

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 4, 2020

CLAIM NO. 201896619

LETARCHA MCGHEE

PETITIONER

VS.

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

LEADEC CORP.
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

* * * * *

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

STIVERS, Member. Letarcha McGhee (“McGhee”) appeals from the July 31, 2020, Opinion and Order of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”) dismissing her workers’ compensation claim pursuant to KRS 342.165(2). No Petition for Reconsideration was filed.

On appeal, McGhee asserts the ALJ erred by finding a causal connection between the false representation on her pre-employment medical questionnaire and the alleged work injury.

BACKGROUND

The Form 101 alleges McGhee sustained work-related injuries to her neck and lower back on January 20, 2018, while in the employ of Leadec Corp. (“Leadec”) when she was hit by a forklift.

On November 30, 2018, Leadec filed a Notice of Special Defense in which it raised the special defense of a false statement on the employment application pursuant to KRS 342.316(7) and/or KRS 342.335.

By Order dated December 11, 2018, the ALJ bifurcated the claim in order “to first address all the issues presented concerning the compensability of this claim and the plaintiff’s entitlement to TTD benefits and the related medicals.”

McGhee was deposed on November 12, 2018. Regarding injuries sustained prior to McGhee’s employment at Leadec, the following testimony ensued:

Q: In those jobs that you had prior to Leadec, did you ever have any work injuries that you suffered?

A: No. At the – no. At the Waffle House, I fell outside, but I was leaving then. That’s what led to my knee surgery.

...

Q: Before you came to work at Leadec, outside of work, did you ever have any injuries, and you told me about Waffle House, any injuries that caused you to seek medical treatment? That could be from a car wreck, a slip and fall, anything like that.

A: I have been in a car wreck before, I've had an injury. I had surgery on my neck prior to this, before.

Q: And I think you had that maybe in 2009?

A: Yes, sir.

Q: And was that the result of a car wreck?

A: Yes.

Q: And I'll come back to that one. Besides that car wreck, any other slips and falls, car wrecks that caused you injury in the past?

A: No.

Q: Did you have any health conditions that you treated for before you came to Leadec?

A: No, I didn't.

...

Q: Lets [sic] talk a little bit about the surgery that you had back in 2009. Tell me about the wreck that you had and when that was.

A: I didn't know I was injured from – that bad until months later. Because I thought I was fine, just like this time. And like I said, months later, I had side effects, and when I went to the hospital for it, that's when I found out that I had a spinal injury. Because evidently they didn't pick it up because they was [sic] just doing tests that wasn't [sic] picking it up, a regular – x-rays. They just gave me x-rays instead of MRIs and things.

...

McGhee discussed the neck problems she experienced before she underwent a 2009 cervical fusion surgery:

A: It was more like – I can't explain. The pain was like a steady – I can't even describe how I was feeling. But it didn't – like excruciating pain, it was more like a

burdensome pain. And what led me up to know I was – my balance was off. It just was...

Q: Did you have any pain or numbness that went down into your arms?

A: My left. Yeah, left arm, paralysis was setting in.

Q: Did you have any pain or numbness that went down into your arms?

A: My left. Yeah, left arm, paralysis was setting in.

Q: So you had pain and numbness in your left arm and there was – it was starting to feel paralysis in that arm?

A: Yes.

Q: Now, after you had the surgery, how did your condition change?

A: I got better.

Q: And by that, did you have no residual problems after that?

A: None. I thought I was healed; I had no problems.

Q: Now, he did a fusion on your neck, correct?

A: Yes.

Concerning the hiring process with Leadec, McGhee testified, in relevant part, as follows:

Q: And did you have to fill out a questionnaire about your prior medical history?

A: Yes.

Q: And did that questionnaire ask you about whether you had any prior problems with your neck or back?

A: Yes.

Q: And how did you answer those questions?

A: I answered truthfully. I always put down my surgeries, from my knee surgery to my neck surgery.

Q: And so when that form was given to you, if it had a question that said have you had prior problems with your neck or back, you'd check yes on that?

