

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001523-WC

PARK TERRACE HEALTH CARE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-08-72802

SAMANTHA THOMPSON, HON. CHRIS  
DAVIS, ADMINISTRATIVE LAW JUDGE,  
AND THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, CLAYTON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Park Terrace Health Care, appeals from the July 21, 2011, opinion of the Workers' Compensation Board, reversing and remanding the January 6, 2011, opinion and order of ALJ Chris David, denying

workers' compensation benefits to the Appellee, Samantha Thompson, and dismissing her claim upon finding that an alleged injuries sustained on July 20, 2008, to Thompson's left shoulder, arm, neck, and head were not work-related. The Board found that the ALJ improperly relied upon hearsay evidence and that without such reliance his opinion dismissing Thompson's claims was clear error. Further, the Board reversed the ALJ's determination that there was no work-related injury and remanded this matter for the ALJ to conduct an analysis under *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky.App. 2007). On appeal, Park Terrace argues that the Board's opinion should be reversed because it misconstrued the standard of review in the ALJ's opinion and order and because it overlooked Kentucky Rule of Evidence 803(1) and (2). Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Park Terrace owns a nursing home and rehabilitation area adjacent to Jewish Hospital Southwest in Louisville. Thompson began working for Park Terrace as a housekeeper in May of 2008. Her responsibilities included cleaning the rooms of residents, as well as the dining area. Thompson testified that this cleaning included vacuuming, dusting, mopping, making the beds and cleaning the bathrooms. Thompson worked forty hours per week, from 6:00 a.m. to 2:30 p.m., which included ten to fifteen minute breaks in the mornings and thirty minutes for lunch. Aside from the weeks ending June 21, 2008, and July 12, 2008, Thompson worked an average of 39.8 hours per week, earning an average weekly wage of \$345.56.

Thompson filed a claim with the Kentucky Department of Workers' Claims arising out of injuries she allegedly sustained when wet pieces of ceiling tile fell from approximately 10-20 feet above her, striking her on top of the head and in the back of the neck as she was cleaning the dining room on July 20, 2008. As a result of this alleged incident, Thompson claimed injuries to her head, neck, and left shoulder. During the course of her deposition below, Thompson testified that she was wiping tables at the time the tiles fell on her head. At the hearing, however, Thompson testified that she was vacuuming when the tiles struck her. Thompson testified that one of the nurses who also worked at the facility came into the dining room and put Thompson in a wheelchair. She was then taken to the emergency room.

Thompson was initially treated for injuries at the Jewish Saints Mary and Elizabeth Hospital Emergency Room, where she was diagnosed with a mild scalp contusion. Records from Thompson's treatment in the emergency room indicate that her symptoms included a headache, but no neck pain or loss of feeling in her arms. Specifically, those records stated, "ceiling fell on head, no loss of consciousness, pain in head and right side of neck." Thompson was not noted to be in acute distress. She exhibited a non-tender neck, painless range of motion in her neck, and no swelling or obvious injury to her head. It was noted that Thompson had minimal tenderness to the crown of her scalp, with no hematoma, step-off, or crepitation. Thompson agreed that she had no abrasions, scrapes, marks, or knots that one could feel from the impact of the ceiling tiles. During the

course of her deposition in this matter, Thompson denied ever having neck pain, shoulder pain, or headache pain prior to July of 2008.

Thompson appeared for subsequent treatment in the Jewish Hospital East Emergency Room on July 23, 2008. At that time, Thompson complained of problems with her left arm and neck. Thompson was subsequently seen at Occupational Physician Services on July 30, 2008, at which time she reported a history of being injured at work on July 20, 2008, when tiles fell on her head and neck. At that time, Thompson was diagnosed with a head and neck contusion. She was seen again on August 6, 2008, at which time she was diagnosed with a contusion to the face and head, and cervical radiculopathy. At that time, she was released to work with restrictions of no bending, straining, twisting of the neck, or lifting over fifteen pounds.

Thompson also came under the care of Dr. Ellen Ballard, to whom she first presented on August 21, 2008, with a history of being injured on July 20, 2008, after a piece of ceiling tile struck her head and neck. Dr. Ballard recommended an MRI scan of the shoulder and cervical spine, and gave Thompson a referral for physical therapy. She also took Thompson off of work for a couple of days. Dr. Ballard saw Thompson again on September 22, 2008. At that time, she noted that an MRI of the left shoulder was performed on September 12, 2008, but that the cervical MRI had been denied. Dr. Ballard noted that the MRI of the left shoulder revealed arthritic changes involving the AC joint, but showed no evidence of a rotator cuff tear.

