

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 1, 2021

CLAIM NO. 202082723

PAROQUET SPRINGS CONFERENCE CENTRE

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

TERRY HOPE and
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Paroquet Springs Conference Centre (“Paroquet”) appeals from the May 28, 2021 Opinion, Order, Award, and the June 29, 2021 Order overruling its Petition for Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ found Terry Hope (“Hope”) sustained a work-related low back injury on November 1, 2019, for which she awarded permanent total disability benefits and medical benefits pursuant to KRS 342.020.

On appeal, Paroquet argues the ALJ erred in finding Hope's cauda equina syndrome was aroused into disabling reality in the course and scope of his employment. It argues Hope's condition was idiopathic, and "is due to a pre-existing disease or physical weakness, personal behavior, or personal mortal enemy." Paroquet argues Hope did not sustain an injury as defined by KRS 342.0011(1). Because substantial evidence supports the ALJ's determination, we affirm.

Hope filed a Form 101 alleging he injured his low back on November 1, 2019 while working for Paroquet. He alleged he developed cauda equina syndrome subsequent to lifting multiple heavy boxes of food, and preparing a meal for serving at a banquet. He underwent surgery for the condition two days later.

Hope testified by deposition on December 20, 2020 and at the hearing held March 24, 2021. Hope was born on June 16, 1978, and he resides in Lebanon Junction, Kentucky. Hope is a high school graduate, and he took a year and a half of culinary courses at the College of DuPage in Illinois. Hope's employment history includes working as a chef for multiple employers in Chicago, Illinois and Louisville, Kentucky.

Hope began working for Paroquet as the Executive Chef and General Manager in 2011. He was responsible for preparation of food for weddings, banquets, and other events. He also assisted in setting up the venue for events and stocked food from deliveries, which he testified involved lifting, bending, squatting, and crouching. Hope testified he lifted multiple boxes of food on November 1, 2019, in preparation for a banquet for two-hundred people scheduled at Paroquet. He estimated the boxes of meat he lifted weighed fifty to eighty pounds each. He

prepared lunch for the staff, and he ate with them. Afterward, at approximately 2:30 p.m., he stood up and experienced an acute onset of “excruciating” low back pain. He continued to work preparing desserts for the banquet for approximately an hour after the incident. He testified he lost feeling in his legs, and he was also unable to stand. Hope testified he had received treatment for right-sided low back pain in 2012, and he briefly treated with a chiropractor for low back pain in 2015, but he had no symptoms after that time until the November 1, 2019 incident.

Co-workers assisted him into a wheelchair, and he was taken to his truck. A friend drove him to the Medical Center South in Brooks, Kentucky, where a nurse practitioner saw him. The following day he was taken to the emergency room at the Hardin Memorial Hospital. He was transferred by ambulance to the University of Louisville Hospital where he underwent surgery by Dr. Michael Doyle on November 3, 2019. Hope received in-patient treatment at the University of Louisville Hospital for two to three weeks. He was then transferred to Frazier Rehab where he received an additional three weeks of in-patient care.

Hope testified he continues to experience low back pain, sometimes severe based upon activity, and he has problems with balance, bending, and stooping. He also has left foot drop, and he is unable to wiggle his right toes. He lies down one to two hours per day to relieve his pain. He also wears an AFO brace when standing. This stabilizes his left foot, and he is able to stand for ten to fifteen minutes. He walks with braces, and uses a cane for stability.

Hope filed records from the Medical Center South, Hardin Memorial Hospital, the University of Louisville Hospital, and Dr. Jules Barefoot’s September

23, 2020 report in support of his claim. The November 1, 2019 Medical Center South record reflects Hope presented with back pain radiating into his left lower extremity after he got up from lunch at 2:30 p.m. The November 2, 2019 Hardin Memorial Hospital record reflects complaints of low back, right thigh, right leg, and left leg pain, with decreased left leg sensation. Hope underwent an MRI, and he was diagnosed with lumbar stenosis, urinary retention, acute spinal cord compression, and compression fractures at L4 and L5. Ketamine was administered intravenously, and Hope was transferred to the University of Louisville Hospital.

