

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 3, 2020

CLAIM NO. 201871287

RURAL KING

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

JOSHUA STALEY and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

BORDERS, Member. Rural King appeals from the October 30, 2019 Opinion, Award and Order, and the December 4, 2019 Order on its petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ awarded Joshua Staley (“Staley”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for a right foot injury.

On appeal, Rural King argues the ALJ's findings of the occurrence of and notice of the foot injury are clearly erroneous and not supported by probative evidence. Rural King further argues the ALJ improperly relied on the opinion of Dr. Christopher Saccone, which cannot constitute substantial evidence. Additionally, Rural King argues the award of TTD benefits was improper as to duration. Because the ALJ's findings are supported by substantial evidence, we affirm.

Staley testified he worked for Rural King as a night stocker. He injured his back and right foot on May 29, 2018 when he was moving a pallet with a pallet jack. Staley stated the jack pushed him into the corner of some shelves. His back hit the shelves and a wheel on the jack rolled onto the side of his right foot. The pallet contained fifteen to twenty-five bags of feed weighing thirty to fifty pounds each. He reported the injury to his supervisor, Rob Zack. Staley had excruciating back pain radiating into his legs. After leaving work, his right foot swelled. Staley reported the foot issues within days of the accident. Staley eventually saw Dr. Saccone who ordered diagnostic studies and recommended surgery. Following surgery performed in July 2018, Staley went to physical therapy. Staley did not work from the time of his injury until released by Dr. Saccone on March 5, 2019. Staley stated he left the doctor's work restrictions at the customer service desk at Rural King. He also left voice mails for the human resource person at Rural King which were never returned.

Staley previously treated at Hardin Memorial Hospital on April 15, 2011 following a motorcycle falling on him. Right leg x-rays were normal, and he was released with a diagnosis of contusion to the right lower extremity. Staley was

treated on April 17, 2013 for a wound to the right lower leg. Staley was treated for cellulitis of the fifth great toe and type I diabetes with a foot ulcer on July 11, 2015. Staley was treated in the emergency room on July 28, 2015 for cellulitis of the right great toe. He had mild sensory loss and mild erythema of the right foot, with tenderness and swelling of the first toe.

Staley was examined in the emergency room on June 2, 2018. Staley reported he backed into shelves at work on Tuesday night. He had back pain and his right leg was swollen. He was directed to remain off work for three days. Staley returned to the hospital on June 5, 2018 with continued swelling of the right leg. A venous evaluation of the lower extremity was normal, indicating Staley did not have a deep venous thrombosis. Staley presented to the emergency room on June 18, 2018, with redness and swelling of the right foot. He had tenderness along the right calf and bilateral extremity edema. Staley was discharged with diagnoses of bilateral pedal edema secondary to unknown cause, cellulitis of the right foot, and chronic well controlled type I diabetes. A CT scan of the right lower extremity on July 3, 2018 revealed fractures of the right cuboid bone and base of the right second and third metatarsals and first, second and third cuneiform bones and right navicular bone with subluxation of the joint between the right navicular bone in the right first and second and third cuneiform bones. An old appearing osteochondral injury to the medial aspect of the joint surface of the talar dome and inflammation edema in the soft tissues throughout the right midfoot were noted.

Records from Healthway Internal Medicine and Pediatrics/Angela Rutledge, APRN, indicate Staley was initially examined on June 12, 2018 for

diabetes and a back injury occurring at work on May 29, 2018. Staley reported pain in the back radiating down the legs with swelling in the legs, right more than left. Physical examination revealed lumbar tenderness, paraspinal muscle spasms on the right, and bilateral non-pitting edema in the lower extremities. The assessment was low back pain and muscle spasm in the back. A lumbar MRI was ordered and Staley was prescribed Naproxen. A work note was given excusing him from work for seven days. Staley had continued back and leg pain with increased swelling on June 26, 2018. Physical examination revealed tenderness of the lumbar spine, paraspinal muscle spasms on the right, and bilateral non-pitting edema of the lower extremities. The assessment was low back pain, muscle spasm of the back, dysuria, and unspecified hematuria. Staley was referred to Occupational Medicine and it was noted he could not return to work without an evaluation. Staley was given another note excusing him from work for seven days.

