

OPINION ENTERED: February 6, 2012

CLAIM NO. 201094790

CARDINAL HILL HEALTHCARE

PETITIONER

VS.

**APPEAL FROM HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE**

ALLISON REEVES
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION AFFIRMING IN PART,
VACATING IN PART AND REMANDING**

* * * * *

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

ALVEY, Chairman. Cardinal Hill Healthcare ("Cardinal Hill") seeks review of a decision rendered August 5, 2011 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), awarding Allison Reeves ("Reeves") permanent partial disability ("PPD") benefits based upon an 8% impairment rating, enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. Cardinal Hill also appeals from the order

ruling on its petition for reconsideration entered September 14, 2011.

The ALJ found Reeves sustained a low back injury on November 5, 2009 when she prevented a resident from falling while working as a nurse's assistant. Reeves worked forty hours per week for Cardinal Hill at the time of the accident. She also cleaned the building on the weekends as a "subcontractor" for which she was paid separately. The ALJ determined the concurrent earnings from cleaning should be included in determining Reeves' average weekly wage.

On appeal, Cardinal Hill argues the ALJ erred by finding an average weekly wage of \$558.20 because he included earnings from a cleaning business, which was an "uncovered employment". Cardinal Hill also argues the evidence compels a finding of prior active impairment. We affirm in part, vacate in part and remand.

Reeves testified by deposition on October 6, 2010, and at the hearing held on June 6, 2011. She is a resident of Burlington, Kentucky, who was born on April 28, 1975. Reeves is a high school graduate, and is a certified nurse's assistant ("CNA"). Her work experience includes working previously as a CNA at a nursing home, her job at Cardinal Hill, and operating a cleaning business. Reeves

described her job as a CNA at the previous facility as involving the bathing, feeding and dressing of residents. Her job as a CNA at Cardinal Hill involved working with adult handicapped individuals, which included cleaning, changing, pushing wheelchairs, exercising residents, and transferring residents from wheelchair to bed or toilet.

On November 5, 2009, Reeves and another CNA were taking an adult resident with Down's syndrome to the bathroom. The resident weighed 160 to 170 pounds. When the other CNA pulled down the resident's pants, he placed both feet in the air, shifting all of his weight to Reeves. She prevented him from falling, and experienced an immediate burning sensation from the level of her bra strap, down both legs. She completed an accident report and sought medical treatment two days later.

Reeves testified she initially sought treatment at Urgent Care where she saw Dr. Litrell, who eventually referred her to Dr. Rohmiller, an orthopedic surgeon. She then saw Dr. Kruer for pain management, who administered injections in the left side of her back. She continues to take Percocet and Cymbalta for her work injuries. Reeves advised she had no previous workers' compensation claims, but experienced sciatica on the right in 2007, for which two epidural injections were administered. Contrary to Dr.

Rohmiller's testimony, Reeves testified she provided him with a complete history of her previous back complaints and treatment.

Reeves also experienced some back pain in September 2009 which was a residual from a cough which caused chest pain radiating into the middle of her back. Reeves stressed the pain was not in the low back. Reeves also testified she had previously taken pain medication for pelvic pain due to a ruptured cyst. She testified she had no ongoing complaints of low back pain prior to her injury in November 2009. Her current complaints consist of pain from the bra strap to her buttocks, into her left hip and thigh. She stated the pain sometimes travels up into the left side of her neck. Her treatment consisted of epidural steroid injections, radiofrequency ablation, and pain medication. Reeves testified her previous low back pain for which she received two epidural steroid injections in 2008 was due to right-sided complaints. She stated her problems since November 5, 2009 have been in the left side of her back and left leg.

Prior to working for Cardinal Hill, Reeves started a cleaning service which cleaned the facility. She later began working as a CNA at Cardinal Hill because

she needed the insurance. At her deposition, Reeves testified as follows:

Q. How many hours are you typically, were you typically working prior to the injury?

A. Forty.

Q. Any overtime?

A. Yes. The forty hours would be for nurse's aide. And I also run a cleaning business, and I am the subcontractor for Cardinal Hill to clean the facility.

Q. And when did you start your business.

A. August of 2007. That was how I first started there.

Q. You started cleaning for them?

A. I started off cleaning, correct.

Q. So they were aware of you having both positions?

A. Yeah.

Reeves testified she received two separate checks from Cardinal Hill, one for the forty hours per week she worked as a CNA and the other for the 15 to 20 hours she spent cleaning on the weekends.

