

OPINION ENTERED: February 21, 2012

CLAIM NO. 201097734

BRANDON REYNOLDS

PETITIONER

VS.

APPEAL FROM HON. RICHARD M. JOINER,  
ADMINISTRATIVE LAW JUDGE

LAYNE CHRISTENSEN  
and HON. RICHARD M. JOINER,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**STIVERS, Member.** Brandon Reynolds ("Reynolds") appeals from the September 30, 2011, opinion and order of Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") finding Reynolds did not sustain a work-related injury on January 15, 2010, and dismissing his claim against Layne Christensen for income and medical benefits. Reynolds also

appeals from the November 4, 2011, order denying his petition for reconsideration.

Reynolds' Form 101 alleges on January 15, 2010, he injured his left hip when he slipped on some plastic sheeting and fell.

Reynolds was deposed on May 13, 2011. He testified he operated a core drill for Layne Christensen. When Reynolds was five years old, he was diagnosed with a condition known as Legg-Perthes. Reynolds explained his "hip was deteriorating." Reynolds was referred to Shriners Hospital for treatment. Reynolds testified when he was thirteen or fourteen he underwent surgery, explaining as follows:

A: They put three pins in my hip just to help it hold together better. The ball in my hip socket was flat on one side, so they put them -- they put the pins in there to just help it stay in the socket.

Reynolds testified after undergoing the surgery, there were no restrictions on his activities, and he played basketball, football, and baseball in high school. He denied having any hip problems before the alleged work-related injury on January 15, 2010. Although his supervisor was aware of his hip condition, there were no

work accommodations made for him. Reynolds recounted the occurrence of the alleged work-related injury as follows:

Q: Just tell me what you were doing and how that came about, please.

A: Okay. We was [sic] painting on one of the core drills, and there's plastic lined underneath of it so we didn't get any on the floor. And I had a brush in my hand and I was painting, and I just slipped. I guess I had some paint on my shoe or something, and I slipped and went down to my leg and couldn't get back up. I don't know what had exactly happened, but I had to have two guys pack me out of there, and I went straight to the hospital then.

Q: Which leg did you go down on?

A: I went down on my left leg, my bad leg.

Q: And you're saying bad leg because that's where you had the prior surgery?

A: Yeah.

Reynolds explained his left leg was fine until he slipped on January 15, 2010. He testified there were approximately ten or eleven people in the shop on that occasion and provided the names of the individuals he believed were present.

Reynolds testified that on January 15, 2010, Phillip Stevens ("Stevens"), a helper at Layne Christensen, and Kimberly Kaiser ("Kaiser"), a driller at Layne Christensen, were doing some maintenance on the drill.

When Reynolds fell, the first person he saw was Stevens, to whom he yelled "to come help me."<sup>1</sup> Reynolds testified he went down on one leg and then fell forward to the ground.

With regard to his fall, Reynolds testified as follows:

A: But my leg -- but I kind of -- I tried to catch myself with my left leg, so it kind of -- it hit the ground first, but I went down. I mean --

Stevens and Ronald Smith ("Smith"), a helper at Layne Christensen, picked him up and took him outside to a vehicle, and Smith took him to St. Claire Regional Medical Center. Reynolds was not admitted to the hospital but received a couple of shots and was given crutches. Reynolds could not walk for approximately three or four months. When he was able to walk, he walked with a limp because the pain was excruciating.

Reynolds testified after he "got hurt" he had to have hip replacement surgery performed on July 27, 2010. He acknowledged personnel at Shriners Hospital told him "later in life [he] would probably have to have a hip replacement." Dr. Paul Lewis, who Reynolds saw after his fall, referred him to Dr. Joseph Leith who performed hip

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<sup>1</sup> Although his name is spelled "Stephens" in Reynolds' deposition, Phillip Stevens' June 24, 2011, deposition reflects his last name is spelled Stevens. Since his name is spelled "Stevens" in his and the depositions of the other employees, we will refer to Phillip Stevens throughout this opinion as "Stevens."

replacement surgery. Reynolds testified Dr. Leith told him he would need hip replacement surgery every ten to twelve years.

