

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 8, 2021

CLAIM NO. 201860128

MAGNA SEATING

PETITIONER

VS.

APPEAL FROM HON. PETER NAAKE,  
ADMINISTRATIVE LAW JUDGE

WILLIAM BROWN  
and HON. PETER NAAKE,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**STIVERS, Member.** Magna Seating (“Magna”) appeals from the May 30, 2021, Opinion, Award, and Order and the June 30, 2021, Order of Hon. Peter Naake, Administrative Law Judge (“ALJ”) overruling its Petition for Reconsideration. The ALJ awarded William Brown (“Brown”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for a work-related left foot injury.

On appeal, Magna asserts the ALJ erred by finding Brown sustained a work-related left foot injury, as Brown's alleged unreasonable failure to follow medical advice broke the chain of causation, rendering his left foot ulcer and treatment non-work-related pursuant to KRS 342.035(3).

### **BACKGROUND**

The Form 101 alleges Brown sustained a work-related injury to "multiple body parts" on September 28, 2018, in the following manner: "Plaintiff suffered injury to his left foot/lower extremity when he slipped between a gap in a platform in the course of his employment causing a harmful change evidenced by objective medical evidence resulting in permanent impairment."

Brown filed Dr. Jules Barefoot's November 17, 2020, Independent Medical Examination report. After performing a physical examination and a medical records review, he furnished the following "Discussion":

1. What are Mr. Brown's diagnoses related to the work related injury set forth above?

His diagnosis is for a preexisting diabetes with a peripheral neuropathy.

Development of a traumatically induced Charcot arthropathy in his left foot secondary to a workplace injury occurring on September 28, 2018.

2. Please explain your opinion as to the cause of said diagnoses based on reasonable medical probability. Based on a reasonable medical probability, the cause of the development of the left Charcot arthropathy and need for surgery would be the workplace accident that occurred on September 28, 2018.

3. If there was a preexisting condition which contributes to Mr. Brown's condition and impairment, please advise.

Although he did have a diabetic peripheral neuropathy prior to the workplace injury, it was in actuality the traumatic injury of September 28, 2018 and the delayed recognition and diagnosis of the development of the Charcot arthropathy that led to his multiple hospitalizations and surgical procedures.

4. Did Mr. Brown's diabetic condition predispose him to develop complications during treatment and healing of the effects of the work related injury, including complications associated with the trauma to Mr. Brown's bony anatomy as well as soft tissue and health capabilities?

Mr. Brown's diabetic condition did predispose him to developing complications during treatment and healing of the effects of the work related injury. However, his preexisting diabetes did not cause the injury but his preexisting diabetes did make treatment of this injury more complex.

5. Were the blisters that developed on Mr. Brown's foot in the same location after two attempts to wear the initially prescribed shoe/insert and brace related to the fit and pressure of the shoe/insert and brace?

My answer to this question is in the affirmative.

Mr. Brown did not develop the blisters on his foot until he was placed in the brace and shoe. Although he did travel after placement of this brace and shoe, by the medical records and by his report, he was not placed on any restrictions as to not travel.

Therefore, it appears that it was an ill-fitting brace that led to the blisters on his foot for which he was seen and treated by Dr. Dripchak and others extensively.

6. The Worker's Compensation carrier denied Mr. Brown's claim after he drove to Pennsylvania. Mr. Brown had been given a new insert and brace and was released to return to work with sit down duty when he took the trip to Pennsylvania. What is the most probable cause of the development of the blister on Mr. Brown's foot which Dr. Dripchak observed?

Mr. Brown had been given a new insert and brace and was advised to return to work by Dr. Dripchak on January 29, 2019. Dr. Dripchak noted “has received his custom shoe and double upright brace. Tolerating it well. No areas of redness or wound problems.” “I would permit him to do sit down job at work if available.” So it appears that Mr. Brown did follow Dr. Dripchak’s advice in that he drove to Philadelphia while sitting. Therefore, the development of this blister and subsequent treatment for it appears to have been due to an ill-fitting brace.

7. But for the trauma to Mr. Brown’s foot and the fractures noted on X-ray and CT scan and the associated soft tissue swelling, would Mr. Brown have experienced complications associated with the development of blisters on two separate occasions after the initiation of use of the shoe and brace and required the treatment for the wounds?

But for the trauma to Mr. Brown’s foot, Mr. Brown would not have been fitted with the brace. Therefore, it appears that he would not have developed blisters secondary to use of the brace and shoe for treatment of the fractures in his left foot.

