Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 13, 2015

CLAIM NO. 201300947

ANTHONY CUNDIFF PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

TSG TRUCKING
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Anthony Cundiff ("Cundiff") appeals from the September 11, 2014, Opinion, Award, and Order and the October 13, 2014, Order ruling on Cundiff's Petition for Reconsideration of Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). In the September 11, 2014, Opinion, Award, and Order, the ALJ dismissed Cundiff's claim for

permanent partial disability ("PPD") benefits and temporary total disability ("TTD") benefits. Regarding medical benefits, the ALJ determined as follows:

> The Plaintiff's claim for unpaid or contested past medical benefits is SUSTAINED to the extent that the Defendant/Employer is hereby ORDERED to reimburse the Plaintiff or his health insurance carrier for any costs incurred by the Plaintiff for the cure or relief of the effect of his work related injury of July 8, 2012.

On appeal, Cundiff asserts the ALJ committed reversible error by failing to award income benefits for his back and right shoulder injuries.

The Form 101 alleges work-related injuries to Cundiff's right shoulder and back occurring on July 8, 2012, while in the employ of TSG Trucking, Inc. ("TSG") in the following manner: "Caught himself when falling out of truck."[1]

The July 7, 2014, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; unpaid or contested medical expenses; injury as defined by the ACT; exclusion for pre-existing

[1] Cundiff filed a "Motion to Amend Form 101" on October 7, 2013, to add a left ankle injury which was sustained by order dated November 5, 2013.

disability/impairment; and TTD. Under "other" is handwritten the following: "including extent and duration w/multipliers; PTD v. PPD."

TSG introduced the October 17, 2013, Independent Medical Examination ("IME") report of Dr. Bart Goldman. After performing a physical examination and a medical records review, Dr. Goldman provided the following findings and opinions:

> In short he has complaints without objective findings related to his cervical and thoracic spines. He does have an objective finding in his lumbar spine and that is the prior surgical scar. However this is unrelated to the 7/8/2012 work related [sic] injury. Of note he has no complaints of shoulder pain at this time and as stated previously there is no way to relate his foot surgery to the injury in question.
>
> His permanent partial impairment rating related to this injury is 0% of the whole person based on a cervical and thoracic DRE category 1. He does have a pre-existing impairment for his lumbar spine which, within a reasonable degree of medical probability, was not significantly impacted by the strain/contusion injury sustained in July of 2012. If he were rated at this time for his lumbar spine he would have to be rated by the range of motion model since he has to [sic] previous surgeries on to [sic] previous levels. Using table 15-7 he would fall into criteria II, E, 'surgically treated disc lesion with residual medically documented pain rigidity.' This carries

> with [sic] a 10% whole person impairment rating in the lumbar spine. An additional level adds another 1% and a second operation adds another 2%. Therefore his permanent partial impairment rating for specific spine disorders would be 13%. He would not be rated for loss of flexion and extension since he fails validity testing because his tightest straight leg raise is 60˚ and the some [sic] of his sacral flexion and extension is 5˚. He would receive a 1% impairment for loss of lateral bend to the left and a 1% impairment for loss of lateral bend to the right. Therefore he would have a 2% whole person impairment for loss of range of motion. Since his sensory complaints are nondermatomal and he has no motor findings he received no impairment for continued nerve root dysfuntion. Therefore his final impairment rating related to his low back is arrived at by combining 13% for specific spine disorders with 2% for loss of range of motion and 0% for continued nerve root dysfunction. This results in a 15% whole person impairment rating which is actually less than his case was settled for in 2005. As far as return [sic] work is concerned, there is nothing on examination at this time which would preclude him from returning to any type of work that he was able doing [sic] prior to the 7/8/2012 injury.

Dr. Goldman responded to the questions posed to him as follows:

> A1: This gentleman had no significant objective findings on examination other than the scar in his low back.

A2: He is, within a reasonable degree of medical probability, at maximum medical improvement from the 7/8/2012 injury and likely was prior to ever seeking medical care.

A3: He has no permanent partial impairment rating related to this injury. He does have a permanent partial impairment rating related to his 2 previous back surgeries. I have reviewed the IME performed by Dr. Morris. If this physician felt that this gentleman was not at maximum medical improvement, which he obviously did since he recommended further treatment, there never should have been an impairment rating given. His sensory examination documented on that IME is much less global than his sensory findings at this time. Additionally he reportedly had some atrophy of the left lower extremity as compared to the right which somehow has managed to resolve on my examination at this time. As far as the shoulder is concerned this gentleman has full range of motion of his shoulder on my examination and had limited range of motion on Dr. Morris'. Adding an additional 3% for pain and orthopedic conditions is not reasonable particularly since Dr. Morris gave him a 13% impairment for the lumbar radiculopathy which is already adding 3%.