Dr. Ballard saw Thompson for a follow-up evaluation on October 8, 2008. At that time, she again recommended a cervical MRI scan to rule out any significant cervical problem. That MRI was performed on October 23, 2008. It indicated spondylitic changes at C4-5, and asymmetric disc osteophytes, narrowing spinal canal, and left neural foramen with mild and moderate narrowing of the right neural foramen. Following review of the MRI, Dr. Ballard recommended consultation with a neurosurgeon and referred Thompson to Dr. Jonathan Hodes. She also referred Thompson to a work-conditioning program and assigned work restrictions of no lifting greater than ten pounds and no overhead work. Thereafter, on December 15, 2008, Thompson again presented to Dr. Ballard with complaints that her lower back was hurting from bending over. At that time, Dr. Ballard recommended a functional capacity evaluation (FCE) to determine the need for work restrictions. She further opined that Thompson would be at maximum medical improvement (MMI) after the FCE was performed. Following the FCE, Dr. Ballard assigned permanent restrictions which included a 20 pound lifting restriction and no overhead work.

Dr. Hodes evaluated Thompson's head and left shoulder on November 18, 2008, and ultimately did not recommend surgical intervention. He received a history of an injury sustained by Thompson as a result of being hit on the head and left shoulder by pieces of ceiling which fell after a leak. Dr. Hodes diagnosed Thompson with chronic neck and limb pain, degeneration of the cervical intervertebral disc, and a personal history of uterine cancer. Dr. Hodes concluded

that Thompson exhibited a pain syndrome which manifested itself with grimacing, verbalization and facial expressions which indicated significant pain in the areas described when raising her heels from the floor, and when touched lightly on the left arm and when moving her shoulder and neck. In the opinion of Dr. Hodes, the radiographs did not explain the pain syndrome and he did not think surgery was an option to resolve the problem. He further opined that Thompson would likely improve with time and he encouraged her to use her arm in a normal manner. Dr. Hodes released Thompson to return to Dr. Ballard for imposition of work restrictions.

Dr. William Bilkey conducted an independent medical evaluation (IME) on March 22, 2010. He diagnosed a cervical strain and chronic left shoulder pain, which he believed was related to the July 20, 2008, incident. He opined that Thompson had failed conservative treatment, and believed that, based upon her restrictions, Thompson would not be allowed to return to her normal job duties. He further opined that there was no evidence of any active impairment affecting Thompson's neck and left shoulder prior to the July 20, 2008, injury, and felt that Thompson was at MMI. Dr. Bilkey recommended a home exercise program to stretch and strengthen the shoulders, as well as use of a transcutaneous electrical nerve stimulation (TENS) unit. He opined that Thompson should be confined to light duty work with maximum lifting of twenty pound, and the avoidance of overhead work. Dr. Bilkey assigned an 8% whole person impairment rating pursuant to the 5<sup>th</sup> Edition of the *AMA Guides*, based upon his conclusion that

Thompson had acquired a cervical diagnosis related estimate (DRE) Category II. Dr. Bilkey stated that he was unable to provide an impairment rating specifically for the left shoulder injury given the variability of range of motion assessments and the negative MRI scan. He did note, however, that it was clear that Thompson had a cervical strain injury and that the rating was provided for that diagnosis. Dr. Bilkey attributed the entirety of the 8% impairment rating to the July 20, 2008, injury.

Dr. Thomas Loeb also conducted an IME on February 17, 2010. Dr. Loeb diagnosed pre-existing cervical spondylosis and developmental adhesive capsulitis, based on limited range of motion. Dr. Loeb stated that he could not be certain as to whether Thompson was truly withholding or did have a true case of capsulitis limiting her motion. Dr. Loeb did not assign an impairment rating because he felt that Thompson was not at MMI and needed further evaluation. Dr. Loeb opined that Thompson would most probably be able to engage in some type of employment in a competitive environment. He recommended that Thompson have an examination under anesthesia for the left shoulder to determine whether she had adhesions and, if so, how much range of motion could be maintained with an appropriate post-manipulation course of physical therapy over approximately a two to three week period. Dr. Loeb felt that an impairment rating could be rendered approximately three to four weeks following the manipulation, as MMI would likely be attained at that time.