A: If it was given to me. I don't remember if that specific form was given to me. But if I filled out anything, then I put it up there.

Q: When you had your physical, did they ask you about your prior problems with your neck or back?

A: I don't know what they asked me. They gave us tests. I do know that it was - at first they told me I didn't pass my physical. And then I turned around and found out that they didn't give the physical properly because they had us pushing 300 pounds that was supposed to have been on wheels and it wasn't. So a lot of that people that day was told that they failed the test. And I was one that was on the list, they called like a lot of people back, letting us know that the test wasn't done properly.

Q: And you said this was at KORT Physical Therapy?

A: Yes.

McGhee was hired to work for the cleaning crew at Leotec in January 2017 without any restrictions on her work activities.

McGhee testified at the October 2, 2019, hearing. Regarding her pre-employment physical evaluation, the following testimony was elicited:

Q: When you applied for work at Leotec in December of 2016, I believe you were sent to KORT Physical Therapy, I think it also sometimes goes by the name of Ergo Science, for a pre-employment physical evaluation. Do you recall that?

A: Yes.

Q: And as part of that pre-employment physical evaluation, do you recall being asked to complete a medical history and prior medical issues questionnaire, a written questionnaire of some sort?

A: If it was in the form, I'm sure I did. I don't remember though. I remember going to that physical.

Q: Let me show you what I believe to be a copy of the three-page medical histories and issues questionnaire you were asked to complete at that pre-employment physical. I've already provided a copy to your attorney.

...

A: Okay, I'm ready.

Q: Go ahead and take a brief look at that again. It's a three-page form.

A: Okay.

Q: And you, by all means, can flip through the three pages, and then I'll have some questions for you. But the first question is, once you've had a chance to look at that, do you recognize that as the medical history questionnaire you completed as part of that pre-employment physical?

A: Yes, that's my handwriting.

Q: And you anticipated my next question. As you look through that, and again if you'll please take a look at all three pages as you get an opportunity to do so, will you confirm for me that the writing on all three pages is, in fact, your handwriting?

A: Yes.

Q: There's a signature at the bottom of the second page. Do you recognize that as your signature?

A: Yes, sir.

Q: And then there's a signature at the bottom of the third page. Do you recognize that as your signature?

A: Besides it looking all digital like that, because it's a copy, yeah, I guess it is. Yes, sir. Okay.

...

Q: If you turn to page 2, ma'am, I have a question for you about some of the contents of that page. And specifically, let me turn your attention to question number 10 which reads: Have you had a bulging herniated or prolapsed disc in your neck or back. Do you see that question?

A: Yes.

Q: Which box, yes or no, did you check in response to that?

A: I checked no because it said within the last six months.

Q: Well, there's multiple parts to that question. The first part of the question simply asks, have you had a bulging, herniated or prolapsed disc in your neck or back.

A: I'm just now seeing there's two parts. I read it all as one, okay. I see, okay. Yeah, because that's why I answered it – I read it all in one, and I thought that it was talking about within the last six months. So that was my fault.

Q: Do you see now that within the last months is a separate, entirely separate question of its own –

A: Now that I – now I do now I do.

Q: Let me just finish my question and that's just so the court reporter can take down what's being said accurately.

A: Okay.

Q: Do you see that that's clearly a second question with its own yes or no boxes?

A: Now I'm paying attention to it and I see it, yes.

Q: Let me turn your attention then to question number 13, which reads: At any point in time have you undergone surgery? Do you see that question?

A: I do.

...

Q: Which box did you check in response to question 13, yes or no?

A: It says no.

Q: Now, let me turn your attention to question 14, which asks at any point in time have you been hospitalized, do you see that question?

A: Yes, I do.

Q: And which box did you check in response to that question?

A: It says – I'm not saying I checked it, but it's saying no, because I'm questioning this sheet.

Q: What exactly are you questioning about this sheet?