Dr. Saccone first saw Staley on July 2, 2018. Dr. Saccone performed surgery on July 20, 2018. On January 8, 2019, Dr. Saccone noted:

This is an injury that was caused by a pallet falling on the patient's foot. Although he is diabetic this injury was not related to diabetes. The crush injury and the amount of damage that was done was due to high impact velocity in force. Although this type of collapse can occur with Charcot deformity related to long-term uncontrolled diabetes in this particular case was not due to direct diabetes.

Dr. Saccone completed a Form 107 on April 18, 2019. Based on Staley's history, diagnostic findings, and operative findings, Dr. Saccone felt the work injury caused Staley's impairment. Dr. Saccone did not believe any part of the impairment is due to a cause other than the work event.

Dr. Ellen M. Ballard performed an independent medical evaluation (“IME”) on February 4, 2019. Dr. Ballard stated findings on radiograph were indicative of Charcot joint coupled with significant diabetic peripheral neuropathy. Dr. Ballard stated Staley reached maximum medical improvement (“MMI”) on January 1, 2019. Dr. Ballard found no clear causal connection between Staley’s injury and his work other than the initial report of some back pain. She noted Staley presently has no back pain. Dr. Ballard assigned a 7% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). Dr. Ballard stated radiographic findings of osteopenia were indicative of a Charcot joint. In an April 3, 2019 deposition, Dr. Ballard testified a diabetic could have a foot injury and not be aware of the issue. The history of the injury provided at the time of her examination did not include the pallet jack wheel running over the foot. The description she received stated the foot was hit by the pallet jack. Dr. Ballard did not believe this would result in the injuries Staley suffered.

In a July 2, 2019 letter, Dr. Ballard indicated she reviewed additional medical records including those of Endocrine Associates from May 19, 2016 through January 17, 2019. She noted Staley had poorly controlled diabetes. In April 2018, Staley had edema which is a physical finding indicative of a problem with the lower extremities. The medical records also indicate Staley was not compliant with his appointments. He had peripheral neuropathy and decreased sensation in his feet. Dr. Ballard disagreed with Dr. Barefoot’s assessment that Staley did not have problems with his extremities prior to the work injury.

Dr. Jules Barefoot performed an IME on June 4, 2019. He noted a history of insulin-dependent diabetes mellitus for 19 years. Staley reported he injured his foot on May 29, 2018 when the wheel of a pallet jack crushed his foot. He developed progressively severe back pain and swelling in his right leg. Dr. Barefoot noted a history of cellulitis involving the right great toe in 2015 that cleared up without sequela. Dr. Barefoot reviewed the February 4, 2019 IME report of Dr. Ballard. Dr. Barefoot diagnosed a crush injury to the right foot due to the May 29, 2018 workplace accident. A CT scan of the right foot revealed an osteochondral injury to the medial aspect of the talar dome, fracture of the anterior aspect of the cuboid bone, comminuted fractures to the base of the right third and second metatarsals, fractures to the right second and third cuneiform bones, fractures to the right first cuneiform bone and right navicular bone, and subluxation of the joint between the right navicular bone and the right first, second, and third cuneiform bones. Based on the history, physical examination, and medical records provided, Dr. Barefoot felt the mechanism of injury described by Staley likely caused the right Lisfranc joint fracture dislocation versus atraumatic natural progression of a diabetic condition. Dr. Barefoot felt it was likely Staley did not immediately realize he injured his foot due to diabetic neuropathy. The swelling noted at the emergency room on June 2, 2018 was a sign of an injury to the right foot. Dr. Barefoot assigned a 7% impairment rating pursuant to the AMA Guides.