8. Has the treatment provided Mr. Brown to date been reasonable and necessary treatment for the effects directly and indirectly related to the work related injury of September 28, 2018 and the complications/sequelae to the trauma of September 28, 2018? Please explain to the administrative law judge the direct and/or indirect relationship between all treatment including treatment for the wounds as well as the surgical procedures. If Mr. Brown’s preexisting diabetes had an effect on the sequelae of the trauma and the complications during the treatment, please advise.

Mr. Brown’s preexisting diabetes did have an effect on the development of the Charcot arthropathy and poor healing noted in his foot. However, except for the traumatic injury to his left foot that occurred at work, he never would have experienced the fractures, subsequent blisters and infections that required extensive treatment.

I have included with this report a paper from Diabetic Foot and Ankle titled “An Overview of the Charcot

Foot Pathophysiology.” As noted on page #4 of this paper, “trauma is the most common ideological factor encounter in the pathogenesis of Charcot arthropathy and is reported to be present in 22-53% of the cases. Capillary leakage and subsequent formation of edema is a physiological response to blunt trauma. A higher energy trauma causes the disruption of marrow trabeculae, leading to interstitial fluid and hemorrhage accumulation to marrow spaces, hence a bone bruise. When this condition occurs in the foot of a nondiabetic patient, it is painful and following the cessation of ambulation, local inflammation of the foot subsides. But in a neuropathic patient the insensitive foot does not exhibit pain as appropriate. Thus, lack of required immobilization flares up the inflammatory cycle.”

This is clearly the conditions that affected Mr. Brown.

When he was initially seen at Concentra it was felt that he developed cellulitis of his left lower leg when in actuality this was an inflammatory response to the traumatic injury that occurred to his diabetic foot. Indeed, he was not placed in a nonweightbearing capacity until October 10, 2018, one week after his initial evaluation of Concentra.

It is my medical opinion that this delay in recognition and treatment of this Charcot arthropathy, which occurred as a direct result of a workplace accident, led to the ongoing significant complications that Mr. Brown has experienced.

Dr. Barefoot assessed a 20% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, due to the September 28, 2018, work injury. Dr. Barefoot found that although Brown had pre-existing diabetic peripheral neuropathy in his foot, it was not impairment ratable prior to the work injury. Dr. Barefoot opined the entire 20% impairment rating is attributable to the September 28, 2018, work injury. He recommended Brown intermittently follow up with Dr. Dripchak. He restricted Brown from walking extended distances or on unlevel surfaces, operating equipment

with foot controls, repetitively climb or descend stairs, and from working on ladders, scaffolding or at unprotected heights.

Both parties filed medical records of Dr. Phillip Dripchak. Pertinent to the issue on appeal is the October 25, 2018, record in which Dr. Dripchak diagnosed the following conditions: “Left Lisfranc/Charcot, diabetes mellitus, diabetic neuropathy, obesity.” Also relevant to the issue on appeal is Dr. Dripchak’s January 29, 2019, medical record in which he imposed the following restrictions: “Continue with blood sugar optimization, strict nonweightbearing. I would permit him to do a sit down job at work if available.”

Brown was deposed on October 12, 2020. He worked for Magna from December 2017 through either September or October 2018. He started as a line assembly manufacturer and was eventually promoted to “team lead.” He was a team lead at the time of his work-related injury. He described the events of September 28, 2018, as follows:

A: I was inspecting seats. The inspection station’s on I’d say maybe a two-foot-high platform, and the way the platform was constructed there was a gap on the left front corner of the platform where it didn’t butt up flush with the assembly line like the rest of the platform did, and I slipped off into that corner and broke my leg.

Q: Now you said there was a gap.

A: Yes.

Q: How large was the gap?

A: The gap was probably like a one-foot-by-one-foot gap maybe, maybe a little bit bigger, maybe about the size of a notepad maybe, in the left front corner. It’s just where they cut it. They cut it out to fit like around one of the pillars of the assembly line and they had cut it too big so

it didn't like fit snug around like the rest of the frame did, and there was just a gap right there. So I'm guessing it was like I said, probably maybe a 12-by-12 gap maybe, about the size of a notepad maybe. I don't – it wasn't a real big huge gap.

Q: And did you fall off the side or did your foot just –

A: Yeah, my leg fell down and I fell pretty much onto the assembly line because like my leg fell down in that hole, and then like all of my weight shifted towards my left leg like when it fell down, and then I just pushed myself back up.

Q: When did this occur in your shift?

A: It was early, within like the first six hours of my shift. It was before our lunch break.

Q: Did you finish your shift out?

A: Yes.

Brown received medical treatment at Concentra on a Tuesday four days after the event in question. He returned to Concentra a second time on a Friday. A week later, they discovered the fractures. At the time of the deposition, Brown had not yet been released to work by Dr. Dripchak.