Hope was diagnosed with cauda equina syndrome at the University of Louisville Hospital. Dr. Doyle performed surgery on November 3, 2019 consisting of a L3-4-5 laminectomy and bilateral L2-L3 and L5-S1 discectomies. He also performed bilateral L2-L3, L3-L4, L4-L5, and L5-S1 laminectomies and foraminotomies. Post-operatively, Dr. Doyle diagnosed Hope with cauda equina syndrome secondary to severe stenosis resulting from facet and ligamentous hypertrophy and large multilevel disk herniations.

Dr. Barefoot evaluated Hope on September 23, 2020. He noted Hope worked as a chef on November 1, 2019, and he experienced an acute onset of low back pain as he was getting up from a chair after lunch. He noted Hope's treatment at the Medical Center South and the Hardin Memorial Hospital. He also noted the surgery Dr. Doyle performed. Dr. Barefoot additionally commented on Hope's ongoing problems. Dr. Barefoot diagnosed a workplace injury which occurred on November 1, 2019, with development of cauda equina syndrome. He also noted Hope has corticospinal lower extremity problems, and impairment of the bladder

and sexual dysfunction secondary to the cauda equine syndrome. Dr. Barefoot opined Hope's problems resulted from his workplace incident. He stated there was no active symptomatic, impairment ratable spinal condition prior to that date. He additionally opined Hope's treatment had been reasonable and necessary. Dr. Barefoot assessed an 83% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment.

Dr. Barefoot testified by deposition on January 21, 2021. Dr. Barefoot is not a surgeon, and he has never performed spinal surgery. He reiterated Hope's cauda equina syndrome was dormant and brought into disabling reality by his work activity. Dr. Barefoot noted the acute onset of low back pain and leg numbness occurred when he got up after eating lunch. Dr. Barefoot extensively described the spinal cord and associated nerve root system anatomy. He specifically stated *verbatim* as follows:

If you look at your spinal cord, typically your spinal cord terminates at a level 11, from there we call a equina horse tail where all the nerve roots from the lower back come from there. There's a blockage along that way and goes all the way across, it blocks all those nerves distal to that blockage. In his particular case by his MRI or CT he had multiple levels of blockage on there, that's why he had multiple level surgical procedure by, Dr. Dole, I think.

Dr. Barefoot noted Hope had multiple levels of nerve root blockage. He additionally noted Hope performed full duty, regular work, without difficulty, prior to the incident. Dr. Barefoot agreed that the activity of standing up, or arising from a seated position is not a traumatic event, "[H]owever, if his prior activities earlier that day set him up to developing these symptoms, certainly getting up,

flexing, extending, could bring that condition on being the final nail in his coffin, so to speak.”

Dr. Thomas Loeb performed a review of Hope’s medical records at Paroquet’s request. In his report dated January 5, 2021, he noted Hope alleged a November 1, 2019 work-related low back injury occurred as he stood up after eating lunch. He noted Hope was not engaged in lifting at the time his symptoms began. He also noted Hope’s history of previous low back problems. Dr. Loeb opined Hope had a pre-existing active condition, progressing slowly, leading up to the November 1, 2019 incident. He specifically stated, “This gentleman’s symptoms were active in the sense that his degenerative changes were occurring ever so slowly but consistently over time leading to the point where his spinal stenosis overwhelmed his neurologic status to the point that he developed cauda equina syndrome.” Dr. Loeb agreed with the 83% impairment rating Dr. Barefoot assessed, but disagreed with the opinion that Hope’s condition is work-related.

Dr. Loeb testified by deposition on February 23, 2021. Dr. Loeb testified he trained as a spinal surgeon, but has not performed spinal surgery for a long time. Dr. Loeb testified he disagrees with Dr. Barefoot’s causation opinion, but he agrees with the 83% impairment rating. He noted cauda equina syndrome is a compression of the spinal cord at the junction of the lower cord which approximately ends at the first lumbar vertebra. He noted cauda equina syndrome could include significant pain, and loss of bladder control. He also noted saddle anesthesia could result from cauda equina syndrome. This includes complete flaccid paralysis, significant pain and loss of bladder control. He noted this condition could be caused

by trauma such as motor vehicle accidents or falls from heights. He noted the condition may have a rapid onset from trauma. He also noted it can be caused by progressive degeneration, and may become symptomatic without an acute injury.

