RENDERED: February 20, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-003266-WC

LUCINDA K. GRAY — APPELLANT

PETITION FOR REVIEW OF A DECISION OF THE
v. WORKERS' COMPENSATION BOARD
CLAIM NOS. WC-90-45939 & WC-93-28017

MADISONVILLE COUNTRY CLUB;
ROBERT E. SPURLIN,
DIRECTOR OF SPECIAL FUND;
RONALD W. MAY, ADMINISTRATIVE
LAW JUDGE; and WORKERS' COMPENSATION
BOARD — APPELLEES

AND CROSS-APPEAL NO. 96-CA-3442-WC

ROBERT E. SPURLIN,
DIRECTOR OF SPECIAL FUND — CROSS-APPELLANT

CROSS-PETITION FOR REVIEW OF A DECISION OF THE
v. WORKERS' COMPENSATION BOARD
CLAIM NOS. WC-90-45939 & WC-93-28017

LUCINDA K. GRAY;
MADISONVILLE COUNTRY CLUB;
RONALD W. MAY, ADMINISTRATIVE
LAW JUDGE; and WORKERS' COMPENSATION
BOARD — CROSS-APPELLEES

AND CROSS-APPEAL NO. 96-CA-003484-WC

MADISONVILLE COUNTRY CLUB — CROSS-APPELLANT

CROSS-PETITION FOR REVIEW OF A DECISION OF THE
v. WORKERS' COMPENSATION BOARD
CLAIM NOS. WC-90-45939 & WC-93-28017

LUCINDA K. GRAY;
ROBERT E. SPURLIN,
DIRECTOR OF SPECIAL FUND;
RONALD W. MAY, ADMINISTRATIVE
LAW JUDGE; and WORKERS' COMPENSATION
BOARD CROSS-APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, GARDNER and JOHNSON, Judges.

JOHNSON, JUDGE: Lucinda Gray (Gray) petitions for review of an opinion by the Workers' Compensation Board (Board) rendered on November 8, 1996, which affirmed in part, reversed in part, and remanded the decision of the Administrative Law Judge (ALJ). The ALJ had found Gray to be totally and permanently occupationally disabled with the disability consisting of a 25% prior active occupational disability, a 55% occupational disability from a work-related motor vehicle accident and a 20% disability from a non-work-related fall at home. The Board reversed as to the lifetime disability benefits based on the rule of law that a post-injury disability may not be added to a work-related disability to enhance the percentage of disability and consequent duration of payments. Johnson v. Scotts Branch Coal Co., Ky.App., 754 S.W.2d 555 (1988). Gray argues to this Court that the Board erred in not reversing the ALJ's finding that 20% of the disability was noncompensable because the finding was clearly erroneous. Madisonville Country Club (Country Club) and the Special Fund, in their cross-petitions for review, argue that the Board erred in affirming the ALJ's finding

that Gray's prior active disability was 25%. We affirm the Board's decision.

We adopt the Board's concise factual description of the three injuries.

> Gray, born April 24, 1955, was employed as a bookkeeper and general laborer for Madisonville. Gray has a high school education but no specialized or additional vocational training. On October 25, 1990, Gray sustained a work-related back injury resulting in a discectomy to Gray's low back. A claim for this work-related injury resulted in a settlement for 25% occupational disability. Gray was off work for a lengthy period of time but ultimately returned to employment with Madisonville. Thereafter, on June 17, 1993, Gray sustained injury to her low back in a work-related motor vehicle accident. She was able to return to work but subsequently in May of 1994, Gray underwent a lumbar laminectomy at the L5-S1 level and discectomy on the left. She did not return to work following this second surgical procedure. Further, in late July or early August 1994,[1] Gray was in a squatting position at her refrigerator at home putting away either canned drinks or ice tea and in the process of getting up from the squatting position either her foot turned or her leg went out and she fell back landing on her buttocks.
>
> Gray filed a second compensation claim on the June 1993 work-related injury. However, she did not file a reopening for the 1990 injury and agreement but that claim was consolidated herein.

