

OPINION ENTERED: June 19, 2012

CLAIM NO. 201073210

BRENDA NALLEY

PETITIONER

VS.

**APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE**

ACTIVE DAY DAYCARE, INC.
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. Brenda Nalley ("Nalley") seeks review of the January 3, 2012, opinion and order rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ") dismissing her claim for income and medical benefits against Active Day Daycare, Inc. ("Active"). Nalley also appeals from the February 6, 2012, order denying her petition for reconsideration.

Nalley's Form 101 alleges an October 30, 2010, injury occurred "while moving a patient in a wheelchair, he leaned back, pinning my hip between the wall and wheelchair." As a result, Nalley asserted she sustained an injury to her left hip requiring surgery.

Nalley testified at a June 10, 2010, deposition and at the November 7, 2011, hearing. At the time of her injury, Nalley drove a wheelchair accessible van for Active. Her job was to drive to the homes, pick up individuals, and take them to Active's center. Nalley was also responsible for taking individuals home at the end of the day. On occasion, she worked in the daycare center.

When Nalley was approximately ten or eleven years old, she underwent surgery because of a hip condition. Nalley testified the first surgery involved the placement of pins in her hip.¹ Approximately a year to a year and half later she underwent surgery to remove the pins. She explained that after the first surgery she was on crutches or in a wheelchair the whole time. Nalley testified her physician told her that while the pins were in her hip, her leg would not grow. As a result, she testified her left leg is shorter than her right. Since the last surgery she

¹ The parties were unable to obtain the records pertaining to Nalley's hip problem and the resulting surgeries.

has walked with a limp. After being released by Dr. Mitchell, the physician who performed the surgeries, Nalley returned to Dr. Mitchell on only one occasion for purposes of determining whether she should have her children by natural childbirth or by C-section. Nalley testified Dr. Mitchell advised her that because her hip did not heal correctly "as [she] was growing," she should not go through natural child birth.

Nalley testified she was injured on a Saturday in the course of securing a passenger in a wheelchair in the van. She explained as follows:

A: On the left already locked in and I was locking this one down here when he started pushing the wheelchair backwards. He was actually raising the two front wheels up off the floor. And he had already had - it had already retracted itself so far that I was in between the wall and his chair, because the wall behind me is the back of the van, so I was already in between that and I was hollering for him to stop pushing on the chair and then I got myself raised up and I was holding onto the handles trying to push him back, hold him this way so I could get out over this strap that I had just strapped down because it's kind of up in the air a little bit and I had a hold of his chair and I pushed at him, I told him, 'Robert, quit pushing on the wheelchair.' And as I jumped over the strap I twisted around on my left leg and just as soon as I did it, I heard it pop.

Nalley further explained she became stuck between the wheelchair and the van wall, and she twisted her hip in an attempt to free herself. After Nalley heard her hip pop, she stood there for a few minutes before attempting to walk. She noticed when she walked, her hip was sore. She drove everyone home, but when she returned to the center after delivering her passengers she was "almost non-walking." Nalley acknowledged no other employees saw this. Nalley testified she got in her truck and went home. The rest of the weekend she took Aleve and laid on a heating pad. On Monday, she realized she was unable to work and called in to advise she could not work.

Active sent her to Flaget Health Clinic where she saw Dr. Raza Malik. At that time, x-rays were taken. Dr. Malik gave Nalley a shot to relieve her pain, advised her to remain on her crutches, and prescribed Morphine and Hydrocodone. She was not to place any weight on the hip. Dr. Malik sent Nalley to Dr. Marcus Craig, an orthopedic surgeon, in Elizabethtown whom she saw three or four times. Dr. Craig ordered an MRI and bone scan. Nalley testified Dr. Craig told her she needed hip replacement, which she desires.

Nalley testified because Dr. Mitchell had retired, she saw Dr. Donald Pomeroy in Louisville approximately fifteen years ago for a checkup.