On June 24, 2011, Layne Christensen deposed several employees who were present in the shop on the date of Reynolds' alleged fall. Ronnie James ("James"), the district manager, testified he was aware Reynolds' application revealed he had a hip problem, but Reynolds told him nothing prevented him from performing "the duties" at Layne Christensen. On January 15, 2010, prior to Reynolds' alleged fall, James noticed Reynolds limping. He heard Reynolds complaining to others "his hip was fixing to go out." When James suggested Reynolds could go home, he declined, indicating he needed the money. Concerning Reynolds' hip problems before the alleged fall, James testified as follows:

Q: You say that you -- you saw him limping before anything --

A: (Interposing) Yes. But this is something that I've seen always. I never paid so much attention to him limping as I did his comments that his -- by others that, you know, he felt bad or that -- and then I asked him the question, and he replied that his hip was bothering him; that it was fixing to go out.

Q: Was this before any allegation of a fall or an injury?

A: Oh, yes, uh-huh.

Q: About how far in advance of that?

A: Oh, I'd have to guess here, but I'm going to say 30 minutes, maybe an hour.

James explained Stevens came to him saying "Brandon was having a problem." When he went to check on Reynolds, Reynolds was "surrounded" by Smith and Stevens. James described his conversation with Reynolds as follows:

Q: Did you discuss what may have occurred with Mr. Reynolds at that time?

A: I asked him what happened. He replied that his hip had went [sic] out. I asked him had he fallen or had he been injured in any way, and he said, no, that he hadn't; that his hip had went out.

Q: What occurred after that?

A: He then -- we moved him. They helped him outside to the truck and put him in a truck. I then followed him out to the truck. Phillip Stevens was going to take him to a clinic or someplace, the nearest place we could take him. But I switched those people. I had Ron Smith take him, which they were both right there. I then at that time asked him again had he fallen or had he been injured in any way. I was very direct. And he said no, he had not fallen. And both these gentlemen were present at that time. Both of them were present at both times.

Smith took Reynolds for treatment. James explained he asked Kaiser, Danny Fultz ("Fultz"), a driller with Layne

Christensen, and Stevens what had happened, and they said they did not see Reynolds fall. They stated they saw Reynolds go to one knee, and then he made the statement his hip went out.

Smith was deposed on June 24, 2011. He testified he did not see Reynolds fall. When Smith turned around, Reynolds was yelling at Stevens to help him up. Smith and Stevens helped Reynolds up and took him outside where he stated his "hip had give [sic] out." Smith took Reynolds to the emergency room. At the hospital, Smith asked Reynolds' mother how Reynolds was doing, and she replied "his hip had give [sic] out or something." Reynolds' mother also told Smith "the doctors wanted him to have his surgery on his hip before." Smith denied telling Reynolds' mother Reynolds had fallen. Smith emphasized when he saw Reynolds, he was down on one knee. Smith saw Reynolds earlier that day and he was "like a man in pain, one leg, limping around." Before January 15, 2010, he was not aware of Reynolds walking with a limp.

Stevens was deposed on June 24, 2011. Stevens testified he worked at Layne Christensen with Reynolds for six years and had gone to school with him. He testified Reynolds told him he had prior hip problems. After Reynolds hollered at Stevens, Stevens turned and observed

Reynolds down on one knee. Stevens and Smith helped Reynolds up and took him outside the building. Stevens went back inside the building and told James that Reynolds' "hip was hurt." James went outside and asked Reynolds if he fell and Reynolds replied "No. My hip gave out." After Reynolds was helped into the truck, James again asked Reynolds if he fell. Reynolds responded, "No. My hip gave out." Stevens testified Reynolds had been limping earlier that morning, and he heard Reynolds tell Kaiser his hip was hurting. Stevens explained he was approximately five to seven feet from Reynolds with his back to him when Reynolds hollered at him. Stevens had not heard anything which indicated a fall had occurred.