Six days before the June 1993 work-related automobile accident, an MRI study was performed on Gray's lower back. The MRI did not show any herniation at L5-S1 level or any need for surgery. However, an MRI study on April 25, 1994, showed a disc herniation at the L5-S1

[1] A close reading of the record reveals that Gray's fall at her home occurred on the Saturday preceding her examination on August 3, 1994. The correct date is July 30, 1994.

level with a marked compression of the left S1 nerve root. Following her second surgery on May 16, 1994, her condition did not improve much, if at all. After her fall at home on July 30, 1994, another MRI was performed on August 2, 1994. This MRI revealed a large left-sided disc herniated interspace with some overlying scar tissue. A third surgery was performed on August 9, 1994. After that surgery, her condition improved some, but not to the extent that she could return to work.

At the hearing on May 1, 1996, all matters were stipulated except the extent and duration of her disability, whether Gray had any prior active disability and whether the impairment was due in part to non-work-related incidents. Gray introduced into evidence the depositions of Dr. James Donley, Gray's treating physician; Dr. Joel Dill, a vocational expert; and Dr. Pearson Auerbach, the Country Club's evaluating physician.

Dr. Auerbach found Gray to have a 10% impairment rating using the Diagnosed Related Estimates method and a 16% impairment rating using the loss of motion method. He stated that it was reasonable to assume that there would be some weakness in the extremities and even some numbness. Regarding his examination of Gray, he stated that he objectively found a bit of weakness in the dorsiflexion strength of the lateral part of the left foot and some diminished sensation in the leg on the left side. He opined that Gray might be able to do some sedentary work, but that she could not do any lifting or perform manual labor. Dr. Auerbach did not state that Gray's fall at home in July 1994 was the result of weakness from her work-related injury.

Dr. Donley stated that he found Gray to have an 18% permanent partial disability rating to the body as a whole. While Dr. Donley noted that Gray had numbness in her left leg, he did not detect any weakness in her left leg. He stated that Gray's pain was the disabling factor and that her ability to perform labor on a regular basis was extremely limited. When asked about the July 1994 fall at Gray's home, Dr. Donley stated that a physician's assistant had taken Gray's medical history on August 3, 1994, when Gray was admitted for surgery. The statement revealed that Gray had explained that she had fallen while at home in a squatting position putting away ice tea in the refrigerator. Gray had explained that while in the process of getting up from the squatting position, "my foot turned on me and I landed on my butt." When asked which of Gray's feet turned, Dr. Donley stated that the note "[a]lludes to the left foot. It doesn't say specifically to the left foot, but then she experienced low back pain and left leg pain radiating down to the foot, with some numbness of the leg." However, Dr. Donley did not state that Gray's fall was caused by her prior work-related injury. Dr. Dill's opinion was that Gray could perform no work in the labor market.

The ALJ, by opinion dated July 2, 1996, awarded Gray total permanent occupational disability and stated that 25% of the disability was prior active disability that had resulted from the October 25, 1990 injury, 55% of her disability was from the 1993 work-related automobile accident and 20% of her disability was from the fall at her home which he determined to be noncompensable. In discussing the law pertaining to prior active disability, the ALJ

stated that, in the absence of a reopening, the parties are bound by the percentage of impairment agreed to in the settlement of the 1990 case. The ALJ also made the following finding of fact: "The ALJ is persuaded that one-fourth of plaintiff's total-permanent vocational impairment (25%) was prior active and resulted from the injury of October 25, 1990."