Brown recounted the medical treatment he has received since the injury:

A: I've had a cast put on my leg probably eight times. I've had – I've been put in the hospital because my leg's gotten infected twice. I've had like a debridement surgery, then I've had a reconstruction surgery. Then after the reconstruction surgery I've had where you had to go in and replace two of the pins in my leg. And then I had the final surgery where I had everything taken off.

Q: Has all of those procedures been performed by Dr. Dripchak?

A: Yes.

...

Q: What kind of problems are you having with your left foot?

A: Now that he's done the surgery?

Q: Yes.

A: I have to have a custom shoe insert made because my foot is misshapen, and I'll have to have one of those for the rest of my life, so I'll have to get it done every year. They said the inserts last for roughly a year each time, so I'll have to have those the rest of my life. My leg is – I don't know what you call it. Like all the muscle went away, deteriorated, because I hadn't walked for close to a year and a half by the time he took off my brace, so I have no muscle definition. So I wear an upright brace. I have to wear this upright brace right now, he said for roughly six months, until he said probably sometimes in January until I can build muscle back up in my leg.

...

Q: Are you currently weight-bearing on that side?

A: Yes.

Q: Do you use any other type of assistive devices, including a cane, a walker, a wheelchair?

A: No, just my upright brace, my leg brace.

Q: How far up does that brace go?

A: It goes up to just below my knee, like the top of my calf.

At the time of his deposition, Brown was still under the following restrictions imposed by Dr. Dripchak:

A: I have to build muscle back up in my leg, so at first I was only weight-bearing for like two to three hours a

day and then working my way up from there, so right now like around six hours. He told me I can push myself until I get tired now. So I'm up to about six hours a day of weight-bearing before my leg starts to get tired or hurt.

The other restriction is he told me I'll never be able to stand all day long, like a ten- or 12-hour shift like I was doing at Magna. He said I won't be able to do that anymore.

Q: So essentially he's told you to weight-bear as long as you're comfortable?

A: Yeah, just build muscle back up in my leg.

Q: And did you say that you had seen him last in August?

A: Yeah. It was – I do believe it was the second week of August.

Q: Do you have a return appointment to see him?

A: He said for me to wear this brace and build up muscle until January, and then I can either come back and see him or he said I could find a doctor out here in California and see that doctor out here.

Q: So you'll either go back and see him or he'll refer you somewhere?

A: Yeah, in January.

Dr. Dripchak also required Brown to elevate his leg above his chest “most of the time.” Brown was non-weight-bearing from approximately the time of the original injury through August 2020.

Brown provided the particulars of his trip to Philadelphia:

Q: Looks like on February 26, 2019, you told Dr. Dripchak that you had gone to Philadelphia on a road trip. Did that trip occur?

A: Yes.

Q: How did you get there?

A: I drove.

Q: How long is that drive?

A: Between ten and 12 hours.

Q: Did you stop or drive straight through?

A: I stopped for like gas and to take breaks and stuff but for the most part drove straight through. Like I didn't stop overnight or nothing.

Q: Were you able to elevate your leg above your chest at that point?

A: Not during the drive.

Q: Did you also notice a blister that formed after your trip?

A: Yes.

Brown also described the specifics of his cruise:

Q: Then it looks like on July 18<sup>th</sup>, 2019, you told Dr. Dripchak you were going on a cruise. Did that cruise occur?

A: Yep.

Q: Where did you go?

A: On a cruise.

Q: Where was it?

A: To Mexico.

Q: Did you fly to your port or drive?

A: We drove. My wife drove. I didn't drive at all.

Q: How far was that drive?

A: It was about a ten-hour drive each way.

Q: And again was it straight through or did you stop?

A: We stopped one time to stay in a hotel.

Q: Were you able to elevate your leg above chest level while you drove?

A: Yes, I did.

Q: How did you do that?

A: I sat in the third row of our van, and the second row, I had it folded down with my leg elevated on the seat and some pillows, and my wife drove. And I had two friends with us that also took turns driving.

Q: How long were you on a cruise?

A: We were on a cruise for – I think it was a five-day cruise.

Q: Were you able to nonweight-bear on the cruise?

A: Yes. I brought my knee scooter with me and I also had crutches.

Q: Did you also keep your foot elevated above chest level on the cruise?

A: Yes, at night, and during the day I took breaks and had it elevation [sic].

Q: How long would you elevate it during the day?

A: For probably about an hour each time, probably two or three times during the day, and had it elevated all night long.

Brown also traveled to California which he described as follows:

Q: Now looks like over the holidays in December that you went to California; is that correct?

A: Yes.

Q: How did you get there, fly or drive?

A: We flew.

Q: How long is the flight?

A: It's about a five-hour flight.

Q: Were you nonweight-bearing?

A: Yes.

Q: Were you able to elevate your foot above your chest?