Dr. Loeb also issued a July 7, 2010, supplemental report regarding Thompson's cervical spine. Therein, he noted that when Thompson was seen at Jewish Hospital on July 23, 2008, there was no recorded evidence of any injury to the neck or shoulder. Dr. Loeb pointed out that x-rays of the cervical spine were performed on that date which showed pre-existing spondylosis or arthritis at C4-5 and C5-6, but no acute findings. He further stressed that there was no objective evidence in the chart which would explain why Thompson developed progressive pain in the left shoulder with numbness into the left upper extremity. Dr. Loeb disagreed with Dr. Bilkey's assessment of an 8% impairment rating and its relationship to the work injury as there was no documented injury to the cervical spine from the work injury. Dr. Loeb also disagreed with the 8% rating insofar as he concluded that Thompson had an essentially normal evaluation of her neck at the time of his examination. He also stressed that there was no absolute data in the record which confirmed exactly how Thompson was struck by the falling ceiling tile.

Thompson testified that a week after the accident, she had throbbing pain, numbness, and tingling in her neck and shoulder. She denies ever having neck pain, shoulder pain, or headache pain prior to the accident in July of 2008. She testified that she does not think she could return to housekeeping work in the future because of her inability to perform the overhead lifting and pulling required for her job. Thompson currently uses a TENS unit three times a day which she stated provides temporary relief.



Following the incident, Thompson missed work the next day. She returned the following day but left early with complaints of left arm and neck pain. Thompson eventually went back to work on light duty which consisted of filing, and putting printing labels and stickers on supplies. Thompson continued to work at Park Terrace until December 14, 2008, at which time she was terminated over a dispute concerning whether she accurately recorded her hours.

Kathy Umfleet also testified below. Umfleet testified that she is presently the payroll/human resources person for Park Terrace. At the time of Thompson's alleged injury in July 2008, Umfleet was employed as a PRN CMT and certified medical technician at Park Terrace. Umfleet testified that one of her offices in the building was on the third floor in a corner adjacent to the dining room. She stated that she used to work with Thompson at Park Terrace and would see her every day. Umfleet testified that on July 20, 2008, she had heard from others that ceiling tiles had fallen in the dining room on the third floor. Umfleet noted that the tiles fell because it was raining outside, although she stated that she never saw the leaking or wet tiles in the dining room that day. Umfleet stated that she saw Thompson standing in the doorway of the dining room that day announcing to her coworkers that the tiles in the dining room were falling, but did not see any evidence of ceiling tiles on Thompson nor notice that she was hurt in any way. Umfleet testified that after hearing this statement, she took her supply cart and went to the dining room to stock supplies. Approximately five minutes later, after taking the supplies to the closet, Umfleet came back down the hall and

overheard a coworker who was speaking with another co-worker say “well, that fool is in there on the floor.”

At this point in Umfleet’s testimony, Thompson’s counsel objected on grounds of hearsay and lack of foundation. Umfleet identified the person making the statement as former employee, Lynn Hatfield. Umfleet also testified that she saw Thompson working later that afternoon, at which time she was pushing a housekeeping cart. On cross-examination, Umfleet acknowledged hearing from coworkers later on that day that the ceiling tiles had fallen and hit Thompson in the head.

A Benefit Review Conference and Final Hearing were held on November 17, 2010. At that time, the parties entered into stipulations, which included, among other things, the following: (1) Thompson sustained an injury on July 20, 2008; (2) Park Terrace had due and timely notice of Thompson’s injury; (3) Temporary Total Disability benefits were paid in the total amount of \$1,404.55; and (4) Medical benefits were paid in the amount of \$9,177.37. The parties agreed that the issues which remained for decision were the extent and duration of Thompson’s disability, application of the KRS 342.(1)(c) multipliers, work-relatedness/causation, the obligation or lack thereof of Park Terrace to pay additional TTD benefits, and whether Thompson sustained an “injury” as defined by the Act.

As noted, in an opinion and order dated January 6, 2011, the ALJ denied compensation to Thompson and dismissed her claim. In so doing, the ALJ stated as follows:

The Administrative Law Judge has carefully reviewed the evidence and the parties' arguments.