The ALJ's findings relevant to this appeal are as follows:

I. Notice

Injured workers are only required to give notice of their accidents to their employers. They are not required to

provide an immediate and detailed notice of every diagnosis and consequence of the accident. See *Trico County Development v. Smith*, 289 S.W.3d 538 (Ky. 2008), with its repeated reference to “notice of accident,” and *Fiorella v. Clark*, 184 S.W.2d 208 (Ky. 1944), a more specific if somewhat older case, but still good law.

Further, I believe the Plaintiff’s testimony when he states that he informed his manager of the accident. The accident occurred, we have at least one third party witness confirming it. After it occurred, the pallet was taken back to the stockroom. It is natural and logical to assume, that as the Plaintiff testified, he informed his manager.

It is more likely, if anything, that Rob Zach did not pass on the information to Mr. Walker.

Notice was given on the night of the accident and is therefore sufficient.

II. Work-relatedness/causation and Injury as defined by the Act

The Defendant relies on the report of Dr. Ballard and the fact that no mention is made in the medical records of a right foot injury until June 2, 2018.

First, that is only a five-day gap. That seems relatively insignificant to me. It’s extremely common for people to have an injury and think it was minor, or to believe that the source was one body part when it was another. Further, in this claim, is the fact that the Plaintiff is a diabetic and he may have thought his right foot condition was more minor than it was or related to either his back or diabetes.

Second, as for Dr. Ballard she is an outlier among the medical evidence as both the Plaintiff’s expert, Dr. Barefoot, but more importantly, he unbiased treating provider, Dr. Saccone, have both said the right foot condition is work-related.

Finally, the right Lis franc was fractured. It’s certainly possible it was broken somewhere else but that is only

speculation. Dr. Saccone is affirmatively stating the injury is work-related.

In reliance on the above analysis and with specific reliance on Dr. Saccone the right Lis franc fracture is work-related.

Rural King filed a petition for reconsideration raising essentially the same arguments it makes on appeal. The ALJ provided as follows in his order on reconsideration:

This matter comes before the undersigned on the Defendant's Petition for Reconsideration and the Plaintiff's Response thereto. The Petition is merely a re-argument of the merits. The Opinion sufficiently sets forth the basis of the findings and Orders. The Defendant's arguments regarding notice are without support at law. While Plaintiffs are required to give notice with as much specificity as possible they are not required to make complex medical diagnoses at all, much less instantly. They are also only required to give notice as soon as practicable. The June 18, 2018 medical record from Hardin Memorial Hospital does mention the right foot as being injured, even if it does not ascribe causation to the May 29, 2018 accident. The ALJ can see how this could be construed as meaning it is unrelated to the work accident. It does not, however, require a finding that it is not attributable to the work accident. Sufficient evidence exists, has been analyzed, to support the findings of sufficient notice and causation. The alleged inadequate history had by Drs. Saccone and Barefoot is a matter of opinion, but not my opinion. Finally, while the Defendant may have offered work to the Plaintiff it was not work he could perform. The dates of TTD stand.

The Petition is OVERRULED.

On appeal, Rural King argues the ALJ erred in finding Staley sustained a work-related injury to his right foot. Rural King argues Staley had pre-existing right leg complaints and poorly controlled diabetes since age 18, he altered