As a result of her hip problems, Nalley testified she cannot walk on her leg, nor can she sit or lie down very long. She constantly experiences a throbbing in her hip joint and pain shoots down her leg. On a scale of one to ten, her pain ranges between four and ten. The only medication Nalley takes is Aleve. She has not worked since her injury. Although she acknowledged she walked with a limp, Nalley denied having any ongoing hip symptoms prior to the injury.

At the hearing, Nalley testified that prior to the surgery, she was under no restrictions for her hip and was not being treated by a physician for her hip problems. Nalley denied Dr. Pomeroy told her in 1998 that she should have hip replacement surgery. She also denied telling Dr. Pomeroy she had had hip problems for five or six years prior to seeing him.

After reviewing the medical evidence submitted by the parties and the testimony, the ALJ entered the following findings of facts and conclusions of law:

. . .

In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.

The Plaintiff has argued that inasmuch as her left hip condition was asymptomatic prior to October 30, 2010 it must be considered a pre-existing, dormant condition brought into disabling reality by the October 30, 2010 incident in [sic] where her left hip was trapped between a wheelchair and the interior of the van. The Defendant has argued that whether or not the Plaintiff's condition was pre-existing active vs. pre-existing dormant is resolved by whether or not the undersigned accepts that her condition was asymptomatic.

In analyzing this claim, and answering the above question, among others, I take note of the fact that I am free to reject or accept testimony and opinions according to the weight I assign them and that the testimony of the Plaintiff, even if uncontradicted, maybe rejected.

I also take note of the fact that although the Plaintiff has testified that in the thirteen years prior to October 30, 2010 the left hip was asymptomatic and that Dr. Craig has opined it must have been asymptomatic that the objective MRIs, scan and x-rays clearly show that the condition of the left hip was chronic and that the overwhelming weight of the objective scans, with the possible exception of some initial marrow edema, shows that all of the trauma to the left hip was chronic and pre-dated October 30, 2010.

It is noted that the Plaintiff walked with a limp since approximately 1973.

Further, in 1998 Dr. Pomeroy stated the Plaintiff needed a total hip replacement but that it would be best if she delayed it as long as possible. Therefore, the very treatment recommendation that is being made now was being made in 1998 and the very diagnosis which underlies the current treatment recommendation was made in 1998.

Finally, regarding this issue, Dr. Gleis does in fact assign an impairment rating, of 10-20%, to the pre-existing active condition.

In short, I simply do not believe the Plaintiff's left hip condition was entirely asymptomatic prior to the October 30, 2010. I further find, based on the medical evidence as a whole but with specific reliance on Drs. Schiller and Gleis, that the October 30, 2010 incident did not cause any work-related injury.

This claim is dismissed; in it's [sic] entirety, because there is no work-related injury. It is unnecessary to address the remaining issues but if a more detailed analysis had been done the need for the total hip replacement would not be work-related as this has been needed since at least 1998.

Nalley filed a petition for reconsideration requesting the ALJ to reconsider his decision to disregard her testimony that she had no left hip symptoms immediately prior to the alleged work injury. Nalley made the same

arguments she now makes on appeal. The ALJ overruled Nalley's petition for reconsideration.

On appeal, Nalley asserts her left hip was completely asymptomatic prior to her work injury on October 30, 2010. She asserts her testimony establishes that during the years prior to her work injury, she consistently worked long hours, holding down two jobs, and engaged in "all sorts of physical activity all without problems, symptoms, or physical limitation." Nalley argues no physician indicated she was suffering from any symptoms in her hip immediately prior to the work injury. She takes issue with the ALJ's finding he did not believe her left hip was entirely asymptomatic prior to October 30, 2010. Nalley asserts there is no evidence in the record from which the ALJ could draw a reasonable inference she was not being truthful when she said she was asymptomatic for thirteen years prior to the work injury. Nalley asserts her testimony regarding her activities during the thirteen years prior to the injury establishes the ALJ is completely wrong concerning her credibility. Thus, there is no evidence the ALJ's decision is "reasonable, or supported by substantial evidence."