Reeves testified she continues to work for Cardinal Hill earning more per hour now than she did as a CNA. Her current job duties involve entertaining

residents. She stated she can no longer lift, push wheelchairs, or lead the exercise program. She no longer does the cleaning, and earns no money from that endeavor.

Lori Friedhoff, the registered nursing program manager for adult day care at Cardinal Hill, testified at the hearing. She manages 10 to 12 employees, including Reeves. She worked with Reeves at a previous facility. She testified Reeves is a good employee, and she is aware of the November 2009 work injury. Prior to the work injury, she testified Reeves had no difficulty assisting residents with toileting, transfers, walking, feeding, lifting, and generally attending to their needs. She noted Reeves also conducted the exercise program. Since the accident, Reeves no longer lifts patients, performs mostly tabletop activities, and exhibits physical manifestations of her pain which were not present before the accident.

Reeves supported her filing of the Form 101 with the March 26, 2010 report of Dr. Rohmiller. He compared a lumbar MRI taken March 11, 2010 with one taken November 12, 2007 and opined, "It certainly appears on her most recent MRI that there has been disc desiccation with the development of a left paracentral disc protrusion that was not seen on the film of 11/12/07." He further stated, "It

certainly appears that the disc protrusion off to the left is new and would be related to her injury."

Reeves subsequently filed additional records from Dr. Rohmiller. He first saw Reeves on February 19, 2010, and noted she had low back pain with right radiculopathy. His office note of March 15, 2010 stated she again complained of predominant low back pain, but did not remark if it affected either side. In his office note from August 20, 2010, Dr. Rohmiller stated she continued to complain of low back pain, but did not believe she was a candidate for fusion surgery. He then referred Reeves to Dr. Kruer for facet blocks and possibly radiofrequency ablation.

Dr. Rohmiller subsequently testified by deposition taken by Cardinal Hill on January 5, 2011. He testified he was unaware of Reeves having any previous low back problems until he was presented with medical records prior to the commencement of the deposition. Based upon the information provided prior to the deposition, Dr. Rohmiller stated he could not say her problems were completely dormant prior to November 5, 2009.

Reeves also filed records from Dr. Kruer, her treating pain management physician. Dr. Kruer administered multiple epidural steroid injections and a radiofrequency ablation. He diagnosed diffuse disc bulge at L4-L5 with

left foraminal protrusion, lumbago and facet arthropathy. In his office note dated May 16, 2010, Dr. Kruer noted the onset of her complaints was in November 2009 while she was lifting a patient. He also noted the prior history of sciatica and back pain with epidural injections in 2008.

Reeves also saw Dr. Steven Wunder, a physical medicine and rehabilitation physician, for evaluation on November 22, 2010. Dr. Wunder noted Reeves had right-sided low back pain prior to the November 5, 2009 work injury helped by injections. He stated:

She had some pelvic pain and was seen by her doctor in September and had an x-ray of her back then also. However, she really was not having back problems per se, and they thought she had more problems with pelvic cysts.

Dr. Wunder noted her current complaints are on the left. He further noted she had a prior low back injury in 2007 from which she recovered. Dr. Wunder further stated:

This patient did have a history of low back pain prior to November 5, 2009. On November 5, 2009, there appeared to be an acute aggravation of this pre-existing condition. I believe she has a DRE Category II impairment from the injury at work on November 5, 2009. I do believe it is causally connected to the November 5, 2009, injury. She would have an 8% impairment to the whole person.

The record from Urgent Care on November 7, 2009 reflects Reeves complained of low back pain and bilateral leg pain and cramping. The record from November 11, 2009 reflects pain in left leg, right leg and low back is improved. The record also reflects a diagnosis of lumbar strain with degenerative disk disease.

Reeves was evaluated by Dr. Tutt, a neurosurgeon, on April 18, 2011. Dr. Tutt opined Reeves did not sustain an injury or harmful change on November 5, 2009. He found she has no impairment rating attributable to a work injury. He stated she would have reached maximum medical improvement ("MMI") after six weeks. He also stated he would assess no restrictions due to the incident, and she retains the capacity to perform her previous work. Dr. Tutt stated her complaints were disproportionate to the imaging studies.

A Benefit Review Conference ("BRC") was held on June 6, 2011. The contested issues preserved in the BRC order and memorandum include benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid medical bills, injury as defined by the Act, credit for no show fees for a missed evaluation with Dr. Tutt, exclusion for pre-existing active disability/impairment, and TTD.