On July 15, 1996, Gray filed a petition for reconsideration which contended that the ALJ had erred in finding the 1994 fall at Gray's home to be noncompensable. Gray argued that she had presented "undisputed and uncontradicted" evidence in her testimony that the injury related to her fall at home was caused by the effects of injuries resulting from the work-related automobile accident. On July 29, 1996, the ALJ overruled the petition and stated that the medical history did not show that Gray's left foot turned or that numbness or weakness caused the foot to turn. The ALJ emphasized that Gray did not mention the fall at her home in her discovery deposition and that Gray did not claim that the fall was connected to the prior work-related injury until the May 1, 1996 hearing. The ALJ went on to point out that even when questioned about the fall, Dr. Donley never stated that the fall was caused by the earlier work-related injury.

Gray, the Country Club, and the Special Fund appealed to the Board. The Board, by opinion dated November 8, 1996, affirmed the ALJ's determination that the fall at Gray's home was noncompensable and that Gray's prior active occupational disability was 25%; but the Board reversed the ALJ's determination that Gray's post-injury 20% disability could be added to her work-related

disability. Thus, Gray was denied lifetime benefits and limited to 425 weeks of disability. The Board stated that, contrary to Gray's argument, the evidence regarding the cause of the fall at her home was controverted and that the evidence did not compel a different result. The Board also stated that while the ALJ was not bound by the prior settlement as to the issue of prior active disability, the ALJ's independent factual finding of 25% prior active disability was based upon sufficient evidence. Thus, any misstatement of the law by the ALJ concerning him being bound by the prior settlement percentage was harmless error. Gray's petition for review and the Country Club's and the Special Fund's cross-petitions for review followed.

Our function in reviewing a Board opinion "is to correct the Board only where the . . . Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992). Additionally, in Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986), the Court held as follows:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.

Francis went on to state that a "ruling of the Board can be reversed only if the evidence for claimant was so strong as to reasonably compel a finding in his favor." Id.

We will first address Gray's argument that the ALJ erred in finding that her 1994 fall at her home was noncompensable.

She argues that there is uncontradicted proof that she fell because of weakness associated with her work-related injury following necessary medical and/or surgical treatment. Gray has the burden of proving that her disability was related to her employment. Jones v. Newberg, Ky., 890 S.W.2d 284, 285 (1994). Having failed to met her burden with the ALJ, the burden on appeal is great. Gray must show that the record contains evidence which would compel a finding in her favor. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974).

Gray argues that a fact-finder cannot reject uncontradicted evidence placed in the record absent a sufficient explanation of reasons for its rejection. Gray relies on Collins v. Castleton Farms, Inc., Ky.App., 560 S.W. 2d 830 (1978), and more particularly, 3 A. Larson, Workers Compensation Law, § 80.20 (9th ed. 1976), quoted in Collins, which states as follows:

> The Commission [the ALJ in Kentucky] may even refuse to follow the uncontradicted evidence in the record, but when it does so, its reasons for rejecting the only evidence in the record should appear--e.g., that the testimony was inherently improbable, or so inconsistent as to be incredible, that the witness was interested, or that his testimony on the point at issue was impeached by falsity and his statements on other matters. Unless some explanation is furnished of the disregard of all uncontradicted testimony in the record, the Commission [ALJ] may find its award reversed as arbitrary and unsupported.

In this case, Gray testified at the hearing that the fall at her home was related to the numbness and weakness that she experienced in her left leg and foot as a result of surgery. Gray attempted to connect the fall at her home with the surgery from the work-related injury by asking Dr. Auerbach and Dr. Donley questions about post-operative weakness and numbness in Gray's leg. While this medical evidence was available for the ALJ to consider, it was not clear, uncontradicted evidence that he was required to accept. The fact is that Gray may have fallen at her home because of weakness and numbness caused by the second surgery, which would be work-related; or she may have fallen for some other reason unrelated to her problems caused by the surgery. It was most definitely a close call for the fact-finder to make. While we might have decided otherwise, this is the type of factual determination that is solely within the purview of the ALJ.