A: Because I have been hospitalized, and I haven't marked no on other stuff before, so I don't know why I would mark it on this. I've been very honest with my medical history and my criminal history. So I don't know why I would say no when I know I have had surgery. I've had knee replacement before this stuff happened. I've had surgeries. So I don't know why it would say no.

Q: Well, let me turn your attention to the table that's located at the bottom of the second page. That table asks you to indicate and describe any prior bodily injuries of any kind, whether it's back or neck or knee. As you look at that table, ma'am, what prior bodily injuries did you indicate and describe in that table?

A: I didn't – I don't – sir, this sheet is very fishy looking. I'm not remembering this. This is my signature – even when I just – before you asked me anything I questioned

this signature right here. It looked like it was put there and not mine. It's different from how I normally do, but this sheet, I'm not – I'm not understanding that. I don't think I even did this sheet. I see my name right here, and I see my signature right here, and I also know that it could have been put there. But I don't know about this, because I don't – my history is not – nothing I keep from people.

Q: You admit that you underwent a cervical fusion surgery –

A: Yes.

Q: - in 2008; that's not in dispute, correct?

A: Yeah. I'm talking about even with this. This is not even from my job. It's supposed to be from the place they sent me to, like KORT Physical Therapy. Is this where this is supposed to be from?

Q: That's from KORT Physical Therapy, which is also sometimes known as Ergo Science, I believe.

A: Okay, because at that – since you brought it up, I mean, I could speak about it, right, because at that –

Q: Well, you need to address my questions.

A: Okay.

Q: If your attorney has followup questions, he can ask you questions.

...

Q: So let me ask you this, when you completed this 2016 medical history questionnaire and indicated no to the question of whether you had ever before suffered from a bulging, herniated or prolapsed disc in your neck, that was a false statement; wasn't it?

A: I don't think I made that statement.

Q: If you had checked no as we see here on the form, you would agree with me that's a false statement?

A: If I did it, that would be false.

Q: Are you now claiming you didn't check no as indicated in this form?

A: I don't – yes, I'm questioning this form altogether now that I'm looking at it, because even when you just pointed out this question about me – the last six months, now I can see me answering that no because it says six months; I wouldn't have lied. But all this other stuff that's insinuating I lied, I am very much so questioning it. I was questioning the whole sheet before you even asked me.

Q: Well, initially all you questioned or all you had a concern was about –

A: The signature.

Q: you were concerned that you maybe had misconstrued question 10 –

A: Uh-huh (AFFIRMATIVE)

Q: - and you thought it was limited to six months?

A: - I don't know what's going on.

...

Q: Now, you're telling me – you're questioning something else, and I'm still not sure exactly what you're questioning.

A: You are wanting me to answer something that I can't answer that truthfully. If you ask me a questions, I have to be honest with you. This, sir, I don't see me saying I haven't undergone surgeries when it's not – it's apparent that I've been through surgeries. I don't disclose [sic] it, and I don't see why I would have done this at all. There's no reason. And like I was going to tell you something, but I can't tell you – I can't say. It was concerning this meeting that we had. It was concerning me going to KORT. I even told her they tried to get me to push 300 pounds that day in simulation. I even told them then that I could not do that because of a prior

injury that I had. And the simulation was not on wheels. So I was like, I cannot physically push this, and it's not on nothing.

...

A: So I don't see me doing this after – on that day. This is in the same day.

Q: You don't see yourself doing it, but you will agree as you look at that report, those boxes are checked no?

A: They are – I don't know if they're checked or not because –

...

A: Yeah, I can't tell, yeah. I cannot tell because it doesn't look – that's why I said, is this a copy, that's why I asked that before I even looked at it.

Q: And when you indicated in that 2016 medical questionnaire that you'd never before undergone surgery, that would be a false statement, correct?

A: You said if I did it?

Q: Well, all we can go by is the form.

...

Q: It would not be accurate?

A: Saying that I did this, I don't – that's what he wants to contest [sic] to that I marked the box, okay.

Q: Well, you don't think anyone else marked this form; do you?