Cardinal Hill subsequently withdrew the issue of the assessment of a no show fee.

In the opinion, order and award rendered August 5, 2011, the ALJ found as follows:

In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds persuasive the opinion of Dr. Wunder and coupling that with the Plaintiff's credible testimony and that of her supervisor, Ms. Friedhoff, finds that the Plaintiff has met her burden of proving that she suffered an injury as defined by the Act on November 5, 2009.

In addition, the Administrative Law Judge believes that Dr. Rhomiller [sic] in his medical records, reviewed the MRI scan taken before the November 5, 2009, incident and the one taken afterwards and opined that she had a harmful change in the human organism as evidence [sic] by the MRI scans which [sic] believed did reflect objective evidence of positive findings in her lumbar spine which were related to the work-related incident of November 5, 2009. The Administrative Law Judge did not find his deposition testimony to be credible or to make much sense when taken into consideration with the medical records generated by him. In addition, the Administrative Law Judge did not find Dr. Tutt's testimony to be persuasive.

The next issue for determination is the appropriate average weekly wage. Having reviewed the wage records submitted by the parties, as well as the testimony of the Plaintiff the Administrative Law Judges [sic]

persuaded that Plaintiff's appropriate average weekly wage was \$558.20 and so finds.

The next issue for determination is entitlement to TTD benefits. In this instance, there is simply no evidence presented to persuade the Administrative Law Judge that the Plaintiff suffered from a period of temporary total disability. In fact, the Plaintiff was able to return to work with restrictions, and it does not appear that she missed work for the appropriate time to allow her to received [sic] TTD benefits pursuant to statute. See KRS 342.040 (1).

. . .

The next issue for determination is what level of benefits the Plaintiff is entitled to pursuant to KRS 342.730. There have been two physicians assess the Plaintiff the [sic] functional impairment rating as a result of her lumbar spine condition.

Dr. Tutt assesses the Plaintiff a 5% to 10% functional impairment rating, pursuant to the Fifth Edition of the AMA Guides [sic], and attributes it to the Plaintiffs [sic] lumbar spine condition that he opined was in existence immediately prior to the November 5, 2009, incident and was therefore pre-existing and active.

Dr. Wunder assesses the Plaintiff an 8% functional impairment rating, pursuant to the Fifth Edition of the AMA Guides, and attributes it to the effects of the November 5, 2009, work-related incident. Dr. Wunder opined the Plaintiff did not have a pre-existing active impairment immediately preceding

the November 5, 2009, work-related incident.

In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds persuasive the opinion of Dr. Wunder and finds that the Plaintiff retains an 8% functional impairment rating, pursuant to the Fifth Edition of the AMA Guides [sic], as a result of her November 5, 2009, work-related incident. Pursuant to KRS 342.730 (1)(b), the functional impairment rating is multiplied by a factor of .85 yielding a 6.8% permanent partial disability award.

In addition, based upon the restrictions assessed the Plaintiff by Dr. Wunder and the Plaintiff's testimony regarding the physical requirements of her job at the time of the November 5, 2009, injury and further coupled with the testimony of her supervisor, Ms. Friedhoff, who testified that the Plaintiff is currently working under physical restrictions and is not capable of performing the job duties required of her at the time of the November 5, 2009, incident, the Administrative Law Judge finds that the Plaintiff does not retain the physical capacity to perform the specific job the [sic] she was performing at the time of her injury for the Defendant Employer, Cardinal Hill Healthcare. While the Plaintiff has returned to work for the Defendant Employer, she is doing so with limitations, and in addition, is no longer capable of performing her concurrent employment as a custodian on the weekends.

Therefore, the Administrative Law Judge finds its [sic] Plaintiff is

entitled to application of the three-time [sic] statutory multiplier pursuant to KRS 342.730 (1)(c)(1) due to the fact she does not retain the physical capacity to return to the type of work that she performed at the time of her injury.

. . .

In this specific instance after careful review of the medical testimony, the Administrative Law Judge finds persuasive the opinion of Dr. Wunder and finds that the Plaintiff does not suffer from a pre-existing active impairment.

In its petition for reconsideration, Cardinal Hill argued, as it does on appeal, the ALJ inappropriately included earnings from Reeves' weekend cleaning service for Cardinal Hill. Cardinal Hill also argued the ALJ erred by failing to carve out impairment for a pre-existing active condition pursuant to Finley v. DBM Technologies, 271 S.W.3d 261 (Ky. App. 2007). Specifically, Cardinal Hill argued, as it does on appeal:

The Defendant having carried its burden of proof on this issue of prior active impairment, it was incumbent on the Plaintiff to present rebuttal proof that was substantial in quality in order to avoid the exclusion for prior active impairment.