A: Not on the flight.

Q: Have you had any other trips?

A: No.

Q: Have you established any sort of medical care in California at this time?

A: No, not yet.

Brown testified at the March 31, 2021, hearing that after Concentra found the fractures, his left foot was placed in an air case. He was given crutches and restricted to light-duty work. Two weeks later, Brown saw Dr. Dripchak for the first time. At that time, Dr. Dripchak directed Brown to be non-weight-bearing and elevate his left leg. He testified as follows:

Q: Were you able to comply with these orders?

A: Yeah. We bought two bean bags. So I was laying on my couch and then I had two bean bags stacked up on the edge of – like, the – I guess the far end of the couch where I would lay down and elevate my leg on the top of the two bean bags.

Q: And were you able to work during this time?

A: No, because Magna Seating put me off work, because I was obviously not able to walk on my own free will.

Q: When did you receive the custom brace insert and the double upright brace?

A: On the beginning of January, I was – they cut my cast off and had me go get an impression to make the mold for the custom inset. And then I got re-casted that same day, and then I actually received my upright brace and the insert. It was, like, the last week of January, like, around the late twenties in January.

Q: Okay. Towards the end of January you received the insert and the brace, and then you started wearing them immediately at that point?

At that point, Dr. Dripchak instructed Brown to use his crutches and only put twenty to thirty percent of his weight on his leg for twenty to thirty minutes daily. Brown continued:

Q: And was that to sort of test out the insert and the brace?

A: As far as I know, yes. It was, like, to work back up to strength of my – in my leg because I hadn't walked for at that time, like, four months.

Brown explained his trip to Philadelphia occurred at the end of February 2019. Since he was already in the insert and brace, he did not believe Dr. Dripchak wanted him to still elevate his leg at all times.

Brown first noticed the blister on the Sunday he was to return home.

He explained:

Q: At that point, how long would you estimate you had been wearing your insert and your brace?

A: At that time, that was the most I'd worn it because, usually, when I was at home I didn't wear it except for – for the, maybe, 30 minutes a day, when I was using my crutches, like, to put weight on it. Other than that – and

so this weekend was the most prolonged I had it on my foot, because I had it on pretty much the whole day, all three days.

Q: And was it your understanding that now that you had this inset and this brace, you were supposed to start trying to – to use it?

A: Yes, because that's what I was going to have to wear for my foot to fully heal.

On June 6, 2019, Dr. Dripchak noticed that the blister had healed. He put Brown's foot into another cast, but when the cast was removed, his wound was infected. "But it was, like, healed over, but the infection was inside the skin." Brown continued to wear the same insert and brace until after the 2020 reconstruction surgery. The following testimony ensued:

Q: So am I correct in thinking that the wound had come back after you started being allowed to use the brace and insert again?

A: Yes.

Q: And did the blister come back, or, I guess, the – you said it was an infection that had come back. Was that in the same location?

A: Yes.

Q: And had you gone on, like, another long road trip?

A: No.

Q: Had you not followed Dr. Dripchak's recommendations in any way?

A: No.

After the infection returned, Brown was returned to strict non-weight-bearing. He testified that his foot was surgically cut in order to drain the infection

and to ensure it did not spread to the bone. He was hospitalized for a week for IV treatment. He testified:

Q: Did Dr. Dripchak know you were going to go on a cruise?

A: Yes. I asked if it was okay. And what he had told me – he said it would be fine as long as I use my crutches and my knee scooter and I refrain from any water activity, so to keep it dry.

Q: But at the time of your cruise you still were on non-weight-bearing restrictions?

A: Yeah. Yes, ma'am.

Q: And so you were – or I'm sorry. Were you able to comply with his instructions for kind of how to be able to go on this vacation but still be safe and keep your foot safe?

A: Yeah. Usually, like, when me and my wife go on vacation, we're big snorkeling fans but we just changed the plans. So we went on the cruise, I used my crutches around the cruise while I was on the ship, and then whenever we left, I used my knee scooter, and then the two times – we went to two different islands. And the first time we did like a shuttle – I don't know what you call it, where they drive you around and they just tell, like, about key points about the island. So I was pretty much sitting the whole time. And then on the second island we went to, I just used my knee scooter and we went up and down the pier where the boats were, because that's where, like, all of the shopping and the restaurants are for Cozumel. Everything is right there on the pier. So I used my knee scooter and we went up and down the pier. My wife shopped a little bit and we had lunch, and then I returned to the boat.

Brown underwent reconstruction surgery in January 2020. Two weeks later, Dr. Dripchak adjusted the pins in Brown's foot. During the final surgery of May 2020, Dr. Dripchak removed all instrumentation in the foot. During this same

time frame, the final insert was fitted to his foot which is the same insert he wore at the time of the hearing.

