

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000865-WC

JEREMY C. DUTY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-13-97786

INSTEEL WIRE PRODUCTS, INC.;  
ZURICH; HON. STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, LAMBERT, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: The Appellant, Jeremy Duty, appeals the November 25,  
2013, opinion and order of Administrative Law Judge Steven G. Bolton (ALJ)

finding that Duty failed to bear his burden of proving that he sustained a

compensable injury, and also the May 2, 2013, opinion of the Kentucky Workers'

Compensation Board remanding the claim for a finding of whether Duty sustained any injury, temporary or permanent, on either alleged date and, if so, whether he was entitled to any income or medical benefits. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Duty worked for Appellee, Insteel Wire Products, a company which manufactures wire mesh used for reinforcement of concrete, as a wire welder. Duty testified below that he is a high school graduate, with training in automobile mechanics, and that his entire work history consists of heavy manual labor. Duty denied any previous work-related injuries but did state that he had aching pain in his right knee prior to December 3, 2012, for which he requested leave in September of 2010. Duty claims that he sustained two work-related injuries, the first on December 3, 2012, when he injured both knees after a fall while walking on the stairs at work.<sup>1</sup> Duty stated that he reported the injury to human resources manager Kristy Travis at Insteel. Despite Duty's claims that he fell on the stairs, the First Report of Injury dated December 3, 2012, stated that Duty injured both knees while "working with carriage on a machine he hasn't worked on in two years." Further, on that date, Duty himself made a handwritten statement in which he stated, "Now that my knee is giving out I knew it was time to let work know before I fell and hurt myself."

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<sup>1</sup> Apparently, during the course of his June 19, 2013, deposition, Duty testified that he injured his knees while going down the stairs, though during the course of the Final Hearing he claimed he was actually going up the stairs when the injury occurred.

In any event, following the incident, Duty was sent to Dr. John Hale. At that time, Duty reported that his knee was hurting and that he fell at work. Dr. Hale asked Duty if he'd ever had any knee problems and Duty reported that he had never had an injury but that his knees "ached" due to the 284 machine that he operated three years previously. Dr. Hale's medical record dated December 3, 2012, revealed that Duty's chief complaint was left knee pain instead of right knee pain. Dr. Hale performed an x-ray, prescribed steroids, and placed Duty on light duty. He then referred Duty to Dr. Michael Calfee, an orthopedic surgeon. Dr. Calfee ordered an MRI and placed Duty back on full-duty work.

Duty nevertheless continued to work on light duty until January 18, 2013, on which date he alleges that he again injured his knee on the same stairs.<sup>2</sup> Duty asserts that when his knee "popped" on the stairs, his partner, Bobby Moffett, helped him off of the floor after which time Duty asserts that he again reported his injury to Travis. Following the January 2013 incident, Duty went to the emergency room at the Parkway Regional Hospital where he was given a shot and a knee brace and was scheduled to see Dr. Fulbright. Dr. Fulbright diagnosed a right knee lateral meniscus tear for which he performed surgery on January 21, 2013, and again on June 13, 2013.

Duty states that he still wears a brace on his knee which was prescribed by Dr. Fulbright following the second surgery and that he has not

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<sup>2</sup> As a result of that fall, Duty also alleged back and elbow injuries, though he has since stated that those injuries have resolved and no longer bother him at this time.

returned to work following the January incident. Duty also continues to take pain medication and remains under the care of Dr. Fulbright, who has not released him to return to work. Dr. Fulbright opined that Duty has not reached maximum medical improvement (MMI) but does retain a permanent partial impairment. Dr. Fulbright stated that assuming the history Duty provided it was his opinion that Duty's knee injury was related to the work accidents and he believed that the history provided was consistent with a meniscus and ACL tear.

Duty also underwent an Independent Medical Evaluation with Dr. William Gavigan on August 1, 2013. Upon review of Duty's medical records and history, and following a physical examination, Dr. Gavigan opined that the alleged falls of December 3, 2012, and January 18, 2013, did not result in a harmful change to Duty's right knee, and that some cumulative injury or event over the previous two years caused the ACL and meniscus tear. Dr. Gavigan stated that it was impossible to state within a reasonable degree of medical probability that Duty's work activities from November 2010 through December 2012 resulted in a harmful change to the human organism with respect to his right knee. Dr. Gavigan assessed a 4% whole person impairment under the 5th Edition of the AMA Guides, which he attributed to a preexisting and symptomatic condition. Dr. Gavigan assessed a 0% impairment as related to the work injuries of December 3, 2012, and January 18, 2013. Dr. Gavigan estimated that Duty would reach MMI on December 13, 2013.

As noted, Duty filed a Form 101 alleging injury as a result of both alleged incidents. In response, Insteel filed a Form 111 stating that the claim was denied because the alleged injury did not arise out of and in the course of employment; that there were issues concerning causality, work-relatedness, and/or injuries as defined by the Act. Further, Insteel asserted that Duty failed to provide due and timely notice of the alleged incidents and also that the claim was barred, either in whole or in part, by preexisting active disability. Insteel also raised the issue of whether it was entitled to credit for both short- and long-term disability and unemployment benefits.

Duty's claim was bifurcated on the issue of whether he suffered a compensable injury. As noted, on November 25, 2013, the ALJ entered an opinion and order finding that Duty failed to bear his burden of proving that he sustained a compensable injury. Specifically, the ALJ found that there was absolutely no contemporaneous evidence that Duty suffered a work-related injury on December 3, 2012, or that he reported an injury resulting from a work-related accident on that date. The ALJ adopted the opinions of Dr. William Gavigan in finding that the alleged work incidents did not result in a harmful change to the human organism, and that at most, Duty sustained a temporary exacerbation of a preexisting condition from the December 3, 2012 occurrence.