The undersigned is fully aware of the Plaintiff's complaints regarding ongoing shoulder pain and limitations as well as her neck pain. The undersigned is aware of the fact that some temporary total disability benefits and some medical benefits were paid. The undersigned is aware that, ultimately, Dr. Bilkey, whom the Administrative Law Judge respects, diagnosed a work-related cervical spine condition. The undersigned is aware that Dr. Loeb has stated that the Plaintiff has, or might have, an adhesive capsulitis in the left shoulder. The undersigned is aware that Dr. Ballard extensively treated the Plaintiff. The undersigned is aware that multiple diagnostic imaging tests have verified degenerative changes in the Plaintiff's cervical spine. The undersigned is aware that the ER diagnosed her with a "minor scalp contusion," whatever that specifically means. Finally, the undersigned is aware that various physicians and FCE have placed restrictions on the Plaintiff.

What the Administrative Law Judge does not accept or believe, and certainly has not been proven, is that any ceiling tiles ever fell on the Plaintiff. The undersigned concludes, from the evidence presented, that even if any ceiling tiles fell on the Plaintiff they did not cause any injury, temporary or permanent, that necessitated even a single trip to the emergency room, much less years of restrictions, office visits, evaluations, physical therapy and other treatment.

The undersigned notes several obvious problems, even in written transcripts and records, with the Plaintiff's credibility. She has told two distinct stories about what she was doing at the time, was it dusting or vacuuming, it

is unlikely, as she testified at the hearing, that she was vacuuming **and** wiping off the tables at the same time. One with each hand, as it were. Quite frankly, to the undersigned, that seems more like an attempt to explain away two different, inconsistent versions of what happened after having previously testified to having a good memory of the event. Such testimony and efforts negatively reflect on the Plaintiff.

The undersigned also takes note of Dr. Bilkey's opinion that not only was the shoulder MRI negative but, also, the variability in the range of motion testing is so great that it cannot be used to assign an impairment rating. Dr. Bilkey did not explain what caused the range of motion testing results to be so varied, but the fact does not reflect well on the Plaintiff.

Further, while the Administrative Law Judge understands that self-reported symptoms evaluated by a trained physician can be considered as objective evidence the record is devoid of any proof of any change of condition, other than degenerative changes, which do not rely upon the Plaintiff's subjective allegations of pain and limitations. The undersigned is not inclined to accept these.

The undersigned is also convinced that the out of court statements made, as testified by Ms. Umfleet, which are adverse to the Plaintiff, to the effect that the Plaintiff knew about the ceiling tiles falling, and reported them a falling, prior to her "accident" and that later "that fool is lying on the floor," are accurate.

The Administrative Law Judge determines that no incident as described by the Plaintiff, at any time, ever took place. Neither the Defendant nor the Administrative Law Judge is required to provide an alternative explanation for degenerative changes or alleged symptoms.

The Plaintiff's claim is dismissed, in its entirety, for failure to prove a work-related injury, either temporary or permanent.

Thompson filed a petition for reconsideration dated January 24, 2011. The ALJ denied that petition in an order dated February 25, 2011. Thompson then appealed to the Board, arguing that the ALJ's finding that she was not injured in the scope of her employment was contrary to the stipulations and the overwhelming evidence contained in the record. Thompson also contended that the ALJ failed to make pertinent findings of fact. Finally, Thompson contended that the ALJ's conclusions were clearly erroneous on the basis of reliable, probative, and material evidence contained in the record.

The Board ultimately concluded that the ALJ's finding that no ceiling tiles had fallen on Thompson was based, at least in part, on the statement made by a third person<sup>1</sup> and testified to by Umfleet stating, "that fool is in there on the floor." In his opinion, the ALJ acknowledged that this was an out-of-court statement and noted that it was adverse to Thompson. The ALJ nevertheless indicated his believe that the statement was "accurate" and, in the opinion of the Board, relied upon it in finding that no incident as described by Thompson ever took place. The Board found that the statement made by Hatfield was hearsay and that the ALJ erred in relying upon it. Further, the Board concluded that if the statement were excluded on hearsay grounds then the remaining evidence would compel a finding that an injury occurred as defined in KRS 342.0011(1). While acknowledging the ALJ's holding that even if the ceiling tiles did fall on

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<sup>1</sup> Umfleet's co-employee, Lynn Hatfield.

Thompson then the work accident did not cause any temporary or permanent injury which necessitated treatment, the Board opined that the ALJ had not provided an adequate basis for that finding. Accordingly, the Board remanded the matter to the ALJ to conduct an analysis pursuant to *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky.App. 2007), based on the lay and medical evidence in the record, and excluding any hearsay statements. Park Terrace appealed to this Court.