The March 9, 2021, Benefit Review Conference Order and Memorandum lists the following contested issues: “benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, TTD duration, and vocational rehabilitation.” Under “Other” is the following: “failure to follow medical advice, proper use of A.M.A. Guides.”

In the May 30, 2021, Opinion, Award, and Order, the ALJ set forth the following findings of facts and conclusions of law in finding the left foot condition work-related:

#### **COMPENSABILITY OF CHARCOT FOOT**

The Defendant argues that the Plaintiff’s Charcot foot is not work-related. The Defendant does not dispute that the Plaintiff suffered an injury when his foot fell through a gap in his work station at Magna Seating. Dr. Myrick, the Defendant’s medical expert also agreed during his deposition that the multiple fracture dislocations which were shown on CT scan in October, 2018 occurred because the Plaintiff was weight bearing after the fall. Dr. Myrick also acknowledged during his deposition that Charcot was diagnosed by Dr. Dripchak a month after the injury.

Dr. Barefoot provided a scholarly article describing Charcot foot. Dr. Barefoot’s opinion, supported by the article, was that trauma which is superimposed on an underlying condition such as diabetes can develop into Charcot foot, and did in Mr. Brown’s case. Multiple fractures and dislocations in the complex bones of the foot and Lisfranc ligament are the hallmark of Charcot foot. Bones are unable to heal and they become displaced because of an inflammatory process which is the result of diabetes or other chronic conditions. The article stated that trauma is the most common etiological factor in the pathogenesis of Charcot arthropathy and

was reported in 22%-53% of cases. With neuropathic patients, the foot does not exhibit pain as appropriate and lack of required immobilization flares up the inflammatory cycle. Dr. Barefoot stated that the injury at work caused the development of Charcot arthropathy, the need for surgery, and the need for braces, inserts and custom shoes. He opined that except for the injury, he would not have developed blisters, infections and other complications of his left foot requiring surgery and other treatment administered by Dr. Dripchak.

The Plaintiff has filed a detailed chronological record of treatment for his injury. He suffered an injury which was diagnosed as strain on his first visit to Concentra. His foot was not immobilized but swelling persisted, and he was suspected of developing cellulitis, an infection. Within a month after the injury however a CT scan which showed multiple fractures and disruption of the Lisfranc ligament. On October 24, 2018 Dr. Dripchak diagnosed left Lisfranc/Charcot. Treatment for this syndrome began with Dr. Dripchak and continued with surgeries, long periods of nonweight bearing, and confinement to a boot or cast.

KRS 342.0011(1) permits compensation for a harmful change in the human organism if work-related physical trauma is "the proximate cause" producing it. A longstanding principle of Chapter 342 is that a worker may be compensated for all of the harmful changes that flow from work related trauma that are not attributable to an independent, intervening cause. *Beech Creek Coal Co. v. Cox*, 237 S.W.2d 56 (Ky. 1951); *Elizabethtown Sportswear v. Stice*, 720 S.W.2d 732 (Ky. App. 1986). An employer is responsible for reasonable and necessary medical expenses when a subsequent work-related event causes a worsening or progression of a preexisting active condition. *Derr Construction Company v. Bennett*, 873 S.W.2d 824 (Ky. 1994). Consistent with the principle that an independent, intervening cause will break the chain of causation, KRS 342.035(3) precludes compensation for a condition caused by the unreasonable failure to follow competent medical advice.

The Defendant argues that the failure to follow medical advice which the Plaintiff received in January 2019 was

the cause of the Charcot foot, because he traveled to Philadelphia in the middle of February, 2019. Dr. Myrick, the defendant's expert, testified that Charcot could not have been caused by a single traumatic event, and would have developed within a few weeks after an injury. His opinion was that the failure to follow medical advice during that trip caused to develop, by failing to remain non-weight bearing.

KRS 342.035(3) precludes compensation for a condition caused by the unreasonable failure to follow competent medical advice. *Teague v. South Central Bell*, 585 S.W.2d 425, 428 (Ky. App. 1979), places the burden of proof to claim the KRS 342.035(3) defense on the employer. The employer must show that: 1) the employee failed to follow medical advice, 2) the failure to follow the medical advice was unreasonable, and 3) the unreasonable failure to follow the medical advice caused the disability in question. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334, 336 (Ky. App. 1995).

Dr. Myrick's initial report in August 2019 relates the development of Charcot foot to the failure to follow medical advice. In that report he states that Charcot foot was unrelated to the injury of September 28, 2018. In his deposition, Dr. Myrick stated that the development of a blister while wearing a boot on his trip to Philadelphia was the cause of Charcot foot.