A: Oh, yes, I do. I can very much think this form was put together because I'm looking at it, and that's what I'm insinuating.

Q: Who marked it?

A: You ask Leadec. I don't know because I don't have no reason not to. They even – they even –

Q: This form did not come from Leadec.

A: They even knew – my employers even knew about my surgery.

Q: I need you to answer my question –

A: I don't know –

Q: - and my question is –

...

Q: Who do you think checked those boxes if it wasn't you?

A: I don't know. They don't even look checked. They look just like a mark going through it, and I'm not even that neat and uniform. They look so perfect looking. I don't know. But like he said, I can't attest to that. That statement is false. I have had surgeries, and I don't even know why I would do that if I did that. I'm not saying I did that. I'm not saying I did it. You're trying to make me say I did it when I'm not sure –

Q: Finally, you would admit that the notion that you had never before been hospitalized for any reason prior to 2016, that would be false, correct?

A: Correct.

Q: Finally, on that table at the bottom of page 2, do you think you had indicated and described various injuries, problems and surgeries, and that someone somehow removed that from the table?

...

A: What was the question?

Q: My question is, do you think you filled out that table and listed the prior surgeries and problems we know you have had, that you've admitted to here today, only to

have someone later come in and somehow removed that information from the form?

A: I don't know what is going on here. I don't know, sir, what this is and what's going on, but I know that I don't see myself just saying no when just in 2015 I had a surgery. So I don't know what this is.

McGhee testified that she was not having any neck or back problems prior to the alleged work injury, and she was able to perform all of her housekeeping duties.

Jamie Golden ("Golden"), facility manager at Leadec, also testified at the hearing. Regarding McGhee's pre-employment physical, Golden testified as follows:

Q: Let me ask you this, are ultimate decision on whether to hire a prospective employee based, at least in part, upon the results of those pre-employment physicals?

A: Yes, sir.

Q: Okay, why is that? Why are you concerned about a prospective employee's physical abilities?

A: Well, the main thing for me is I come from – in this kind of industry, you always want to make sure we don't – I'm conscious that I don't want to send anybody home hurt, God forbid, dead. So we want to make sure that we're setting out employees up for success and not putting them in any kind of harms way because, as Ms. McGhee has alluded to, we do multiple lifting and pushing, bending, mopping, carrying, driving automotive – of the PMVs, power motor vehicles. So we want to make (1) that we're going to put them in the right position, but (2) we don't have any liability where we're going to put somebody in there to get hurt; one for the employee, but also for the company. So as the criteria is stated, she stated two elements of the criteria that we put the employee through. One was the drug test and one is what we call, PAT, physical assessment test. And then the third is actually a background check. So

we actually – there’s three criteria that we put them through before we offer employment, making sure they can pass a background check, which Ms. McGhee alluded to. If we’re aware of the felony, we do have a time period that we go back and accept, (1) what type of felony, but (2) the history of that felony. The secondary is drug use. We don’t want anybody coming in the facility, just given the nature of an automotive environment, under the influence of drugs or using drugs. And then the third thing is the physical assessment test and questionnaire.

Q: Based upon your experience with this process, if you had a prospective employee who had a multiple level cervical fusion, do you think that individual would likely be hired for a position in housecleaning and cleanup, where they would be expected to do the physical activities you described for us?

A: No, sir. We’ve got multiple people that interview and assess potential employees, and given the nature of the constant level changes, the constant bending over, cleaning out pits, we go in a confined space where we provide training, but we’ve had several people come in that’s tried to get employed with knee surgeries and knee issues, and like I said, it’s constant 10-hours on concrete, constant up and down steps and staircases to mop and clean offices, pack up vacuums and bring different mop buckets up and down stairs. And it’s just not a good fit for what we introduce our potential employees into.

Leadec’s Exhibit 1 to the hearing is a “Medical History and Issues”

form. Question 10 on the form asks the following:

Have you had a bulging, herniated or prolapsed disc in your neck or back?