Nalley also argues the ALJ erroneously failed to analyze this case pursuant to Finley v. DBM Technologies,

217 S.W.3d 261 (Ky. App. 2007). Nalley asserts the ALJ "attempted to side-step Finley v. DBM Technologies, supra, by making an unsupported conclusion" that she was not being truthful regarding the absence of symptoms in her left hip immediately prior to the work injury. Nalley argues the ALJ completely failed to address whether her left hip condition was dormant prior to the work injury of October 30, 2010. Further, she posits if the ALJ believed Nalley had an active condition then he should have so stated and cited the evidence supporting such a conclusion.

Finally, Nalley asserts if the ALJ found her left hip was active prior to the injury then he must determine her current impairment rating and carve out that portion of the impairment rating that was pre-existing. Nalley posits since Dr. Warren Bilkey assessed a forty percent impairment and Dr. Gregory E. Gleis speculated Nalley had a ten to twenty percent impairment rating prior to the work injury, giving Active the benefit of the doubt, Nalley has a twenty percent increase in her impairment rating attributable to the work injury. Therefore, at a minimum she is entitled to an award of sixty percent occupational disability.

As the claimant in a workers' compensation proceeding, Nalley had the burden of proving each of the essential elements of her cause of action. Snawder v.

Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Nalley was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox,

19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The report of Ellis & Badenhausen Orthopedics reflects Nalley was seen on September 18, 1998, by Dr. Pomeroy. Dr. Pomeroy diagnosed "severe arthritis of the left hip secondary to old congenital hip dysplasia." Dr. Pomeroy noted Nalley complained of pain in her left hip and further noted as follows:

This is a 34-year-old lady sent to the office by Dr. Bill Nash for evaluation of her left hip. She has had problems with her hip for a number of years and when she was a child, she was found to have a dislocated hip and underwent two hip surgeries to try to reduce this.

She did well for a number of years but over the last 5-6 years, she has had increasing discomfort in her left hip and has been seen by Dr. Nash. Because of her continued problems, however, Dr. Nash sent her here for evaluation of her hip surgery and the current status of her hip. She states she has difficulty walking any long distance at all because of the pain she has.

Dr. Pomeroy went on to state the examination of Nalley's hip revealed she had a "very restricted range of motion of her hip." The x-rays reveal "severe arthritic changes of her left hip." Dr. Pomeroy stated he discussed Nalley's problems with her and Nalley wanted "to wait as long as she can to consider hip replacement surgery." Dr. Pomeroy prescribed anti-inflammatories and explained to Nalley he felt she would probably need hip replacement surgery in the near future. Nalley was to consider this and contact Dr. Pomeroy.

The November 1, 2010, x-ray report from Flaget Immediate Care Center reflects two views of the left hip were performed. The impression is as follows:

Severe deformity of the left hip and proximal femur as detailed above. This is overall favored to be chronic. A definite acute displaced fracture is not clearly identified on this examination, but would be difficult to exclude. If pain persists or if there is high clinical concern for acute abnormality, correlation with MRI would

be recommended as a more sensitive evaluation.

The report from Lincoln Trail Diagnostics generated as a result of an MRI of the left hip conducted on December 16, 2010, reflects the following impression:

1. Severe chronic-appearing deformity of the left proximal femur with chronic presumed large fracture fragments and bony deformity but no obvious superimposed acute fracture. There does appear to be some marrow edema in the lower femoral neck and greater trochanteric region though without a superimposed definite fracture line. However CT may be useful in this regard. There is a mild left hip effusion.

The bone scan report of Elizabethtown Diagnostic Imaging conducted on February 10, 2011, regarding the left hip reflects the following findings:

The patient has increased uptake in the left hip joint and including the left femoral head. The appearance of this is more suggestive of degenerative changes but the previous MRI is probably the most specific. No other abnormalities of the pelvis are identified.