During Dr. Myrick's deposition, he was asked to examine the records of Mr. Brown's initial treatment with Concentra. Dr. Myrick agreed at that time that the multiple fractures and dislocations in Mr. Brown's left foot were likely caused by weight bearing on the foot within the month after his injury.

The medical record shows that multiple fractures in the Plaintiff's foot and diagnosis of Charcot foot occurred in October, 2018. The trip to Philadelphia which the Defendant argues was contrary to medical advice and caused Charcot foot occurred in February, 2019. Logically, because the development of Charcot foot occurred months before the Plaintiff took his trip in February 2019, and was first diagnosed in October 2018, the cause of Charcot foot could not have been the trip the Plaintiff took at a later date.

The Plaintiff's expert medical evidence, consisting of the report of Dr. Barefoot, explains, with the use of a scholarly article and description of the timeline of events in Mr. Brown's injury and treatment, that all of Mr. Brown's left foot problems were caused by his fall at work. The Plaintiff had diabetes and diabetic neuropathy before the injury. This condition had been present for years and was an active medical condition. The Plaintiff's injury was complicated because of pre-existing diabetes and the development of Charcot foot, but nevertheless was proximately caused by his accident at work.

The report of Dr. Ellen Ballard was filed by the Defendant. In it, Dr. Ballard opined that Mr. Brown's left foot Charcot surgery would not be related to his injury in September 2018. She indicated that no permanent harmful change occurred due to his injury at work. She opined that only a soft tissue injury occurred as a result of his fall, and that the present condition in his left foot was not due to the fall but to peripheral neuropathy and uncontrolled diabetes. This opinion contradicts the fact that fractures appeared in Mr. Brown's injured left foot, and not his right foot, and were discovered only weeks after his fall. Had the diabetes and neuropathy been the sole cause of the Plaintiff's foot problems, they should have developed in both feet because both feet were affected by diabetes and peripheral neuropathy. The timeline of medical treatment showing injury to the Plaintiff's left foot, persistent swelling in the left foot, then a CT scan showing acute fractures and dislocations in the left foot support the opinions of both Dr. Barefoot and Dr. Myrick that the fractures found on CT Scan in October 2018 were due to the fall. Dr. Ballard's opinion does not explain how the fractures developed, if it were not because of the fall. Therefore the testimony of Dr. Ballard is not persuasive.

The discovery of multiple fractures and diagnosis of Charcot foot was made within four (4) weeks of Mr. Brown's injury. During that time, there was not a complete resolution of symptoms, and in fact Mr. Brown's symptoms became worse. It is likely that using his foot during that time caused the dislocation of fractures in Mr. Brown's left foot. The Defendant has

not argued that bearing weight at that time was contrary to medical advice. While all physicians agree that the Plaintiff's pre-existing diabetes and diabetic neuropathy complicated and probably contributed to the development of Charcot foot after his injury, it is illogical to conclude that it was solely due to these pre-existing conditions. The Plaintiff's pre-existing conditions were present for years prior to the injury and existed in his whole body, including his right foot. Charcot foot only developed in the Plaintiff's injured left foot, and had never been diagnosed before the injury.

Defendant's argument that Charcot was caused by the Plaintiff's trip to Philadelphia in February 2019 fails because the Plaintiff's trip to Philadelphia occurred after development of Charcot in his left foot, which was diagnosed on October 25, 2018 by his treating orthopedic doctor. The Administrative Law Judge finds that the opinion and report of Dr. Barefoot is more persuasive than either Dr. Myrick's opinions or the opinion of Dr. Ballard. Dr. Barefoot's opinions are consistent with the treating orthopedic doctor's timeline of diagnoses and treatment in Mr. Brown's left foot.

The Administrative Law Judge finds that the fractures in Mr. Brown's left foot, disruption of the Lisfranc ligament and Charcot foot were proximately caused by the injury of September 28, 2018 and are therefore compensable.

Magna asserted the same arguments in its Petition for Reconsideration as it does on appeal.

In the June 30, 2021, Order overruling the Petition for Reconsideration, the ALJ furnished the following additional findings:

The Defendant has filed a Petition for Reconsideration arguing that the Administrative Law Judge misconstrued the testimony of Dr. Myrick in finding that the Plaintiff's failure to follow medical advice was the cause of his Charcot Foot injury. The Defendant also argues that Dr. Myrick is better qualified to testify regarding the Plaintiff's injury than Dr. Barefoot.

The Administrative Law Judge found that the development and diagnosis of Charcot foot occurred several months prior to the Plaintiff trip to Philadelphia. The Defendant argued that the Plaintiff's trip to Philadelphia was the occasion on which he disregarded his treating physician's medical advice. Therefore, it would not be possible for the trip to Philadelphia to cause Charcot foot.