Within the last 6 months?

With continued pain in your arms or legs?

Question 13 on the form asks as follows: “At any point in time, have you undergone surgery?” To all the above questions, McGhee checked “no.”

The June 26, 2019, Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, and TTD. Under “other matters,” the BRC Order indicates the claim is bifurcated to determine compensability, MMI, TTD, and medicals.

The July 31, 2020, Opinion and Order contains the following findings of fact and conclusions of law set forth *verbatim*:

Alleged False Employment Application

As a threshold issue, the defendant maintains plaintiff’s claim is barred in its entirety because she provided false information about her medical history on her employment application, upon which the employer relied in the position from which she now alleges she was injured. KRS 342.165(2) states:

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

- (a) The employee has knowingly and 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.*

As applied to this case, the defendant maintains plaintiff made multiple false representations on her pre-employment physical questionnaire, as part of the application process, which Leadec relied upon in hiring and placing plaintiff in the position in which she was

allegedly injured.

As an initial matter, there is no dispute that, prior to applying for employment with Leadec, plaintiff injured her knee and underwent multiple surgeries, including a total knee replacement. It is also undisputed that in 2009, she underwent a multiple level cervical fusion following a motor vehicle accident. As part of her December 2016 pre-employment physical examination, the plaintiff completed a Medical History and Issues questionnaire in which she was asked the following questions:

- 1. Have you had a bulging disc, herniated or prolapsed disc in your neck or back?*
 - 1a. Within the last 6 months?*
- 2. At any point in time, have you undergone surgery?*
- 3. At any point in time, have you been hospitalized?*

Plaintiff answered all four (4) of these questions in the negative. Additionally, in a table provided for her to include details about any prior injuries, hospitalizations or surgeries, plaintiff left it completely blank and signed her name immediately below it. Plaintiff offered rather conflicting explanations for why she failed to divulge her prior knee and cervical injuries, hospitalizations and surgeries. Plaintiff initially testified that she recalled the questionnaire, that it appeared to be in order, and that her two (2) signatures were indeed genuine. However, when further cross-examination pointed out the false nature of the negative answers to the questions on the medical application, plaintiff then suggested her signatures looked "fishy". She claimed the checkmarks on page 2 were too uniform to be hers, suggesting that some unidentified individual(s) must have either completed the form in her stead or otherwise altered and redacted her responses. No explanation of how that could have actually happened was offered.

From the evidence available, the Administrative Law Judge concludes plaintiff herself answered all four (a) medical history questions in the negative. The ALJ is led to this conclusion in part by how the defendant points out that even if plaintiff is given the benefit of the

doubt and we assume she had meant to answer these questions in the affirmative, that still would not explain her complete silence on the table regarding the details of her prior injuries, hospitalizations or surgeries.

Plaintiff appeared quite pleasant and cooperative at the final hearing and her employment with the defendant seems to have been a legitimate attempt to get her life back in order after some previous problems. However, without speculating as to plaintiff's possible motivation for providing false information, the ALJ is forced to conclude plaintiff made multiple false representations and omissions, frustrating the purpose of her pre-employment physical examination.

Because it is determined plaintiff provided false information on the medical history of her 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.

Here, Mr. Golden testified that Leadec requires the pre-employment physical to ensure that a prospective employee is physically capable of safely performing the work required in housekeeping. He

added that an applicant has to demonstrate that she can repetitively lift, push, carry, bend, mop and drive equipment without risk of injury to either herself or to others around her. Mr. Golden testified that had Leadee been made aware of the plaintiff's prior knee and cervical surgeries, she likely would not have been hired by the company, at least not for a housekeeping position. His testimony in this regard is unrebutted.

Moreover, although plaintiff pointed out she supposedly verbally related some of her prior medical problems to the evaluator during testing and that she ultimately passed the testing, these kinds of excuses were rejected by the Kentucky Supreme Court in *Gutermuth*. There, the supreme court explained that verbal notification does not remedy written false representations and omissions. *Id.* at 273. A meaningful physical examination cannot take place in the presence of such written misstatements and omissions; the entire process is invalidated. *Id.* for these reasons, it is determined that plaintiff provided materially false information about her medical history on her employment application and that the employer relied upon those false statements in hiring plaintiff and placing her in the housekeeping position.