In the order denying the petition for reconsideration, implicitly finding Cardinal Hill had indeed not carried its burden, the ALJ ruled as follows:

IT IS HEREBY ORDERED, Defendant's said Petition is hereby **OVERRULED** based on Plaintiff's response.

As the claimant in a workers' compensation proceeding, Reeves had the burden of proving each of the essential elements of her cause of action. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Reeves was successful in that burden regarding the issue of entitlement to benefits based upon an 8% impairment rating assessed for her work injury with no exclusion for a prior active condition, the question on appeal is whether there was substantial evidence of record to support 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). Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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 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).

Based upon the foregoing, we believe the ALJ's award of benefits based upon the 8% impairment rating assessed by Dr. Wunder is supported by substantial evidence. Dr. Wunder, in his report dated November 22, 2010, specifically noted Reeves' history of pre-existing intermittent low back pain prior to November 5, 2009, and proceeded to specifically assess an 8% impairment rating based upon that injury. While it is true Dr. Tutt assessed an impairment rating, all due to pre-existing active conditions, this amounts to little more than conflicting evidence upon which the ALJ could have relied. The ALJ chose to rely upon Dr. Wunder's assessment of impairment, rather than upon the Dr. Tutt's opinion upon which he could have, but was not compelled to rely. This coupled with Reeves' testimony she was having no back pain immediately prior to the November 5, 2009 injury, supports the ALJ's determination in declining to attribute any of the 8% impairment to pre-existing active conditions. The ALJ's determination is supported by substantial evidence and is hereby affirmed.

Cardinal Hill also argues the earnings from Reeves' cleaning service for services performed separately from her employment should be excluded from the calculation of her average weekly wage. Reeves argues the issue was

not properly preserved for determination, therefore the ALJ's determination should be affirmed. We disagree. The BRC order and memorandum specifically states average weekly wage was an issue preserved for determination by the ALJ.

When computing average weekly wage, case law instructs money earned as an independent contractor does not fall within the ambit of workers' compensation coverage. Hale v. Bell Aluminum, 986 S.W.2d 152 (Ky. 1998). In Hale, the Kentucky Supreme Court stated:

Employments not within act, or not insured. In case of concurrent employments, each employment considered must be such as would come within the scope of the act; and where in his employment by one employer the employee is not covered by compensation insurance, his salary therein will not be included with his salary in another employment with another employer, in which he is covered by such insurance, in determining the basis of the payment of compensation for an injury in the latter employment. Wright v. Fardo, Ky. App., 587 S.W.2d 269 (1979) at 274.

Since it has previously been determined that independent contractors are not employees and, thus, fall outside the scope of the Workers' Compensation Act, we agree with the Court of Appeals that **claimant's earnings as an independent contractor per his own aluminum siding company, Stephen & Son, should not be added to his wages earned per Bell in order to compute his average weekly wage.** see Fields v. Twin-Cities Drive In, Ky., 534 S.W.2d 457 (1976).
(emphasis added)

Reeves' testimony clearly establishes her earnings from her cleaning service, albeit from the same source, are for services performed as an independent contractor, and should therefore be excluded from the calculation of her average weekly wage. Reeves' situation is no different than that outlined in Hale, *supra*. Therefore, the ALJ erred by including earnings from the cleaning service in the calculation of the average weekly wage. On remand, the ALJ is directed to calculate Reeves' average weekly wage based solely upon the wage she earned through her employment with Cardinal Hill as a CNA, and exclude her earnings as an independent contractor.

Accordingly, the decision by Hon. R. Scott Borders, Administrative Law Judge, rendered August 5, 2011, and the order ruling on the petition for reconsideration entered September 14, 2011, are hereby **AFFIRMED IN PART, VACATED IN PART and REMANDED** for further proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON STEPHANIE D ROSS
7000 HOUSTON ROAD
BLDG 300, STE 26
FLORENCE, KY 41042

COUNSEL FOR RESPONDENT:

HON MICHAEL J SCHULTE
301 ARTILLERY PARK DR, STE 101
FORT MITCHELL, KY 41017

ADMINISTRATIVE LAW JUDGE:

HON R SCOTT BORDERS
8120 DREAM STREET
FLORENCE, KY 41042