An ALJ may believe some parts of the evidence and disbelieve other parts even if it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). The ALJ indicated that he was influenced by the fact that Gray had omitted mentioning the fall in her discovery deposition, taken in December 1995. While we agree with Gray that there was no inconsistency in the mere fact that she did not volunteer information that was not asked her during a discovery deposition, it is within the purview of the fact-finder to weigh such factors. The ALJ also indicated that he was influenced by the fact that the medical history Gray gave to the physician's assistant prior to the 1994 surgery did not mention

that she suffered from weakness and numbness in her left leg due to the earlier surgery. The ALJ is entitled to consider such matters when judging a witness' credibility and drawing inferences from the evidence. When more than one reasonable inference can be drawn from the evidence, the ALJ is free to choose which inference to draw and this Court has no authority to second-guess his decision. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

The Country Club and the Special Fund argue in their cross-petitions that the ALJ erred as a matter of law in holding that the parties were bound by the prior active disability figure of 25% contained in a settlement agreement. The parties request that the matter be remanded to the ALJ for a determination of prior active disability. In Beale v. Faultless Hardware, Ky., 837 S.W.2d 893 (1992), the Supreme Court of Kentucky in addressing the issue of settlements and the doctrine of res judicata stated as follows:

> In addition to being contrary to KRS 342.125(3), the application of res judicata by the Court of Appeals would undermine the policy of encouraging settlements in workers' compensation cases. Accordingly, Parson is overruled to the extent that in the litigation of a claim for a subsequent injury, it would make res judicata a fact contained in an agreement to settle a prior workers' compensation claim. This decision in no way affects the rule that absent a re-opening or the litigation of a claim for a subsequent injury, an approved settlement of workers' compensation claim is final and binding on the parties to the agreement.

Id. at 896. Therefore, the ALJ did err in stating that he was bound by the prior active disability percentage provided for in the settlement of the prior claim.

The proper test for determining prior active occupational disability is "'how much, if any, occupational disability, by the standards employed in determining allowance for workmen's compensation benefits, the employee's condition evidenced immediately before he received the second injury.'" Wells v. Bunch, Ky., 692 S.W.2d 806, 808 (1985), quoting Griffin v. Booth Memorial Hospital, Ky., 467 S.W.2d 789 (1971) (emphasis original). In the case of a second injury, the ALJ must determine what the claimant's actual disability was immediately before the latest compensable injury, which will translate into pre-existing active disability. Melton v. General Tire, Inc., Ky.App., 905 S.W.2d 81 (1995).

In his findings, the ALJ noted that Dr. Donley assessed a 10% whole body impairment for the 1990 injury. It is the function of the fact-finder to translate functional impairment to occupational disability. Newberg v. Davis, Ky., 841 S.W.2d 164, 166 (1992). The ALJ further noted that Gray did not work for almost a year after the surgery, that Gray had been seen periodically by Dr. Donley for pain flare-ups, and that Gray had undergone an MRI six days before the automobile accident. In fact, the ALJ stated that "[c]ertainly plaintiff's treatment records would indicate she was suffering from a significant prior active impairment before the 1993 injury . . . . There is no evidence of any other occurrence prior to the 1993 injury that would have caused plaintiff to suffer additional disability from a back condition." Further, the ALJ made the following finding of fact: "The ALJ is persuaded that one-fourth of plaintiff's total-

permanent vocational impairment (25%) was prior active and resulted from the injury of October 25, 1990." Since the ALJ made an independent finding of fact that the prior active disability was one-fourth of the total impairment and because that finding is supported by substantial evidence, we agree with the Board that any misstatement of the law by the ALJ was harmless error.

The decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR GRAY:

Hon. Dick Adams
Madisonville, KY

BRIEF FOR MADISONVILLE COUNTRY CLUB:

Hon. Kimberly Lemmons Garrison
Lexington, KY

BRIEF FOR SPECIAL FUND:

Hon. Joel D. Zakem
Louisville, KY