A4: This gentleman has had 2 previous low back surgeries and therefore certainly had a pre-existing condition. However this condition, as far as I can tell, did not significantly impact his strain injury. His current low back pain, however, is likely related to that pre-existing condition.

> A5: Based on my examination [sic] requires no restrictions related to that 7/8/2012 injury.
>
> A6: There is nothing on examination at this time to preclude him from returning to the type of work he was doing at the time of the 7/8/2012 injury.

TSG introduced an "Amended Notice of Filing Independent Medical Examination Medical Records Review by Dr. Bart J. Goldman" indicating that the "previous filing contained some extraneous pages not relevant to this case." TSG represented Dr. Goldman's report remains unchanged.

Attached to the Form 101 is the April 9, 2013, IME report of Dr. Jerry W. Morris. After performing a physical exam of Cundiff, Dr. Morris set forth the following diagnoses:

> 1. Internal arrangement of the right shoulder secondary to distraction and torsion injury.
>
> 2. Aggravation of lumbar degenerative disc disease and degenerative joint disease.
>
> 3. Persistent sprain and strain of the lumbar spine, with inadequate treatment.

Concerning causation, Dr. Morris opined Cundiff's symptoms are a direct result of the work-related occurrence of July 8, 2012. He explained as follows:

> The forces involved with the distraction and sudden torsion of his shoulder and low back, with his whole body weight jerking him in a sudden fall, were altogether of sufficient magnitude and duration to cause this harm to his human organism.

Dr. Morris assessed a 5% whole person impairment for Cundiff's right shoulder condition, a 13% whole person impairment for his lumbar spine condition, and an additional 3% impairment because "of his marked impediments to activities of daily living based on the pain survey from Chapter 18, Page 575, Table 18-3, Category 2 Moderate, an additional 3%."

In a supplemental report dated April 19, 2013, Dr. Morris assessed a 0% impairment rating for both a pre-existing dormant condition and a pre-existing active condition. Dr. Morris also imposed physical restrictions.

The ALJ set forth the following Analysis in the September 11, 2014, Opinion, Award, and Order:

> As to work-relatedness/causation, the evidence in the record is uncontradicted that the Plaintiff suffered a work-related fall on July 8, 2012 that arose out of, and in the course of his employment. Plaintiff gave two depositions and testimony at the final hearing concerning the time, facts and circumstances of the work related accident. His testimony was consistent and he was a credible witness at the final hearing. His

testimony was the only direct evidence of what transpired.

As to whether the Plaintiff suffered an injury as defined by the Act, he testified clearly as to his injuries to his right shoulder, left ankle and back as he slipped and fell from the running board of the cab due to diesel fuel on his shoes from a leaking tank. His description of how his body was twisted as he grasped the hold bar in an attempt to keep from falling to the ground is plausible and fits the nature and character of his injuries.

A concern is the length of time between the date of the accident and when the Plaintiff obtained medical treatment. The Plaintiff testified that his supervisor kept putting him off by saying he was trying to get him *health insurance*. The subsequent medical histories and injuries were consistent with his account. I believe he did suffer a work-related traumatic event which is the proximate cause producing a harmful change in the human organism as evidenced by objective medical findings. KRS 342.0011 (1).

As to notice, Plaintiff testified that he immediately notified his supervisor, Scott Gentry and reported the incident. According to the report of the Plaintiff, Mr. Gentry was more interested in continuing the transport of the shipment than taking care of either his equipment or his driver.

I believe from the evidence that the Plaintiff suffered a work related injury, timely reported same and actively sought relief from his symptoms. Unfortunately, he had no money and the employer would not pay

for medical expenses, so his efforts to receive treatment were limited to emergency room care. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky., 1977). Further, under our law there is a presumption that an unexplained workplace fall arises out of the employment unless the employer presents substantial evidence to show otherwise. *Vacuum Depositing, Inc. v. Dever*, 285 S.W.3d 730 (Ky., 2009) citing *Workman v. Wesley Manor Methodist Home*, 462 S.W.2d 898 (1971). In this instance, the Defendant/Employer presented no non-medical evidence concerning the actual occurrence, nor was there any attempt to impeach the veracity of the Plaintiff. Thus, the ALJ is constrained to accept Plaintiff's version of the facts as being accurate.