Kaiser was deposed on June 24, 2011. He testified Reynolds was painting a rig and was approximately twenty feet from him. He saw Reynolds limping earlier that day and asked him what was wrong. Reynolds responded his hip was bothering him. Kaiser did not see the alleged event. Kaiser explained when he turned around he saw two people helping Reynolds up. At that time, Reynolds had "one knee down" on the floor. Kaiser testified prior to his fall, Reynolds stated his hip was "giving out."

Fultz was deposed on June 24, 2011. He testified he was painting a drill and was approximately ten feet from

Reynolds. Fultz did not see or hear a fall. Fultz testified on that day and before the alleged fall, Reynolds had been limping for quite a while and had "a bad limp." Fultz saw them walking out the door with Reynolds. Fultz had never seen Reynolds walk with a limp prior to that day.

At the August 22, 2011, hearing, Reynolds testified when he slipped on the plastic he went down face first and ended up on his belly. Concerning his co-workers' testimony Reynolds was on one knee, Reynolds explained as follows:

A: ...I might have tried to get up or something because I mean something was said about me getting on one knee, but I mean I was trying to get up but I couldn't get up. So, I mean I hollered at the nearest guy to me and when I raised my head that was Phillip Stephens.

Reynolds denied making any statements his hip went out. He testified he might have said "my hip's out" or "my hip's gone," but that was because of the fall. Reynolds testified he always walked with a limp because "one leg is a little bit shorter than the other one." He denied telling anyone on January 15, 2010, his hip was hurting or his hip was going to go out. Reynolds denied ever having hip problems or hip pain prior to January 15, 2010. He testified when he called for Stevens to help him, he was

still on his stomach. Reynolds testified he may have gotten up on one knee when his co-workers tried to help him get up.

Reynolds' girlfriend, Laken Nichole Burchett ("Burchett"), testified at the hearing she had known Reynolds for seven years and he had always walked with a limp. When Reynolds was discharged from the hospital, she accompanied Reynolds to Layne Christensen's shop to "do the injury report." At the shop, Reynolds explained to Linda Cecil ("Cecil"), the secretary, and James how he fell. Cecil and James did not disagree with what Reynolds said.

Reynolds' mother, Lori Ann Reynolds ("Lori") testified at the August 22, 2011, hearing. Lori testified Reynolds has limped since he was eight years old. She testified when she was at the hospital, after the January 15, 2010, fall, Smith told her Reynolds fell. Lori denied ever telling Smith she knew Reynolds' hip had given out.

Reynolds relied upon the June 18, 2011, independent medical examination ("IME") report of Dr. Anthony McEldowney. Dr. McEldowney assessed a 10% impairment pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") due to the injury which was the "direct result" of the January 15, 2010, "fall on the left

hip." Because of Reynolds' asymptomatic condition of "perthes [sic] disease and avascular necrosis," Dr. McEldowney stated 50% of the impairment rating relates to a previously asymptomatic dormant condition. He opined Reynolds did not have an active impairment prior to the injury.

Dr. McEldowney's August 1, 2011, rebuttal report submitted after he had reviewed Dr. Richard T. Sheridan's report, states he "stands firm with [his] findings of direct causation of injury to the left hip with exacerbation of a previously asymptomatic dormant condition."

Layne Christensen relied upon the July 14, 2011, IME report of Dr. Sheridan. After reviewing a February 15, 2010, CT scan report of the left hip, a January 15, 2010, x-ray report of the left hip, an October 30, 2007, x-ray report of the left hip, and a January 15, 2010, emergency room report from St. Claire Regional Medical Center, and after conducting an examination, Dr. Sheridan diagnosed left hip pain. He saw no evidence Reynolds' condition was related to a specific traumatic episode such as the alleged slip and fall. Dr. Sheridan stated Reynolds did not strike his left hip when he allegedly fell and reported "left hip pain and chronic pain in the left hip which had been

worsening for the two months prior to January 15, 2010." He opined there was no evidence on the x-rays or CT scan of a harmful change in Reynolds' condition when compared to the prior x-rays in 2007. Dr. Sheridan indicated there is evidence Reynolds' condition was pre-existing and active. With regard to the significance of the Legg-Perthes disease, Dr. Sheridan stated as follows:

The significance of the prior diagnosis of Legg Perthes [sic] disease is that it can lead to changes in the femoral head, such as enlargement and flattening of the head, and to arthritis and/or avascular necrosis. I think that is what happened in this case which required a surgery in 1999 and the total hip replacement in 2010. Legg Perthes [sic] disease is a disease of childhood, more common in boys than in girls. It usually presents with pain in the hip and x-ray changes and the x-ray changes may be minor or they may show a cystic formation and abnormalities in the femoral head and/or avascular necrosis and can proceed to osteoarthritis which is what I believe happened in this case.

After summarizing the lay and medical testimony, the ALJ made the following findings of facts:

1. The stipulations are accepted.
2. On January 15, 2010, Brandon Reynolds was an employee of Layne Christensen.
3. On January 15, 2010 Brandon Reynolds had had Legg Perthes [sic] disease since childhood.

4. Legg Perthes [sic] disease is unrelated to Mr. Reynolds' employment.

5. The diseased hip became worse on January 15, 2010 to the point that Mr. Reynolds was taken to the hospital. He did not fall.

6. Mr. Reynolds ultimately underwent hip replacement surgery which was done solely to treat the Legg Perthes [sic] disease.

7. Even if there were a stumble or fall on January 15, 2010, the surgical procedure would not have occurred as a result of that fall. The surgical procedure was done to treat the Legg Perthes [sic] disease.

The ALJ entered the following relevant conclusions of law:

1. The threshold issue is whether Brandon Reynolds had an injury as defined in the Workers' Compensation Act. Under the Kentucky Workers' Compensation Act, "injury" means, in part:

. . .

Having accepted the testimony of the co-workers about their observations on January 15, 2010, I find that the weight of the evidence leads me to conclude that there was no fall and thus no traumatic event which is essential for an injury to have occurred.

2. Brandon Reynolds did not sustain an injury on January 15, 2010 as the term "injury" is defined in the Kentucky Worker's Compensation Act.

Accordingly, the ALJ dismissed Reynolds' claim against Layne Christensen.

Reynolds filed a petition for reconsideration asserting error in the ALJ's summary of the testimony. Reynolds also took issue with the ALJ's statement the January 15, 2010, medical records of St. Claire Regional Medical Center contain a notation Reynolds reported he had chronic pain in his left hip. Reynolds asserted there was "no such record" in evidence, and he was "unaware of any such records." Reynolds asked the ALJ to provide more "specific reference and further documentation." Since the ALJ stated he "'accepted the testimony of the co-workers about their observations,'" he requested the ALJ to describe in detail the evidence which led him to conclude there was no fall and, thus, no traumatic event.

Reynolds asked the ALJ to describe the medical opinion in the record that he did not suffer an injury on January 15, 2010. Reynolds also requested the ALJ provide the medical opinion in the record which is the basis for number seven of the ALJ's findings of fact.

Reynolds asserted the ALJ's opinion and order "contains elements of his conclusion that [his] hip condition was pre-existing active." Reynolds objected to such a conclusion since it was not a contested issue.

Reynolds requested the ALJ explain his findings of facts and conclusions of law "without concluding Reynolds was suffering from a pre-existing active condition on January 15, 2010." Reynolds also asserted the ALJ's opinion and order contained "elements of his conclusion that [his] hip condition resulted in an idiopathic injury." Reynolds objected to the ALJ's "reliance upon such a conclusion" since it was not a contested issue and requested the ALJ explain his findings of facts "without concluding Reynolds suffered an idiopathic injury."

In the November 4, 2011, order denying Reynolds' petition for reconsideration the ALJ stated, in relevant part, as follows:

. . .

