low back pain, right leg pain and left leg pain. Considering the fact that he saw his chiropractor, Dr. Coxon, on 7/24/2019, less than two months prior to the 9/18/2019 date when he saw Dr. Coxon again for a "flareup" and also due to the fact that he told Dr. Coxon on three occasions – 9/18/2019, 9/19/2019 and 9/20/2019 – that he did not know what caused his low back pain to flareup, I would say that the impairment rating was not changed by the 9/7/2019 [sic] incident he claims at work.

In concluding there was a causal connection between the false representation made during the pre-employment physical examination of November 1, 2018, and the alleged low back injury of September 17, 2019, Dr. Travis opined:

> Yes, there is a causal connection between the false representation made during the preemployment physical examination and the alleged low back injury of 9/17/2019. Given the nature and extent of the patient's preexisting chronic low back condition and treatment after 9/17/2019 (the date of the alleged work incident) simply represents a continuation of his chronic low back problems, as I will summarize below.
>
> Mr. Mattingly obviously purposefully mislead [sic] the examining APRN on 11/1/2018. I reviewed that form, and Ms. Logsdon specifically asked Mr. Mattingly if he had any previous history of low back pain. … Those are two serious false representations made by Mr. Mattingly on the pre-employment physical appointment of 11/1/2018. Again, in reviewing the medical records, Mr. Mattingly would unequivocally undoubtedly be aware of his past history of significant low back pain. The 11/1/2018 form specifically, under review of systems, asked about back pain. Mr. Mattingly clearly circled no. …

Based on his review of Dr. Coxon's records, Dr. Travis offered the following:

> Obviously, Mr. Mattingly knowingly and wittingly misrepresented himself and made false representations on the patient history & physical exam of 11/1/2018. This much previous history of low back pain is clear evidence that Mr. Mattingly did not "forget" his low back pain. He purposefully falsified those answers.
>
> It is quite clear that Mr. Mattingly falsified answers to the questions on the 11/1/2018 form. With all due respect to Mr. Mattingly, it is hard to believe that he just forgot his past history of low back pain and the pain in both lower extremities and his alcoholism.
>
> I agree with Ms. Logsdon, APRN, that she would not recommend Mr. Mattingly for hire per her 11/1/2018 preplacement physical exam, had he not falsified the medical history, and had she known the nature and extent of Mr. Mattingly's previous back problems. Had I done the preplacement physical as was done by Logsdon, APRN did [sic] on 11/1/2018, had the patient disclosed the nature and extent of his preexisting chronic

> back problems, which he failed to disclose to Ms. Logsdon, I would have not recommended him for hire by NSU Corporation as a production associate.

Dr. Travis' opinions in concert with the records of Dr. Coxon and Internal Medicine of Lebanon, constitute substantial evidence supporting the ALJ's finding that KRS 342.165(2)(c) is applicable, as there is a causal connection between the false representation and the injury for which the compensation has been claimed. Further, the records of Dr. Coxon, Internal Medicine of Lebanon, and Logsdon's letter with the attached Patient History and Exam Form signed by Mattingly constitute substantial evidence supporting the ALJ's determination that NSU has satisfied the elements of KRS 342.165(2).

The burden of proof in an affirmative defense rests with the defendant. Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. App. 1984). Since the defendant was successful before the ALJ in proving Mattingly's claim for an alleged injury is barred by KRS 342.165(2), the sole issue on appeal is whether substantial evidence supports the ALJ's determination. "Substantial evidence means evidence of substance and relevant consequences having the fitness to induce conviction in the minds of reasonable men." Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be drawn therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The fact-finder 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 parties' total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

We find no merit in Mattingly's assertion that a pre-employment physical performed by an independent contractor does not comply with KRS 342.165(2). Mattingly contends that since he did not fill out the questionnaire, the questionnaire signed by him does not constitute a written false representation. We reject that argument. Mattingly did not deny his signature appears on the Patient History and Exam Form. The fact that Logsdon may have filled out a portion of the form does not negate the fact that Mattingly provided the information to Logsdon which she relied upon and utilized in completing the form. All that is necessary is that Mattingly knowingly and willfully made a false representation as to his physical condition or medical history which is memorialized by writing. The form attached to Logsdon's letter complies with the statutory requirement. Regarding his past medical conditions, Mattingly was asked if he had recovered from any of the above which he denied. Considering the records of Dr. Coxon in the light most favorable to Mattingly, those records certainly establish Mattingly had substantial ongoing low back pain prior to his November 1, 2018, interview and examination by Logsdon, from which he may or may not have ever recovered. Without question, Mattingly did not divulge recovering from prior back problems spanning at least ten years.

Further, his statement to Dr. Shields reveals he had ongoing back pain for over 25 years up until the date of the alleged injury which he did not disclose to Logsdon.

NSU should have been apprised of Mattingly's longstanding low back problems prior to making a determination regarding an offer of employment. KRS 342.165(2) is designed to ensure the employer has all relevant information regarding the health of a potential employee prior to making a determination as to whether to offer the individual employment. In this case, the statute is directly implicated due to the fact Mattingly had pre-existing longstanding low back problems spanning over two decades and he was hired without disclosing those problems. Less than a year later, Mattingly sustained an injury to the low back, the very area for which he had received continuing chiropractic treatment since at least 2008. As noted by the Supreme Court in Daniels v. B.R. & D. Enterprises, Inc., Claim No. 2005-SC-0652-WC, rendered March 23, 2006, Designated Not To Be Published: "As in *Gutermuth*, *supra*, it is significant that the false representation and subsequent injury both involved the same portion of the body." As in Gutermuth, the ALJ correctly determined all of the elements contained in KRS 342.165(2) were present and made all the necessary findings in order to invoke the provisions of KRS 342.165(2) thereby barring Mattingly's claim due to his failure to disclose a longstanding known condition.

Accordingly, the December 20, 2021, Opinion and Order and the January 18, 2022, Order overruling the Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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