Dr. Loeb noted Hope had longstanding degenerative changes predating November 1, 2019. He added the calcifications present on the disc herniations indicate they had been present for quite some time. He opined the degenerative conditions were active and significant enough for him to seek treatment previously. He opined arising from a seated position is not significant enough to cause cauda equina syndrome. However, it is possible a degenerative condition could progress to the point cauda equina syndrome develops regardless of activity. Dr. Loeb acknowledged Hope had no history of low back treatment for four years prior to the November 1, 2019 incident.

A Benefit Review Conference was held on March 8, 2021. The issues preserved for determination included benefits per KRS 342.730, work-relatedness/causation, exclusion for prior active disability, unpaid/contested medical expense, injury as defined by the Kentucky Workers' Compensation Act, temporary total disability, vocational rehabilitation, idiopathic injury, medical expenses, and whether Dr. Loeb's opinion constitutes substantial evidence.

In her decision rendered May 28, 2021, the ALJ determined Hope sustained a work-related low back injury. She specifically found *verbatim* as follows:

The ALJ finds Hope sustained a work-related injury on November 1, 2019. Despite Hope's severe degenerative back condition, he experienced no disabling condition or functional impairment, until after performing heavy lifting on November 1, 2019. The medical evidence equivocally establishes Hope had a

pre-existing severe degenerative spine condition and developed Cauda Equina Syndrome. The issue is whether the development of the Cauda Equina Syndrome is related to Hope's work. The ALJ finds Dr. Barefoot's opinion most persuasive and consistent with the totality of the evidence. Although Dr. Loeb opined there is no work connection to Hope's Cauda Equina Syndrome, his report is not based on the total picture.

On the morning of November 1, 2019, Hope performed a lot of physical activity preparing for a banquet of 200 people. He handled about 50 cases of food ranging from 10 pounds to 60 pounds that morning. He put away supplies. He also prepared lunch for everyone. After lunch, while getting up out of his chair, he experienced excruciating pain in his low back and lost feeling in his legs with numbness and tingling. Although, MCS Medical Center South discharged him and diagnosed only left sided sciatica, both Dr. Barefoot and Dr. Loeb opined he was experiencing Cauda Equine Syndrome at that point in time. Dr. Loeb specifically said Hope would have been experiencing the evolving stages at the ER visit.

Hope had severe degenerative disc disease prior to November 1, 2019, which was not active or disabling. The medical evidence is clear that Hope had severe pre-existing degenerative changes in his back. However, prior to November 1, 2019, Hope sought treatment only twice for his low back, in 2012 and 2015. On both occasions, Hope's diagnosis was sciatica and his symptoms resolved after treatment. In the three years prior to the November 1, 2019, Hope experienced no symptoms and sought no treatment for his low back.

Dr. Barefoot diagnosed Hope with a work injury on November 1, 2019 with development of Cauda Equina Syndrome. Dr. Barefoot examined Hope and received a full description of his activities on the morning of November 1, 2019. He advised Hope developed an acute onset of severe back pain with weakness in his legs while getting up from lunch. Dr. Barefoot attributes the severe onset of pain to Hope's work activities of that morning. Dr. Barefoot opined any low back condition present prior to November 1, 2019 was asymptomatic dormant, which is consistent

with Hope's lack of complaints and treatment. He opined the activities of stocking and heavy lifting brought Hope's preexisting condition into disabling reality.

Although Dr. Loeb opined the development of Cauda Equina Syndrome was just the progression of Hope's pre-existing condition and not work related, his opinion did not take into account the full picture. Dr. Loeb did not have the benefit of the details of the work Hope performed that morning prior to the onset of his symptoms. Dr. Loeb acknowledged heavy lifting is a risk factor in the development of Cauda Equina Syndrome, but then opined he did not believe there was any evidence heavy lifting played a significant role in Hope's case. Dr. Loeb was aware Hope mentioned some heavy lifting, but Dr. Loeb admitted there were no specifics about the lifting in the medical records he reviewed. His opinion is not persuasive because he did not have the specific details with regard to the lifting actually performed by Hope on November 1, 2019.

The ALJ further determined Hope's injury rendered him permanently totally disabled. The ALJ found Hope did not have a pre-existing active disability. She specifically found as follows:

To the extent that the condition is active immediately before the trauma occurs, it cannot have been aroused by the trauma and, thus, to that extent cannot be compensable. "[T]o be characterized as active, an underlying preexisting condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). The employer bears the burden of proving the existence of a preexisting, active disability.