Second, the plaintiff asserts that he is unaware of any record where Mr. Reynolds reported to the hospital that he had chronic pain in his left hip. On August 1, 2011, plaintiff served several records, among which is the Emergency Department record of St. Clair Regional Medical Center noting that Mr. Reynolds was seen at 10:09 on 01/15/2010. This record reflects that the patient was the historian and the history is recorded in part as follows:

Fell and landed on the concrete surface, slipped. Occurred at work. Patient is experiencing severe pain. No other injury. Patient reports falling forward and

landing on right knee. Patient did not hit left hip. Reports of hearing a 'pop' and now having pain in his left hip. Reports immediate numbness in his left leg which has resolved. He states that he has chronic pain in his left hip which has been worsening for the past 2 months. Reports severe pain since falling today at work. He has an appointment on 1/20/10 with his family Dr. Dr. Paul Lewis.

From this record, I inferred that Mr. Reynolds had reported to the hospital emergency room that he had chronic pain in his left hip.

Third, the plaintiff requested what observations of coworkers were relied upon in leading to the conclusion that there was no fall and no traumatic event. The testimony of Mr. Ronnie James is that he saw Mr. Reynolds limping and complaining his hip was ready [sic] go out. Mr. Ronald Smith heard Mr. Reynolds say that his hip had given out. Before the incident, Mr. Smith had also seen Mr. Reynolds limping around. Mr. Phillip Stephens heard Mr. Reynolds say that he had not fallen; his hip had given out. He, Stephens, testified that he saw Mr. Reynolds limping around that morning. Mr. Kimberly Kaiser testified that he saw Mr. Reynolds limping before the incident in question and Mr. Reynolds told him his hip was bothering him. All of these observations lead fairly to the conclusion that there was no fall and no traumatic event. The testimony of Mr. Reynolds was not

sufficient to persuade me to the contrary.

Fourth, the definition of injury was recited in the Opinion and Order rendered on September 30, 2011. Whether an injury occurred as defined by the Workers Compensation Act is not solely a medical determination. Mr. Reynolds clearly has a serious medical condition but it did not arise out of his employment and did not result from a traumatic event. The report of Dr. Sheridan supports the finding that there was no harmful change to Mr. Reynolds caused by his employment.

Fifth, the determination that the surgical procedure would not have occurred as a result of the fall alleged is based on an inference derived from the report of Dr. Sheridan [sic] is based on paragraphs 1, 2, 3, and 4 under the "Discussion & Opinion" section of Dr. Sheridan's report.

Sixth, the Plaintiff suggests that I may not consider the presence and nature of the prior existing Legg-Perthes disease in determining whether there was an injury. I was not and still am not persuaded that Mr. Reynolds's work had anything to do with the onset of his symptoms on January 15, 2010 as alleged.

Seventh, an idiopathic condition is one of unknown cause. Here the known cause of Mr. Reynolds's problem is Legg-Calve-Perthes (or Legg-Perthes) disease as discussed in the report of Dr. Sheridan.

I do not find material patent errors appearing on the face of the Opinion and Award. On this basis, the petition for reconsideration is **DENIED**.

On appeal, Reynolds asserts the ALJ erred in determining he did not suffer an injury as defined by the Act. Reynolds takes issue with numbers five, six, and seven of the ALJ's findings of facts of the September 30, 2011, opinion and order and raises three issues on appeal. First, Reynolds argues the ALJ presumed facts that were not in the record. Reynolds asserts the ALJ believed the testimony of various co-workers in spite of a host of circumstances that contradict their testimony. Reynolds maintains there is no medical testimony establishing the fall "would not have caused the need for surgery." Reynolds asserts the "only medical testimony on this issue" indicates the surgery occurred as a result of his fall. Reynolds argues although the ALJ may have determined he did not fall, the ALJ did not determine Reynolds did not slip or trip. Reynolds maintains "no one could say that they did or did not see Reynolds slip or fall." Reynolds asserts his hip condition "was activated and made rateable by a work activity" which satisfies the requirement he prove a work-related harmful change.