As to Plaintiff's original claim for TTD benefits, the definition of "Temporary Total Disability" or "TTD" is set out at KRS 342.0011(11)(a). TTD "means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment". Here, the Plaintiff continued to work until he was terminated. Both IME physicians placed him at MMI. Plaintiff concedes in his brief that he is not eligible for an award of TTD benefits. His claim for TTD benefits must be dismissed.

The issues of Benefits per KRS 342.730, Extent & duration with multipliers, PTD v PPD, and Exclusion for preexisting disability/impairment must be considered together.

There are two IME physician reports. Dr. Jerry Morris, DO, awards Plaintiff a 19% WPI pursuant to his calculation of Plaintiff's impairment rating according to the AMA *Guides to the Evaluation of Permanent Impairment, 5th Edition.* Dr. Morris attributes 100% of Plaintiff's disability to the July 8, 2012 work-related injury.

Dr. Bart J. Goldman, MD, opined that Mr. Cundiff had no significant objective findings on examination other than the scar in his low back. Within a reasonable degree of medical probability, Dr. Goldman finds Mr. Cundiff to be at MMI from the 07/08/2012 injury and goes on to state that he likely was prior to ever seeking medical care. ***Using the 5th Edition of the Guides to the Evaluation of Permanent Impairment Dr. Goldman assigned him with 0% permanent partial impairment rating related to this injury. However, Dr. Goldman also opined that Mr. Cundiff has a 13% preexisting condition from two previous low back surgeries***.

Based on his examination, Mr. Cundiff requires no restrictions related to the injury of 07/08/2012. Dr. Goldman opined that there is nothing on examination at this time to preclude Mr. Cundiff from returning to the type of work he was doing at the time of the 7/8/2012 injury.

This claimant has a significant prior medical history that goes back to 1997. He has had prior back surgery and significant medical treatment/ diagnostic procedures through at least 2005. As can be seen from Dr. Guarnaschelli's prior medical records, as recently as 2005, he rated the Plaintiff at 23% WPI, with 50% of that

rating assigned to a 1997 injury and 50% being assigned to 2004 and 2005 injuries. Dr. Goldman had reviewed Plaintiff's records and assigned Plaintiff a 13% active WPI that pre-existed the 7/8/2012 occurrence. Dr. Morris, on the other hand had reviewed none of Plaintiff's prior medical records, basing his rating completely on the history given by Plaintiff and his physical examination.

The law in Kentucky is that a medical opinion that has been corrupted by inaccurate or incomplete information is not substantial evidence which could support an award of benefits to a claimant. *Cepera [sic] v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky., 2004). Here, Dr. Morris found a WPI of 19%. Subtracting the 3% he assigned for marked impediments to activities of daily living, he and Dr. Goldman are only 3 percentage points apart in their assignment of a rating. The only (and controlling) difference is that Dr. Morris was ignorant and unapprised of Plaintiff's significant prior medical history regarding his back and upper extremities. Thus, from an evidentiary standpoint, Dr. Morris' opinion is totally corrupted and of no evidentiary weight.

For these reasons, I have no choice but to rely upon the only remaining competent evidence as to the Plaintiff's disability. As to that issue I am both compelled and persuaded by the medical opinion of Dr. Bart J. Goldman, MD, which I find to be the most persuasive evidence in the record as to Plaintiff's medical condition.

Although the Plaintiff was allowed to amend his Form 101 by order of November 5, 2013, I am aware of no evidence in

the record supporting an award for an injury to the left ankle.

As to the issue of unpaid or contested medical expenses, the Defendant employer is responsible for the Plaintiff's reasonable medical expenses incurred as the result of the work related accident which were, according to the record, two ER visits.

The ALJ provided findings of fact and conclusions of law as follows:

1. As stipulated by the parties and set out herein above.

2. As found by the undersigned ALJ in the Analysis set out herein.

3. The Plaintiff suffered a work related injury, timely reported same and actively sought relief from his symptoms. In my opinion, based upon the evidence taken as a whole, he did injure his left shoulder and back in what was a temporary exacerbation of a prior, active pre-existing condition.

4. In a workers compensation case, the burden of proof is on the claimant to prove every element of his claim, including the fact that he sustained an injury as defined by the Act and that a workplace injury arose out of employment. Jefferson County Public Schools v. Stephens, 208 S.W.3d 862 (Ky. 2006); Lane v. S&S Tire, Inc., 182 S.W.3d 501 (Ky. 2005); Kubajak v. Lexington-Fayette Urban County Government, 180 S.W.3d 454 (Ky. 2005).

5. When the cause of a condition is not readily apparent to a lay person, medical testimony supporting causation

is required. Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Co. v. Williams, 407 S.W.2d 396 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980).