With respect to the requirement and KRS 342.165 (2)(c) that the defendant must show a causal nexus between the false representation and the 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. In the present case, plaintiff provided false information about a prior cervical injury and a multi-level cervical fusion surgery, and she alleges she further injured her cervical spine as a result of the January 20, 2018 accident. In addition, as pointed out above, Golden's testimony is unrefuted that but for plaintiff's false employment application, the employer would not

have hired and placed plaintiff in the housekeeping position from which she was allegedly injured. These facts lead the ALJ to conclude there is a causal relationship between plaintiff's false employment application and her alleged work injury. As such, it is determined plaintiff's claim is barred by KRS 342.165(2) and her claim must be dismissed.

On appeal, McGhee argues the ALJ erred by finding a causal connection between the false representations made on her pre-employment medical questionnaire and her alleged work-related neck injury because both involved the same body part. We affirm on this issue.

ANALYSIS

Relevant to the issue on appeal is KRS 342.165(2) which 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 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.** (Emphasis added).

Importantly, McGhee only contests the ALJ's determination regarding KRS 342.165(c) pertaining to the causal connection between the false representations McGhee made on her pre-employment medical questionnaire and her alleged work-

related neck injury. She does not contest the ALJ's findings regarding KRS 342.165(2)(a) and (b). Thus, our discussion herein will not encompass these factors. Just as important, McGhee failed to file a Petition for Reconsideration. Consequently, in the absence of a Petition for Reconsideration, concerning questions of fact, the Board is limited to a determination of whether substantial evidence in the record supports the ALJ's conclusion. Stated otherwise, where no Petition for Reconsideration was filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, our sole task on appeal is to determine whether substantial evidence supports the ALJ's decision, and we conclude it does.

Despite McGhee's assertion to the contrary, the ALJ appropriately found Daniels v. B.R. & D. Enterprises, Inc., No. 2005-SC-0652-WC, 2006 WL 734407 (Ky. 2006) to be instructive. In Daniels, the Kentucky Supreme Court deemed significant, for the purposes of satisfying KRS 342.165(2)(c), instances when the false representation and the work injury in question involve the same body part. However, the Supreme Court held that medical evidence establishing this causal connection, while helpful, is not necessary. The Supreme Court stated, in relevant part, as follows:

Contrary to the claimant's assertion, KRS 342.165(2)(c) requires there to be substantial evidence of a causal connection between the false representation and the subsequent injury. **Although medical evidence may be a**

means for proving such a connection, it is not the sole means for doing so. As in *Gutermuth, supra*, it is significant that the false representation and subsequent injury both involved the same portion of the body. The claimant falsely represented to Dr. Dahhan that the “pulled muscle” was his only prior back injury, and Dr. Dahhan cleared him to perform a job requiring heavy manual labor. In the presence of a reasonable finding that the claimant's failure to disclose the 1998 back injury was a substantial factor in the hiring and the claimant's own testimony regarding the physical demands of the work and the events of June 11, 2002, it was reasonable for the ALJ to conclude that a causal connection existed between the false representation and the 2002 back injury, which occurred while pulling on a miner cable.

Slip Op. at 5. (Emphasis added).