Next, Reynolds argues the ALJ exceeded his authority by deciding this case on the basis of defenses that were never designated as contested issues. Reynolds asserts Layne Christensen did not raise "a pre-existing

active defense nor an idiopathic injury defense, as a contested issue." Reynolds asserts those issues are not included within the issues of "injury as defined by the Act" and "causation." Rather, the issues "must be asserted unequivocally and in plain language." Reynolds asserts the ALJ's decision has impermissibly provided two defenses which were not listed as contested issues either in the Benefit Review Conference ("BRC") order or at the hearing.

Finally, Reynolds argues the ALJ's opinion and award is erroneous on the basis of the reliable, probative, and material evidence contained in the whole record. Conceding the statements of the co-workers, if believed, amount to substantial evidence, Reynolds asserts in view of the entire record such testimony standing alone is "not sufficient to induce conviction in the minds of reasonable men when the record is considered in its entirety." Reynolds asserts the co-workers' testimony was contrived.

As the claimant in a workers' compensation proceeding, Reynolds 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). Since Reynolds was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984).

"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). 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 that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The August 9, 2011, BRC order reflects the following contested issues: "benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, TTD, and vocational rehabilitation." Although the BRC order listed six contested issues to be resolved by the ALJ, the ultimate issue, as framed by the evidence, was whether Reynolds fell at work and sustained an injury to his hip. Stated another way, the primary issue was the cause of Reynolds' hip problems which surfaced at work on January 15, 2010. Layne Christensen's lay and medical evidence establish no fall occurred, and the hip problems Reynolds experienced on January 15, 2010, did not result from a traumatic event at work but, rather, from Legg-Perthes disease. Based on

Layne Christensen's lay and medical evidence, the ALJ determined no fall occurred and, thus, Reynolds did not sustain an injury as defined by the Act. Based on the medical proof submitted by Layne Christensen, the ALJ also determined the cause of Reynolds' hip problems, which worsened on January 15, 2010, is Legg-Perthes disease. The ALJ's determination no work-related injury occurred as well as his determination as to the cause of Reynolds' hip problem which necessitated hip replacement surgery is supported by substantial evidence.

In the opinion and order, the ALJ stated he accepted the testimony of Reynolds' co-workers. In the order denying Reynolds' petition for reconsideration, the ALJ cited to the testimony of James, Smith, Stevens, and Kaiser in support of his finding Reynolds did not fall at work and there was no work-related traumatic event. At least three employees testified Reynolds stated he did not fall but that his hip had gone out. Others testified Reynolds had been limping and complaining of hip pain before he called out for help and was observed down on one knee. Clearly, the testimony of the co-workers, if believed, establish there was no fall and thus no injury.

Based on Dr. Sheridan's testimony, the ALJ concluded the effects of the Legg-Perthes disease was the

cause of Reynolds' hip problems which worsened on January 15, 2010, and an event at work on that date was not the cause of Reynolds' hip problems. In response to Reynolds' petition for reconsideration, the ALJ cited the January 15, 2010, record of St. Claire Regional Medical Center which reflects Reynolds had chronic left hip pain which had been worsening for the past two months. Although reflecting Reynolds stated he fell at work, contrary to Reynolds' testimony, that record also reflects Reynolds reported experiencing chronic left hip pain which had worsened over the two months prior to January 15, 2010. Significantly, Dr. Leith's July 28, 2010, report does not mention a history of a work injury or traumatic event. His report reflects the following history:

Mr. Reynolds is a 25 year old male who suffered a left femoral neck fracture several years ago. He underwent open reduction/internal fixation at that time. He has gone on to develop post-traumatic arthritis and has severe left hip pain. He notes he has constant aching pain that is limiting his ability to walk. It hurts all the time. His pain is an 8 out of 10. He notes this interferes with his job and it interferes with his activities of daily living in these applications.

Likewise, his July 28, 2010, "operative report" does not mention an injury of any type.