In addressing these issues, we note first, that it is well-established that a claimant in a workers' compensation claim bears the burden of proving each of the essential elements of the cause of action. *Burton v. Foster-Wheeler Corp.*, 72 S.W.3d 925 (Ky. 2002). Further, KRS 342.285 confers authority upon the Board to review the decision of an ALJ, and to ensure that it conforms to the provisions of the Act. To carry out this duty, the Board is obligated to determine whether the ALJ acted without or in excess of his or her powers, and whether or not the decision is clearly erroneous on the basis of the evidence contained in the record, or whether the decision is arbitrary, capricious, or characterized by an abuse of discretion. *See Brasch-Barry General Contractors v. Jones*, 175 S.W.3d 81 (Ky. 2005). No new evidence may be introduced to the Board, and the Board may not substitute its judgment for that of the ALJ concerning the weight of the evidence on questions of fact.

In reviewing the arguments of the parties, we note that this Court's function is to correct the Board only where this Court perceives that the Board has overlooked or misconstrued controlling statutes, or committed an error in assessing

the evidence so flagrant as to cause gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

On appeal, Park Terrace raises three arguments, namely, that: (1) The Board erred and misconstrued or overlooked the appropriate standard of review applicable to Appellee's burden on appeal and the reasonableness of the ALJ's opinion and order of dismissal; (2) The Board erred in substituting its judgment as to the ALJ's findings of fact where evidence of substance supported his determinations under a correct interpretation of the law; and (3) The Board erred and misconstrued or overlooked KRE 803(1) and (2) in finding that out-of-court statements relied upon by ALJ Davis were hearsay.

In response, Thompson argues that: (1) The Board did not exceed its authority in reversing and remanding this matter back to the ALJ; (2) Regardless whether the Board was correct in determining that the out-of-court statements relied upon by the ALJ constituted hearsay, it is a moot point; and (3) There was never an issue as to whether the work-related event/incident occurred in this case.<sup>2</sup>

In reviewing the arguments of the parties, this Court is of the opinion that they can be more accurately framed as raising two issues: (1) Whether or not the out-of-court statements testified to by Umfleet were hearsay, and if so, did the

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<sup>2</sup> We decline to address this issue further herein. To this end, we note that the Board disagreed with Thompson's assertion that the ALJ's finding that her injury was not work-related was contrary to the parties' stipulations. As the Board noted, during the course of the BRC on November 17, 2010, the parties listed as contested issues: extent and duration, application of the multipliers, underpayment of TTD, causation/work-relatedness, and whether an injury occurred as defined by the Act. The Board found no error with the ALJ's attempt to make findings of fact concerning whether Thompson had sustained a work-related injury. Thompson did not cross-appeal this finding.

ALJ err in his reliance on same; and (2) Whether or not the Board applied the appropriate standard of review in its determination to reverse the ALJ.

First, we address the argument between the parties as to whether or not the out-of-court statements testified to by Umfleet were hearsay, and whether the ALJ erred by relying on same in dismissing Thompson's claim. In addressing this issue, we note that 803 KAR 25:010(14) provides as follows:

The Rules of Evidence prescribed by the Kentucky Supreme Court shall apply in all proceedings before an administrative law judge except as varied by specific statute and this administrative regulation.

Further, we note that KRE 801(c) defines "hearsay," as:

[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Clearly, KRE 802 provides that hearsay is not admissible except as otherwise provided by the Kentucky Rules of Evidence, or by the rules of the Supreme Court of Kentucky.

In reviewing the testimony of Umfleet, it is clear that the statement she relayed was not one that she made herself but rather one made by co-employee, Lynn Hatfield. Without question, Hatfield was not a party to this case. Further, there is no dispute that this statement was offered into evidence for the purpose of proving that Thompson was lying on the floor of the dining room after the tiles had already fallen. Accordingly, this Court finds that the statements were in fact hearsay as that term is defined by our Kentucky Rules of Evidence. The ALJ, in



reliance upon this statement, found it to be “accurate” and an adequate basis upon which to base his determination that no incident as described by Thompson ever took place.

Park Terrace argues that the Board misconstrued KRE 803(1) and (2) in finding that the out-of-court-statements were inadmissible hearsay. Park Terrace argues that the statements qualify as exceptions to the hearsay rule because they were either present-sense impression statements “describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter,” or excited utterances “relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition.” *See* KRE 803(1) and (2), respectively. We disagree and find that reliance by the ALJ thereon was error.