The ALJ found Hope had no pre-existing active impairment prior to the date of injury. She noted he had no symptoms, nor had he sought any treatment for several years prior to the date of the accident. She also noted Hope continued to

perform his regular job without difficulty until the accident date. The ALJ also performed the analysis required by City of Ashland v. Stumbo, 461 S.W.3d 392 (KY 2015), and determined Hope is permanently totally disabled due to his work injury. The ALJ determined Hope is entitled to medical benefits for 780 weeks pursuant to KRS 342.020.

Both Hope and Paroquet filed Petitions for Reconsideration. Hope argued the ALJ erred by limiting his medical benefits to 780 weeks. Paroquet argued the ALJ erred by failing to make required findings of fact. It also argued the ALJ did not accurately understand the evidence. Finally, Paroquet argued Hope's problems are longstanding. In her Order issued June 29, 2021, the ALJ granted Hope's Petition for Reconsideration, and amended her decision to remove the 780-week cap on medical benefits. The ALJ denied Paroquet's Petition for Reconsideration as no more than a re-argument of the merits of the claim, and a request to re-weigh the evidence.

On appeal, Paroquet argues the ALJ erred in finding Hope's cauda equina syndrome arose in the course and scope of his employment. It also argues Hope did not sustain an injury as defined by KRS 342.0011(1). It argues Hope's condition is idiopathic.

As the claimant in a workers' compensation proceeding, Hope had the burden of proving each of the essential elements of his cause of action, including whether he sustained an injury and impairment. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Hope was successful in that burden, the question on appeal is whether substantial evidence of record supports the ALJ's

decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Substantial evidence” is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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 party’s total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney’s Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ’s decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ’s role as fact-finder by superimposing its own appraisals as to

weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We conclude substantial evidence supports the ALJ's finding Hope sustained an injury due to the November 1, 2019 work incident. The ALJ was confronted with the conflicting causation opinions of Drs. Barefoot and Loeb. Those physicians agree Hope's lumbar condition warrants an 83% impairment rating; however, they disagree regarding the cause of his condition. Dr. Barefoot opined Hope had significant pre-existing dormant degenerative conditions that were aroused into disabling reality by his November 1, 2019 work activities. He determined Hope's condition was not active because he had not undergone any back treatment since 2015, and he was able to daily perform his usual work without limitations. It is well established that the arousal of a dormant condition into disabling reality constitutes an injury within the meaning of the Act, and that once aroused into a disabling state, the previously dormant condition, or medical treatment attributable to address the symptoms which began after the injury, constitute a harmful change in the human organism. McNutt Construction/First Generation Servs. v. Scott, 40 S.W.3d 854 (Ky. 2001).

Dr. Loeb, however, did not share Dr. Barefoot's view regarding causation. He did not believe Hope's condition was caused by his work. He opined Hope's degenerative condition was active and progressing slowly.

The ALJ chose to rely upon Dr. Barefoot's opinions rather than those expressed by Dr. Loeb. The ALJ explained the basis for her determination.

Although Hope did not experience the acute episode of low back pain until he stood after lunch, Dr. Barefoot explained this was caused by Hope's work activities earlier in the day.

Paroquet argues Hope's condition was idiopathic, or personal to him, and did not result from his work activities. A review of Kentucky law on the issue begins with the case of Workman v. Wesley Manor Methodist Home, 462 S.W.2d 989, 900 (Ky. App. 1971), where benefits were denied to an employee who fell and broke her hip in the course of her employment. The facts indicated that the employee did not slip or stumble but fell after her back gave way due to an injury previously suffered in one or possibly two automobile accidents. The Court held, "an injury from a fall resulting during the course of the employment but solely from a cause or causes to which the work is not a contributing factor is not compensable." Id. at 901. The Court further noted that, under the "positional risk theory," benefits may be allowed for injuries sustained in a fall "if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle." Id. (quoting Larson, *Workmen's Compensation Law*, § 12.11).