In so finding, the ALJ noted that Duty's medical records indicated knee problems as early as 2010, but that it did not appear to be a debilitating condition at that time because Duty continued to work without restriction or further

complaint for nearly two years until December 3, 2012. The ALJ further found that there was no evidence to indicate that Duty suffered a work-related injury on December 3, 2012, or that he reported an injury resulting from a work-related accident on that date. The ALJ stated that it was only after the January 18, 2013, incident that Duty claimed to have also fallen at work on December 3, 2012. The ALJ ultimately found that the work incidents alleged by Duty temporarily aggravated a preexisting condition, and that there was no harmful change to the human organism which would entitle Duty to workers' compensation benefits. In so finding, the ALJ relied upon the opinions of Dr. Gavigan and rejected the opinions of Dr. Fulbright on the grounds that Dr. Fulbright was not apprised of the true history of Duty's condition and that his opinion was not expressed within the bounds of reasonable medical probability. Accordingly, the ALJ dismissed Duty's claim in its entirety.

Duty filed a petition for reconsideration on December 11, 2013, arguing that the ALJ erred in rejecting Dr. Fulbright's opinion in part because he did not indicate that it was "within reasonable medical probability." That petition was denied by the ALJ in an order entered on December 13, 2013. Thereafter, Duty appealed to the Board.

In reviewing this matter, the Board found that Duty provided inconsistent testimony and statements concerning the alleged December 3, 2012, injury. The Board found that the ALJ was within his discretion to reject the opinion of Dr. Fulbright on the belief that it was based upon an inaccurate history

pursuant to *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004).

Nevertheless, the Board cited its authority to raise *sua sponte* issues that were unpreserved and not raised by the parties. Accordingly, the Board noted that the ALJ did not make specific findings regarding each of the alleged injury dates, nor did he discuss the impact of the exacerbation which he determined that Duty had sustained. The Board noted that since the rendition of *Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2001), it was possible for an injured worker to establish a temporary injury for which temporary benefits may be paid but fail to prove a permanent harmful change to the human organism for which permanent benefits are authorized.

Accordingly, on May 2, 2013, the Board entered an opinion vacating the opinion and order of the ALJ and remanding the claim for a finding as to whether Duty sustained a temporary or permanent injury on either alleged date and, if so, whether he was entitled to any income or medical benefits as a result. It is from that opinion and order the Duty now appeals to this Court.

Prior to reviewing the arguments of the parties, we note that the function of this Court on review is to correct the Board only where the Court perceives that the Board has overlooked or misconstrued controlling statutes or precedent, or has committed an error in assessing the evidence so flagrant as to cause gross injustice. *See Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). We review this matter with this standard in mind.

On appeal, Duty argues that the Board erred in finding that the ALJ's refusal to consider Dr. Fulbright's report was within the ALJ's discretion. Duty argues that the ALJ based his dismissal on the fact that Dr. Fulbright failed to use the phrase "reasonable medical probability" in his report. Duty asserts that "no magic words" are required for a physician to express an opinion. Further, Duty argues that the ALJ stated in his opinion that there was a "strong inference" that something happened between December 3, 2010, and December 3, 2012, to tear Duty's meniscus and ACL, and that this was only speculation. Duty argues that he reported both of his accidents immediately after their occurrence and that this was not disputed by the employer. Thus, Duty argues that the ALJ was without authority to speculate that something else happened to injure Duty's knee prior to the work incidents at issue.

In response, Insteel argues that the Board did not err in finding that the ALJ appropriately utilized his discretion in discounting the opinion of Dr. Fulbright, and in finding that Duty was injured outside of work. Insteel asserts that the ALJ reviewed the evidence and acted within his wide discretion as fact-finder to make the determinations that he did.

Upon review of the arguments of the parties and the applicable law, we are in agreement with the Board that the ALJ appropriately utilized his discretion in declining to rely upon the opinion of Dr. Fulbright, and in finding that Duty failed to prove that he was injured while working at Insteel. While Duty argues that there are no "magic words" which physicians are required to use in



rendering opinions, we note that this is not the issue *sub judice*. As correctly noted by the Board, the ALJ specifically stated the opinion of Dr. Fulbright was rejected because it was “based on inaccurate or incomplete information.” This is in accordance with the holding of our Kentucky Supreme Court in *Cepereo v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004). Indeed, it is well within the discretion of the ALJ to determine the quality, character, and substance of the evidence. *Square v. Tipton*, 862 S.W.2d 308 (Ky. 1993).

Believing this determination was in accordance with applicable law and supported by substantial evidence, we decline to find otherwise on appeal. Upon review, and in accordance with the opinion of the Board, the ALJ will have the opportunity to determine whether Duty sustained a temporary or permanent injury on either alleged date and, if so, whether he was entitled to any income or medical benefits as a result.

Accordingly, in light of the foregoing, we hereby affirm the May 2, 2013, decision of the Kentucky Workers’ Compensation Board, vacating and remanding this claim to the Administrative Law Judge for additional findings in accordance therewith.

ALL CONCUR.

Rodger W. Lofton  
Paducah, Kentucky

BRIEF FOR APPELLEE, INSTEEL  
WIRE PRODUCTS:

Joel W. Aubrey  
Bradley J. Hayes

Louisville, Kentucky