his description of his work injury, and his initial complaints were inconsistent with a finding that he acutely fractured bones in the foot in the work injury. Rural King argues the medical records, prior to the work incident, document a history of problems including high blood sugar, diabetic ketoacidosis, retinal problems, cellulitis, and diabetic ulcers. Despite this history, Staley denied that he had any neuropathy, vision, or kidney problems when he saw Dr. Ballard. He also denied any problems with his feet related to diabetes. Rural King believes the medical records disprove Staley's testimony. Rural King notes Staley first alleged that the jack made contact with his right foot in his deposition on January 29, 2019, 245 days after the alleged work injury. Rural King asserts contemporaneous medical records and an eyewitness account reveal his foot was not run over. He initially complained of back pain and right leg swelling, with no discussion of leg or foot pain until he saw Dr. Saccone on July 2, 2018. While he did complain of right leg swelling in June 2018, Dr. Ballard noted he had poorly controlled diabetes, peripheral neuropathy, and pedal edema in both legs. Rural King argues these inconsistencies make it impossible to determine what caused Staley's right foot condition or that his right foot symptoms are causally related to his May 29, 2018 work injury within a reasonable degree of medical probability.

Rural King also argues the ALJ's finding that Staley gave notice regarding the alleged foot injury in a timely manner is clearly erroneous and not supported by probative evidence based on the fact Staley failed to allege that the pallet jack hit/slid/ran over the right foot until litigation was initiated.

Rural King maintains that in finding notice was proper, the ALJ improperly relied on Staley's testimony that he informed his manager of the accident and the fact that a third party witnessed the event. The ALJ provided no further discussion or analysis. However, the ALJ ignored Rural King's argument that, while it was aware Staley backed into a shelf and hit his low back, there was improper notice that his right foot made contact with a pallet jack or that he sustained any right foot injury. It notes the ALJ did not address the allegations regarding the description of the event relative to the right foot. Rural King contends Staley's failure to describe the incident adequately renders his notice of this alleged injury improper. Rural King argues Staley did not adequately provide the "nature" and "cause" of the accident, and failed to provide "a description of the nature and extent of any resulting injury."

Rural King further argues Dr. Christopher Saccone's opinion cannot constitute substantial evidence, and reliance upon it was improper. Rural King contends Dr. Ballard is the only physician who had a complete medical history, and considered Staley's altered description of the incident. Dr. Saccone first saw Staley on July 2, 2018 and noted, "Patient recalls the mechanism of injury as twisting and falling." However, a "twisting and falling" mechanism is inconsistent with all other versions of the incident. Rural King asserts neither Dr. Saccone nor Dr. Barefoot had an accurate medical history regarding diabetic neuropathy or significant right foot problems. Neither reviewed pre-injury records. It contends their opinions regarding causation did not take into consideration the pre-injury diabetic neuropathy, right leg/foot complaints, right foot ulcers, right foot cellulitis, or

diabetic ketoacidosis. The ALJ failed to address that Dr. Saccone relied upon descriptions of the incident inconsistent with Staley's final version of the incident.

Finally, Rural King argues the award of TTD benefits was improper as to duration. The ALJ awarded TTD benefits from May 29, 2018, the date of injury, through December 17, 2018. He based the determination on Staley being kept off work by Dr. Saccone and not being released to return to work until December 17, 2018. However, Staley did not present to Dr. Saccone until July 2, 2018. Therefore, he could not have been taken off work until July 2, 2018 at the earliest. Furthermore, Rural King argues they were actively trying to get Staley to come into work. Staley was ultimately terminated for job abandonment. Therefore, Rural King contends Staley does not satisfy the two-prong test for entitlement to TTD benefits until July 2, 2018.

As the claimant in a workers' compensation proceeding, Staley had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is whether substantial evidence 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). Although a party may note evidence supporting a different outcome than 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 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 first address Rural King's argument that Dr. Saccone's opinion cannot constitute probative evidence. Certainly, there can be instances where the history provided can be so inadequate as to render that physician's opinion lacking in probative value. *See* Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). However, Cepero was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the

left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous.