The Workman Court acknowledged there is a rebuttable presumption that an unexplained fall during the course of employment is work-related. However, the Court found that the rebuttable presumption had been reduced to a permissible inference by evidence that the employee's fall was not unexplained but, rather, resulted solely from a prior, non-work-related back condition. Consequently, the

“old” Board was not compelled to find that the employment was a causative factor in the employee's injuries.

The continuing viability of the Workman decision was addressed in Jefferson County Public Schools/Jefferson County Board of Education v. Stephens, 208 S.W.3d 862 (Ky. 2006), in which the Supreme Court upheld a determination by the ALJ that the claimant sustained a work-related injury when she fell walking from a carpeted surface to a tile floor. There was evidence introduced that the claimant might have experienced dizziness prior to her fall. However, the ALJ believed the claimant’s testimony that she did not experience any such dizziness. The Court stated as follows:

The burden is on an injured worker to prove every element of her claim, including that a workplace injury arose out of the employment. See Workman v. Wesley Manor Methodist Home, 452 S.W.2d 898 (Ky. 1971); Stasel v. American Radiator & Standard Sanitary Corp., 278 S.W.2d 721 (Ky. 1955). As explained in Arthur Larson and Lex K. Larson, Larson’s Workers’ Compensation Law, § 4 (2006), an analysis of whether a work-related injury arises out of employment begins with a consideration of the three categories of risk: 1.) risks distinctly associated with employment (e.g., machinery breaking, objects falling, explosives exploding, fingers getting caught in machinery, exposure to toxic substances); 2.) risks that are idiopathic or personal to the claimant (e.g., a disease, internal weakness, personal behavior, or personal mortal enemy that would have resulted in harm regardless of the employment); and 3.) neutral risks (e.g. a stray bullet, a mad dog, a running amuck, lightning). Where an employment and personal cause combine to produce harm, the law does not weigh the importance of the two causes but considers whether the employment was a contributing factor.

Although one naturally infers that a fall in the workplace has something to do with the employment, proving that

it arose out of the employment can be problematic when the reason that it occurred is unexplained. Workman v. Wesley Manor Methodist Home, *supra*, stands for the principle that an unexplained workplace fall is presumed to arise out of the employment unless the presumption is rebutted. The court determined subsequently in Indian Leasing Company v. Turbyfill, [*supra*], that even an idiopathic fall may be compensable if work placed the individual in a position that increased its dangerous effects.

We explained in Magic Coal Co. v. Fox, 19 S.W.3d 88, 95 (Ky. 2000), that rebuttable presumptions are governed by KRE 301. Such a presumption shifts the burden of going forward with evidence to rebut or meet it to the party against whom it is directed, but it does not shift the burden of proof (i.e., the risk of nonpersuasion) from the party upon whom it was originally cast. If a presumption is not rebutted, the party with the burden of proof prevails on that issue by virtue of the presumption. If a presumption is rebutted, it is reduced to a permissible inference. The ALJ must then weigh the conflicting evidence to decide which is most persuasive.

Because a fact must be proved with substantial evidence, a rebuttable presumption must be met with substantial evidence. Therefore, an employer asserting that a workplace fall was idiopathic must meet the presumption with substantial evidence to that effect. If the employer does so, the ALJ must weigh the conflicting evidence, including the permissible inference that a workplace fall arises out of the employment. The burden of persuasion remains on the worker.

Id. at 866-867.

While Hope's injury did not result from falling, the above analysis is relevant in that it provides an outline of what may be considered idiopathic, and the burden of establishing the cause of the injury. In this instance, the ALJ appropriately reviewed the differing opinions expressed by Dr. Barefoot and Dr. Loeb. She properly exercised her prerogative and relied upon Dr. Barefoot who determined Hope's lifting activities at work in concert with arising from the table aroused his

condition into disabling reality. We find the ALJ's determination is supported by substantial evidence, and will not be disturbed.

Accordingly, the May 28, 2021 Opinion, Order, and Award and the June 29, 2021 Order on Petitions for Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON LYN DOUGLAS POWERS
1315 HERR LANE, SUITE 210
LOUISVILLE, KY 40222

COUNSEL FOR RESPONDENT:

LMS

HON CHRISTOPHER P EVENSEN
6011 BROWNSBORO PARK BLVD, SUITE A
LOUISVILLE, KY 40207

ADMINISTRATIVE LAW JUDGE:

LMS

HON MONICA RICE-SMITH
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601