6. Here, there is substantial evidence in the record that the Plaintiff had two prior back surgeries and treatment for back and shoulder problems from as early as 1997 through at least 2005. The IME physician who knew of, and had reviewed the relevant medical records of those conditions found no permanent disability attributable to the 7/8/2012 accident, but assigned Plaintiff a 13% WPI based upon his pre-existing active condition. Plaintiff's IME physician had no knowledge of the nature or extent of that condition because he had reviewed no prior medical records. His opinion is therefore tainted as a medical opinion that has been corrupted by inaccurate or incomplete information and is not substantial evidence which could support an award of benefits to a claimant. *Cepera [sic] v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky., 2004).

7. Thus, in reliance upon the medical opinion of Dr. Bart J. Goldman, MD, which I find to be the most complete, compelling and persuasive medical evidence in the record as to the Plaintiff's medical condition, I find the Plaintiff to have a 0% WPI per the AMA *Guides to the Evaluation of Permanent Impairment, 5th Ed.* attributable to the work injury of July 8, 2012

In his September 23, 2014, Petition for Reconsideration, Cundiff asserted the ALJ misinterpreted the evidence concerning the extent and duration of his back and shoulder injuries. His petition for reconsideration was denied by order dated October 13, 2014.

On appeal, Cundiff asserts the ALJ erred by failing to award income benefits for his back and shoulder injuries.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence, evidence sufficient to convince reasonable people, in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id.

Kentucky law holds that when the party with the burden of proof is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and

> an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Id. at 735.

Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful claimant, this is a great hurdle to overcome.

> 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. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can

> reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is “clearly erroneous” and, perforce, would “compel” a different finding.

Id. at 643

In the September 11, 2014, Opinion, Award, and Order, the ALJ determined Cundiff "did injure his left [sic] shoulder and back in what was a temporary exacerbation of a prior, active pre-existing condition." The ALJ also stated that the opinions of Dr. Goldman persuaded him to make this determination. Dr. Goldman's opinions, in his October 17, 2013, IME report, fully support this determination regarding Cundiff's back condition. However, Dr. Goldman did not address the existence of a pre-existing active shoulder condition. Regarding Cundiff's alleged shoulder injury, Dr. Goldman found that Cundiff was not experiencing shoulder pain at the time of the examination and demonstrated a full range of motion in his shoulder. Later in his report, Dr. Goldman stated Cundiff "has no permanent partial impairment rating related to this injury." It can be assumed, then, that because Dr. Goldman spoke to both injuries in his report, this statement regarding no permanent partial impairment rating is applicable to both of Cundiff's alleged injuries.

On remand, the ALJ must identify, *with specificity*, the medical evidence in the record which supports his conclusion that Cundiff "did injure his left [sic] shoulder...in what was a temporary exacerbation of a prior, active pre-existing condition."[2] Should the ALJ determine Dr. Goldman's opinions cannot be relied upon in determining Cundiff sustained a temporary exacerbation of a prior, active pre-existing condition to his shoulder, then he must cite to the medical evidence which supports this determination. Should the record not support the ALJ's determination that Cundiff sustained a temporary exacerbation of a prior, active pre-existing condition to his shoulder, the ALJ must determine the nature of Cundiff's alleged shoulder injury based on the medical evidence in the record.

Additionally, on remand, in awarding medical benefits, the ALJ must specifically define each injury and the duration of each injury. The ALJ must also determine whether Cundiff is entitled to future medical benefits for each injury. *See* FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007); Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001).

[2] Cundiff alleged a right shoulder injury, not a left shoulder injury.

Accordingly, the September 11, 2014, Opinion, Award, and Order and the October 13, 2014, Order on Plaintiff's Petition for Reconsideration are **AFFIRMED** to the extent the ALJ dismissed Cundiff's claim for income benefits for his work-related back injury. The ALJ's dismissal of Cundiff's claim for income benefits for his alleged work-related shoulder injury and the award of medical benefits for the shoulder and back injuries are **VACATED**.

This claim is **REMANDED** for entry of an amended decision identifying the medical evidence which supports the ALJ’s conclusion that Cundiff "did injure his left [sic] shoulder...in what was a temporary exacerbation of a prior, active pre-existing condition." Should the evidence not support the ALJ's determination Cundiff sustained a temporary exacerbation of a prior, active pre-existing condition to his right shoulder, the ALJ must then determine the nature of Cundiff's alleged right shoulder injury. In his amended award, the ALJ must also identify the specific injuries for which Cundiff is entitled to medical benefits, the duration of each injury, and determine whether Cundiff is entitled to future medical benefits for either injury.

ALL CONCUR.

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