Our review of the record reveals nothing to suggest that, in this particular case, the statements made by Hatfield to Umfleet meet the criteria for an “excited utterance,” as set forth in KRE 803(2). Nowhere in Umfleet’s testimony did the events appear “startling,” nor of a nature significant enough to cause the individual making the statements to be under the stress and excitement necessary to meet the criteria for the “excited utterance” exception. Indeed, Umfleet testified that despite the falling ceiling tiles, she was not even concerned enough to look into the dining room and see what was going on.

Likewise, we find no merit to the argument that the statement qualifies as a “present-sense impression” as set forth in KRE 803(1). Indeed, that

provision clearly provides that the statement must be made in description or explanation of an event or condition while the declarant is perceiving the event or condition or immediately thereafter. Hatfield's statement was not made in explanation of the event, but was instead simply a statement made about the event itself. It was not made for the purposes of describing how Thompson actually came to be lying on the floor, but was simply a remark concerning Hatfield's personal opinion of Thompson's behavior. Accordingly, this Court finds that the statements made by Umfleet were hearsay and do not fall within either of the two exceptions urged by Park Terrace.

Moreover, concerning that ALJ's reliance upon the statement and characterization of the statement as "accurate," we note that the declarant herself explained that her statement was not intended to indicate a belief that the accident did not occur. Further, we note that in addition to stating that a co-worker described Thompson as a "fool" lying there on the floor, Umfleet also testified that she learned Thompson had been injured on the day that it happened and, further, that she had heard more than one co-worker talking about the tiles that had fallen and struck Thompson on the head. Additionally, Umfleet clarified her own testimony by indicating that her comments were not intended to say that Thompson was not hit in the head with tiles because, although she did not personally see the accident happen, she was aware of other individuals that had seen it. Indeed, we are aware of no evidence below to discount the possibility that between the time Umfleet first saw Thompson standing in the doorway discussing the fallen tiles,

and the time she returned from putting the supplies in the closets, that additional tiles might not have fallen and hit Thompson in the head.

In light of these other statements made by Umfleet, we simply cannot agree with the ALJ's conclusion that the statement made as to the "fool" lying on the floor was "accurate", nor was it substantial evidence upon which to base the conclusion that the accident did not in fact occur. Accordingly, we affirm the Board's opinion that the ALJ erred in relying upon this statement as a basis for forming the opinion that the incident itself did not occur.

Having so found, we now turn to the argument made by Park Terrace that the Board erred and misconstrued or overlooked the appropriate standard of review applicable to Thompson's burden on appeal, and the reasonableness of the ALJ's opinion and order of dismissal. In making this argument, Park Terrace directs the attention of this Court to the holding of *Clark County Board of Education v. Jacobs*, 278 S.W.3d 140 (Ky. 2009), wherein our Kentucky Supreme Court held that when the party with the burden of proof fails to convince the ALJ, then the party's burden on appeal is to show that overwhelming evidence compelled a favorable finding, insofar as no reasonable person could fail to be persuaded by the evidence. *Id.* at 143. Park Terrace argues that the Board erred in failing to apply this standard of review to Thompson's appeal.

Park Terrace argues that because Thompson provided two different stories as to how she was injured and because there was a dearth of medical findings supporting such injury, it was entirely reasonable for the ALJ to dismiss

her claim. Park Terrace argues that when the Board found as it did, it erroneously assumed the role of fact-finder. Park Terrace asserts that in making his decision, the ALJ had the authority to believe certain parts of the evidence and disbelieve other parts, and that the Board overlooked this in its reversal. In its brief, Park Terrace has also provided this Court with a list of medical records and findings which it believes support the decision of the ALJ.<sup>3</sup>

In response, Thompson argues that the Board did not exceed its authority in reversing and remanding this matter back to the ALJ. Thompson argues that the ALJ's sole stated reasons for reversal were a determination that, no incident, as described by Thompson, at any time, ever took place, because: (1) he was unconvinced that Thompson could recall what she was doing when the ceiling tiles fell; (2) because he presumed that Dr. Bilkey's inability to assign an impairment rating due to the "variability in the range of motion testing" did not reflect well on Thompson; (3) because he concluded that the record was devoid of any proof of any change of condition, other than subjective complaints of pain and degenerative changes; and (4) because he relied on what he described as "out of court statements" adverse to Thompson which he interpreted as suggesting that she knew about the tiles falling prior to her accident.