We find nothing like the factual scenario in Cepero in this case. Dr. Saccone was, in the ALJ's opinion, in the best position to determine whether longstanding diabetes or a trauma was responsible for the foot fractures, having reviewed diagnostic images, performed the surgery, and observed the actual bone and tissues in the foot. He considered diabetes and a traumatic injury as possibilities and based on his expertise as a surgeon determined high velocity impact trauma was the most likely cause. While Rural King emphasizes Staley's history of cellulitis, diabetic ketoacidosis, and a pressure ulcer, those conditions are of little significance, other than establishing the history of diabetes. There is no evidence the fractures pre-date the alleged injury, but there was evidence the fractures were caused by the injuries. Dr. Saccone considered the medical evidence and unequivocally rejected long-term diabetes as a cause of the injury.

As noted by Dr. Barefoot and acknowledged by Dr. Ballard, sensory loss in the foot initially could have prevented Staley from perceiving the injury to the foot. This sensory loss possibly explains the discrepancy between Staley's

descriptions of the event. He may not be certain if the ankle was struck or run over, but he developed pain in the lower extremity as a result of the work incident, so the exact mechanism of the same is a distinction without difference. Staley testified his back complaint initially was predominant. Unlike Cepero, where doctors received an inaccurate history and had no other source regarding that history, Dr. Barefoot reviewed Dr. Ballard's February 4, 2019 IME report. Thus, he had knowledge of Staley's prior history as documented in Dr. Ballard's review of Staley's medical history. Like Dr. Saccone, Dr. Barefoot concluded the fractures resulted from the work accident.

The opinions of Dr. Saccone and Dr. Barefoot constitute substantial evidence supporting the ALJ's finding that Staley sustained a foot injury due to the work accident. The record contained conflicting medical opinions regarding causation. Where there is conflicting medical opinion, the ALJ as fact-finder has wide discretion to pick and choose whom and what to believe. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977). Although an opposing party may note evidence supporting a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

We next address the issue of notice. KRS 342.185(1) requires notice of an accident be given to the employer as soon as practicable. See Smith v. Cardinal Const. Co., 13 S.W.3d 623 (Ky. 2000). Moreover, a worker is not obligated to give notice of a latent harm until the worker becomes aware of it. Turner, Day and Woolworth Handle Co. v. Morris, 267 Ky. 217, 101 S.W.2d 921 (1937). Likewise, if

an employer receives notice of a work-related accident and what appears to be minor harm, it is excusable for the worker to fail to give notice of another more serious harm of which the worker is unaware. Proctor & Gamble Mfg. Co. v. Little, 357 S.W.2d 866 (Ky. 1962). If a worker gives notice of a work-related accident, and a harm resulting from the accident does not become apparent until sometime thereafter, further notice is not required until the harm develops into a compensable state. Reliance Diecasting Co. v. Freeman, 471 S.W.2d 311 (Ky. 1971).

Substantial evidence supports the ALJ's determination that Staley timely provided notice to Rural King. Staley promptly gave notice of the accident to his supervisor. Whether the supervisor properly relayed the notice to his superiors is something outside of Staley's control, but in any event it constitutes proper notice. Under the circumstances of this claim, he was not required to give notice immediately of his foot injury. Staley did not realize he sustained a serious foot injury nor did he know the cause of the swelling in his leg shortly after the accident. It was not until Staley saw Dr. Saccone and the foot fractures were correctly diagnosed that he was aware of the full extent of his injury caused by the work accident. Because of the loss of sensation, the foot fracture initially must be considered a latent injury.

We also find no error regarding the award of TTD benefits as to duration. TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky.

App. 2004), the Court of Appeals held that until MMI is achieved, an employee is entitled to TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury. Here, the ALJ determined the fractures in Staley's foot occurred during the work incident. The ALJ could reasonably conclude that Staley should not have engaged in weight bearing with the foot from the time of the fracture. The record contained sufficient evidence to conclude Staley was not capable of performing his usual or customary work from the time of injury until he reached MMI following the foot surgery.

While Rural King has identified evidence supporting different conclusions, there was substantial evidence presented to the contrary. As such, the ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said his conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the October 30, 2019 Opinion, Award and Order, and the December 4, 2019 Order rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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