The Defendant now argues that the Plaintiff's injury, including Charcot Foot, was well on its way to complete healing at the time the Plaintiff took his trip to Philadelphia, and that there was an interruption or delay in healing caused by the disregard of medical advice on that trip. This is a different argument than presented in its Brief. Dr. Myrick's opinion was clearly that the Charcot process was initiated after the Plaintiff's trip to Philadelphia. Dr. Myrick stated that had the Charcot Foot been caused by the work-related injury, the Charcot process would have developed before February 2019. (See Dr. Myrick Report dated January 23, 2021). This opinion conflicts with the fact that Charcot Foot was first diagnosed by Dr. Dripchak in October 2018 several months before February 2019. The Defendant did not present evidence to show that the Plaintiff's Charcot Foot, already diagnosed and in process, was materially changed by the Plaintiff's trip in February 2019.

The Defendant also argues that the qualifications of Dr. Myrick are superior to Dr. Barefoot regarding testimony concerning a foot injury. The Administrative Law Judge has broad discretion in determining which of the testifying medical experts to believe. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2005). Other factors such as reliance upon a mistaken set of facts, may render a duly qualified physician's opinion to be less than persuasive. Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). In this case, Dr. Myrick based his opinion upon an assumption that the Plaintiff's Charcot Foot did not develop until after February 2019, and that was shown to have been incorrect.

KRS 342.281 provides that in considering a Petition for Reconsideration, "[t]he Administrative Law Judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or

decision . . . .” This language precludes an ALJ from reconsidering the case on the merits and/or changing the findings of fact. Garrett Mining Co. v. Nye, 122 S.W.3d 513, 520 (Ky. 2003). The scope of review on a Petition for Reconsideration is to examine the opinion or order for patent errors and the ALJ may not reweigh the evidence on a factual issue decided in the initial opinion. Wells v. Ford, 714 S.W.2d 481 (Ky. 1986).

Therefore, the Defendant’s Petition for Reconsideration is overruled.

### **ANALYSIS**

On appeal, Magna asserts that Brown’s failure to follow medical advice by taking a “lengthy drive to Philadelphia running around with a friend for three days” broke the chain of causation and caused the “complication of the Charcot condition (the ulcer) which has resulted in the remainder of [Brown’s] treatment as well as his current condition” in his left foot. As argued by Magna “[t]he blister that snowballed into the litany of problems to follow occurred at the conclusion of the Philadelphia trip.” On this issue, we affirm.

KRS 342.035(3) provides that, “[n]o compensation shall be payable for the death or disability of an employee if his or her death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.” When an affirmative defense is asserted, the burden of proof lies with the employer. Teague v. South Central Bell, 585 S.W.2d 425, 428 (Ky. App. 1979). The employer must show that: 1) the employee failed to follow medical advice; and 2) that the failure to follow the medical advice was unreasonable. A third factor is whether the unreasonable failure to follow the medical advice caused the disability in

question. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334, 336 (Ky. App. 1995). The determination of whether the failure to follow medical advice is unreasonable is a question of fact for the ALJ. Fordson Coal Co. v. Palko, 282 Ky. 397, 138 S.W.2d 456 (1940).

When the party with the burden of proof is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Since Magna was unsuccessful before the ALJ, the sole issue in this appeal is whether the evidence compels a different conclusion. In Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986), the Kentucky Supreme Court said:

If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled “clearly erroneous” if it reasonably could have been made. Thus, we have simply defined the term “clearly erroneous” in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is “clearly erroneous” and, perforce, would “compel” a different finding.

Id. at 643.

Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

This Board is not a fact-finding tribunal. *See* KRS 342.285. Rather, the ALJ has the sole authority to judge the weight, credibility, and inferences to be derived from the record. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., *supra*. The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

We emphasize that on appeal, Magna has not challenged the fact that Brown's Charcot foot was diagnosed in October 2018, *before* his February 2019 trip to Philadelphia. Indeed, Dr. Dripchak's October 25, 2018, medical record reveals he diagnosed Charcot foot at that time, which was four months prior to Brown's Philadelphia trip. In its appeal brief, Magna states as follows: "In both the original opinion and the order on petition for reconsideration, the ALJ hangs his hat on the fact Charcot foot was diagnosed by Dr. Dripchak in October 2018. However, that is not the issue, not what has been argued by the Defendant, and not what needed to be addressed by the ALJ." Further, Magna does not challenge the work-relatedness of the fractures Brown sustained on September 28, 2018, nor does it challenge the work-relatedness and necessity of the braces utilized to treat Brown's left foot. Magna's argument on appeal focuses exclusively on the left foot blister which formed while Brown was in Philadelphia and eventually led to an infection and subsequent treatment. As it asserts in its brief to this Board, "[i]t is the causation of the ulcer which was a complication of Charcot which is the issue and which is clearly not

work-related.” Magna contends the blister was caused by Brown’s failure to follow Dr. Dripchak’s medical restriction of being strictly non-weight-bearing. Instead, as Magna asserts, Brown chose to take a trip to Philadelphia and “[run] around with a friend for three days” which changed the course of Brown’s left foot condition and treatment.