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<sup>3</sup> This evidence includes the contradictory statements made by Thompson as to what she was doing when the incident allegedly occurred, Thompson's admission at the hearing that there were no visible bumps, scraps, or abrasions on her shoulder and neck, findings of degenerative disc disease, determinations from medical professionals that Thompson was not a surgical candidate, that she had a normal cervical range of motion and a variable range of motion in her left shoulder, and that Thompson has had no treatment since 2009, among other findings.

Thompson argues that each of these factors merely served as a basis for the ALJ to disbelieve Thompson's version of the story, but did not constitute affirmative evidence to support the ALJ's determination that no injury or accident actually occurred. Thompson also argues that the medical evidence relied upon by Park Terrace in support of its assertion that the ALJ's finding was reasonable speaks only to the severity of Thompson's injury, and not to whether the accident itself occurred. We agree.

While there may have been a number of factors that led the ALJ to disbelieve Thompson's testimony, these factors were not, by themselves, sufficient to prove or disprove whether the tiles struck Thompson in the head and neck. Certainly, it was within the discretion of the ALJ to decline to rely upon Thompson's testimony if he believed that she told two different stories as to how the injury occurred. It was not, however, within the authority of the ALJ to base his decision upon those portions of Umfleet's testimony which were clearly hearsay.<sup>4</sup>

In so finding, we address the ALJ's alternative determination that, "even if the ceiling tiles did fall on Thompson, the work accident did not cause any temporary or permanent damage which necessitated treatment of any kind." The Board must not only determine whether or not the ALJ's decision was arbitrary, but also has the responsibility of determining whether the opinion and order was clearly erroneous on the basis of the evidence contained in the record. After

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<sup>4</sup> See discussion herein, *supra*.

discounting the evidence offered by Umfleet, the Board determined that the remaining evidence compelled a finding that an injury occurred as defined in KRS 342.0011(1). Again, we agree.

Our law is clear that where an ALJ's decision dismisses a claimant's application for benefits upon a finding that she failed to show a permanent, work related injury, such decision must be affirmed if it is supported by substantial evidence under a correct interpretation of the law. *Sweeney v. King's Daughters Med. Ctr.*, 260 S.W.3d 829, 830 (Ky. 2008). We do not find the ALJ's opinion to be supported by such evidence in this instance.

While the ALJ did find that the failure of Dr. Bilkey to explain the variability in the range of motion of Thompson's shoulder "did not reflect well on [Thompson's] credibility," the ALJ did not explain why this was so. And, while the record certainly includes records establishing the presence of degenerative changes to the neck and shoulder, it also includes evidence that on the day of the alleged incident Thompson presented to the emergency room and was diagnosed with a scalp contusion. They also indicate presentation on a second occasion, three days later at the emergency room for additional evaluation of a scalp contusion after being struck by a falling ceiling tile, as well as a presentation at Occupational Physician Services one week later for a head and neck contusion. In light of the evidence in the record, this Court is in agreement with the Board that an analysis pursuant to *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky.App. 2007), is appropriate.

Wherefore, for the foregoing reasons, we hereby affirm the July 21, 2011, opinion of the Workers' Compensation Board, reversing the January 6, 2011, opinion and order of the ALJ, and remanding this matter for additional analysis under *Finley, supra*.

CLAYTON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. Even absent the claimed hearsay testimony, sufficient evidence existed, in my view, to call into question whether Thompson, in fact, suffered a work-related injury, or was malingering. The ALJ has the duty and the authority to weigh the evidence and to believe or disbelieve the witnesses, in whole or in part. *Clark County Bd. of Educ. v. Jacobs*, 278 S.W.3d 140, 143 (Ky. 2009). Furthermore, “when the party with the burden of proof fails to convince the ALJ, the party’s burden on appeal is to show that overwhelming favorable evidence compelled a favorable finding, in other words, that no reasonable person could fail to be persuaded by the evidence.” *Id.* Thompson has failed to do so. I would vacate and reverse the decision of the Board and direct it to affirm the decision of the ALJ.

BRIEF FOR APPELLANT:

Joshua W. Davis  
Louisville, Kentucky

BRIEF FOR APPELLEES:

Udell B. Levy  
Louisville, Kentucky