We find no merit in Reynolds' argument the ALJ impermissibly relied upon two defenses not raised by Layne Christensen. Two of the issues stated in the BRC order were work-relatedness/causation and injury as defined by the Act. In resolving the issues of work-relatedness/causation and injury as defined by the Act, the ALJ is required to determine whether a traumatic event occurred on January 15, 2010. Consistent with Dr. Sheridan's opinions, the ALJ determined the Legg-Perthes disease was the cause of Reynolds' hip problems which worsened at work and necessitated treatment at the hospital. Dr. Sheridan's opinions and the records of St. Claire Regional Medical Center and Dr. Leith support the ALJ's determination Reynolds' hip problems were not related to his work.

While we agree the existence of a pre-existing active condition should have been listed as a contested issue in the BRC order, based on the record we do not believe the ALJ erred in concluding Reynolds had a pre-existing active condition prior to January 15, 2010. In determining whether an injury as defined by the Act occurred, the ALJ was permitted to explain what he believed to be the cause of Reynolds' hip condition which led to the hip replacement surgery. Reynolds made no objection to nor

did he move to strike Dr. Sheridan's report or the co-workers' testimony. In his rebuttal report, Dr. McEldowney responded to Dr. Sheridan's report in which Dr. Sheridan opined Reynolds had a pre-existing active condition. In Layne Christensen's brief it argued Reynolds' pre-existing active condition was the cause of his hip problems and not a work injury. Reynolds made no objection to nor did he move to strike that portion of the brief arguing Reynolds had a pre-existing active condition. Therefore, any objections Reynolds may have to the failure of Layne Christensen to list pre-existing active condition as a contested issue was waived.

Also, on August 2, 2011, in addition to other records, Reynolds filed St. Claire Regional Medical Center's records dated January 15, 2010, one of which was referenced by the ALJ in his order ruling on Reynolds' petition for reconsideration. That record clearly reflects Reynolds had a pre-existing active condition which had been worsening for two months prior to August 15, 2010. In that same filing, Reynolds attached the records of Dr. Leith, referenced herein, which make no mention of Reynolds sustaining a work injury. Given the records introduced by Reynolds which establish he had a pre-existing active

condition, the ALJ was not prohibited from determining Reynolds had a pre-existing active condition.

In reviewing the record, we believe Reynolds was well aware Layne Christensen's defense was that no fall occurred and Reynolds' hip problems were related to his pre-existing active hip condition caused by Legg-Perthes disease. The report of Dr. Sheridan and the testimony of the co-workers clearly placed Reynolds on notice of Layne Christensen's position.

We also point out an "idiopathic injury," as characterized by Reynolds, has no relevance in this case since the ALJ found there was no fall. Therefore, there was no reason for the ALJ to consider the issue of whether a fall was idiopathic or unexplained.

Reynolds takes issue with the ALJ's finding that had a stumble or fall occurred, the surgical procedure would not have occurred as a result of the fall. We believe that finding by the ALJ to be gratuitous, since the ALJ made a specific finding Reynolds did not fall and in his conclusions of law again stated there was no fall and thus no traumatic event.

We point out Reynolds' sole basis for recovery was that the fall at work on January 15, 2010, caused an injury to his hip and the need for surgery. Reynolds

relied upon the opinions of Dr. McEldowney who stated Reynolds sustained an injury as a result of a fall at work on January 15, 2010, and the injury aroused a previously dormant, non-disabling condition. Reynolds did not maintain he sustained a cumulative trauma hip injury as a result of working at Layne Christensen.

Finally, Reynolds' assertion the co-workers' testimony was contrived has no merit since the ALJ determines credibility of the witnesses, and the ALJ's determination as to what testimony is credible cannot be disturbed by this Board.

In light of the record, Reynolds has fallen far short in his obligation to demonstrate the findings of the ALJ are so unreasonable that the evidence must be disregarded as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the September 30, 2011, opinion and order and the November 4, 2011, order denying Reynolds' petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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