We acknowledge Dr. Dripchak’s January 29, 2019, medical record reflects he imposed the restriction of “strict nonweightbearing.” We also recognize this medical record immediately precedes Brown’s trip to Philadelphia. However, the ALJ relied upon Dr. Barefoot’s opinions in concluding Brown’s left foot ulcer is causally connected to the September 28, 2018, injury and not, as Magna claims, a failure to follow medical advice. In his November 17, 2020, medical report, Dr. Barefoot unequivocally opined Brown sustained traumatically induced Charcot arthropathy of the left foot as a result of the September 28, 2018, work incident. Dr. Barefoot also opined Brown’s foot ulcer “arose secondary to the original injury on September 28, 2018,” due to an ill-fitting brace. As Dr. Barefoot opined, “[b]ut for the trauma to Mr. Brown’s foot, Mr. Brown would not have been fitted with the brace. Therefore, it appears that he would not have developed blisters secondary to use of the brace and shoe for treatment of the fractures in his left foot.”

While the record contains contradictory opinions relating to the cause of Brown’s foot ulcer, specifically the opinions of Drs. Ellen Ballard and Keith Myrick, those opinions merely represent conflicting evidence supporting a different outcome. In order to reverse the decision, Magna must demonstrate substantial evidence of probative value does not support his decision. Special Fund v. Francis,

supra. Dr. Barefoot's medical opinions establishing a causal link between Brown's ill-fitting brace and the formation of the ulcer comprise substantial evidence upon which the ALJ can rely and negate any analysis under Luttrell v. Cardinal Aluminum Co., supra. As concluded by Dr. Barefoot, but for the work-related fractures in Brown's left foot, fractures Magna has not asserted are non-work-related, Brown would not have been required to wear a brace which ultimately formed the ulcer leading to the infection and subsequent treatment.

While the ALJ did not implicate the "direct and natural consequence" rule, we believe it is certainly highly suggestive in the case *sub judice*. Consistent with the doctrine of proximate cause, our courts have long recognized the general rule that workers' compensation benefits must be allowed for all the injurious consequences flowing from a work-related injury. Beech Creek Coal Co. v. Cox, 314 Ky. 743, 744, 237 S.W.2d 56 (Ky. 1951). For purposes of the Act, "injury" has been held to include all direct and natural consequences of the original injury that are not attributable to an independent, intervening cause. In Addington Resources, Inc. v. Perkins, 947 S.W.2d 421, 423 (Ky. App. 1997), the Court explained the "direct and natural consequence rule" as follows:

The applicable rule has been referred to as the direct and natural consequence rule and is explained in Larson, Workmen's Compensation Law, § 13.11 (1996), as follows:

The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury is compensable if it is the direct and natural result of a compensable primary injury. See also *Dutton v. Industrial Comm'n of Arizona*, 140 Ariz. 448, 682

P.2d 453 (Ct. App. 1984); and *Beech Creek Coal Co. v. Cox*, 314 Ky. 743, 237 S.W.2d 56 (1951).

As Dr. Barefoot unequivocally linked Brown's left foot ulcer to the braces he was required to wear due to the work-related fractures, his opinions constitute substantial evidence supporting the premise the formation of the blister was a direct and natural consequence of the original injury and not, as Magna has, in so many words, argued, due to an independent, intervening cause (i.e. Brown's trip to Philadelphia).

Since substantial evidence supports a causal connection between the September 28, 2018, injury and the formation of the ulcer on Brown's left foot, the ALJ's ultimate determination regarding the work-relatedness of Brown's left foot condition is affirmed.

Accordingly, on the issue raised on appeal, the May 30, 2021, Opinion, Award, and Order and the June 30, 2021, Order are **AFFIRMED**.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

HON LEE JONES  
P O BOX 1139  
PIKEVILLE KY 41502

**LMS**

**COUNSEL FOR RESPONDENT:**

HON TAMARA TODD COTTON  
640 S 4<sup>TH</sup> ST STE 400  
LOUISVILLE KY 40202

**LMS**

**ADMINISTRATIVE LAW JUDGE:**

HON PETER NAAKE  
MAYO-UNDERWOOD BUILDING  
500 MERO ST 3<sup>RD</sup> FLOOR  
FRANKFORT KY 40601

**LMS**