Similarly, in *Gutermuth v. Excel*, Ky., 43 S.W.3d 270 (2001), the claimant completed a written questionnaire concerning her medical history indicating only that she had a hysterectomy and vein strip, when in fact she had numerous surgeries relating to a prior carpal tunnel condition and thumb joint replacement. She also denied having experienced recurring back, knee or shoulders problems despite having sustained a prior knee injury for which she had filed a workers' compensation claim. Importantly, she also had a longstanding history of cervical spine problems. After slightly more than a year of employment with Excel, Gutermuth sustained a work-related neck injury. During the course of litigation, Gutermuth testified she did not list the prior injuries because she did not consider them relevant or serious. Her supervisor testified he was not aware of the prior surgeries at the time Gutermuth was hired and, had he known her medical history, he would have required a specific medical clearance to perform the type of work for which she was hired. The ALJ dismissed Gutermuth's claim on the basis the

claimant made a knowing and willful false representation of her physical condition and medical history on the questionnaire, the employer had relied upon that false representation, and there was a causal connection between the false representation and the injury for which she was seeking compensation. In finding the causal connection, the ALJ relied upon medical evidence linking Gutermuth's past medical conditions and her alleged work-related injury. The ALJ's decision was ultimately affirmed by the Kentucky Supreme Court.

Consistent with Gutermuth, in the case *sub judice*, the false representations, which admittedly appear on McGhee's pre-employment medical questionnaire, are directly relevant to her alleged work-related neck injury. Undisputed is the fact McGhee, in 2009, was involved in a motor vehicle accident which resulted in a cervical spine injury and cervical fusion surgery. As set forth herein, McGhee testified to this fact in both her deposition and at the hearing. Pursuant to Daniels and Gutermuth, the ALJ was permitted to infer a causal link from the fact that the false representations made on McGhee's pre-employment medical questionnaire and her alleged work-related injury involve the same body part. As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and

credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, *supra*. As the ALJ's determination is supported by substantial evidence, we affirm the dismissal of McGhee's claim for the alleged work neck injury.

That said, we vacate the ALJ's dismissal of McGhee's entire claim and remand for additional findings. The Form 101 alleges McGhee sustained a work-related *low back injury* along with the neck injury. McGhee testified concerning her low back problems at both her deposition and the hearing. Notably, the ALJ summarized her testimony concerning her low back symptoms in his decision. Also, in her brief to the ALJ, McGhee reiterated that her claim encompasses injuries to both her neck and low back.¹ While this Board acknowledges there is no impairment rating in the record assessed for McGhee's alleged low back injury, the ALJ is still obligated to resolve all of the bifurcated issues including McGhee's alleged low back injury claim. This includes determining whether there is a causal connection between the false representations made on her pre-employment medical questionnaire and her alleged work-related low back injury. We also are cognizant that McGhee never raised this issue on appeal and also failed to file a Petition for Reconsideration. Nonetheless, the Supreme Court in Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000) observed that whether an award conforms to the Act is a question of law which a court can review without regard to whether it was contested by a party. It noted a

¹ Her brief states, in part, as follows: "In this bifurcated claim, the Plaintiff seeks benefits for a work injury to the **back** and neck that occurred on 1/20/18 when a forklift crashed into Plaintiff's flatbed cart. Plaintiff seeks a finding of compensability for the debilitating neck and **back** conditions that have resulted from the subject work injury. Per the unanimous medical opinions of record, Plaintiff respectfully submits that she has yet to reach MMI for her neck and **back** conditions." (Emphasis added).

reviewing court has a duty to determine whether an award is in conformity with the Act even if the question first arose upon review. Thus, this Board clearly is authorized to determine whether a decision conforms with Chapter 342 regardless of whether the particular error in applying the law was contested by a party or whether the initial award was appealed on a different ground.²

Accordingly, the dismissal of McGhee's claim for a work-related neck injury set forth in the July 31, 2020, Opinion and Order is **AFFIRMED**. The ALJ's dismissal of McGhee's entire claim is **VACATED**. This claim is **REMANDED** to the ALJ for additional findings and a decision in accordance with the views set forth herein.

ALL CONCUR.

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² Further bolstering the appropriateness of our remand is the Court of Appeals' recent decision in Bluegrass Oakwood, Inc. v. Robin Stubbs, Claim No. 2019-CA-0699-WC, rendered November 13, 2020, Designated Not To Be Published, in which the Court affirmed the Board's remand to the ALJ for a resolution of *all* of Stubbs' injury claims.