The following impression was noted:

1. Moderate increased uptake seen in the left hip joint. The findings are more suggestive of arthritis late stage avascular necrosis could have of such a pattern.
2. No abnormalities on the right are identified.

Contrary to Nalley's assertion, there is evidence in the record rebutting her testimony that she was completely asymptomatic for at least thirteen years prior to the alleged October 30, 2010, injury. The records of Dr. Pomeroy, with Ellis & Badhausen, clearly establish in 1998, Nalley had severe hip problems to the extent Dr. Pomeroy recommended hip replacement surgery. At the hearing, Nalley denied she was told by Dr. Pomeroy she needed hip replacement surgery. She also denied telling Dr. Pomeroy she had hip problems for five or six years before she saw him. In addition, as noted by the ALJ, the x-rays, MRI, and bone scan reflect Nalley had significant chronic degenerative left hip problems. Therefore, we conclude there is evidence in the record which permitted the ALJ to disregard Nalley's testimony that her left hip was completely asymptomatic prior to the alleged injury of October 30, 2010.

In addition, portions of Dr. Craig's testimony do not support Nalley's assertion she was completely asymptomatic. Dr. Craig's testimony as to whether Nalley's condition was dormant and asymptomatic prior to the alleged injury of October 30, 2010, is as follows:

Q: Okay. And the pain that she is having, in your opinion is that

stemming from this arthritis in the hip?

A: I think that that plays a role in it, yes.

Q: Okay. Alright. Now, if we assume that she was asymptomatic prior to this incident and then she has this fall and then she has continuing symptoms since then --

A: Right.

Q: Would this be a situation where that fall acted as a trigger that made the arthritis become symptomatic?

A: Yes, that's - the way that Ms. Nalley described it to me was that she was doing very well and then once she had this injury then the pain got to where it was severe.

Q: Okay. Now, let me give you all the great legal language we use --

A: Okay.

Q: We have what we call a dormant, non-disabling disease or condition aroused into disabling reality by a work injury --

A: Okay.

Q: Does that fit what we're talking about with Ms. Nalley?

A: It does sound as if she was -- even though she had the previous hip problems, it was dormant by the fact of how functional she was.

The above testimony of Dr. Craig concerning whether Nalley had a dormant non-disabling condition aroused into

disabling reality is equivocal. Clearly, Dr. Craig is relying upon the history provided to him by Nalley in expressing his opinion. During his deposition, Dr. Craig testified Nalley was experiencing symptoms in her left hip prior to the alleged October 30, 2010, event. Dr. Craig testified Nalley appeared "to have been functional despite having arthritis in her hip at work." Dr. Craig also testified Nalley "was either tolerating the condition or was less symptomatic and then she had this incident where her pain got dramatically worse." Further, when asked about the records of Dr. Pomeroy, Dr. Craig testified as follows:

Q: And in his diagnosis, he notes severe arthritis of the left hip, secondary to old congenital hip dysplasia.

A: Okay.

Q: Is that essentially the same thing we're talking about here today or is that different somehow?

A: Yeah, you know, if it were a test, you know, then I probably wouldn't put congenital hip dysplasia, but it's a -- I understand exactly what he means and it's not inaccurate, it's just not --

Q: Not exactly--

A: It's not exactly how I would word it, but it's - but for this purpose I think it's accurate.

Q: It's pretty much the same thing?

A: Kind of, yeah.

Q: Okay. Well, obviously, she wouldn't have seen the doctor unless she was having some problems?

A: Exactly.

Q: And in the note it indicates that maybe she had actually seen Dr. Nash who maybe used to be in this office?

A: Yeah, he still works here as an employee now.

Q: And then later on was seen by Dr. Pomeroy at Ellis and Badenhausen--

A: Uh-huh.

Q: Now, if she had this time when this hip was painful and then the symptoms went away, are we still talking about a dormant condition, that's what I'm leading up to?

A: With how bad her hip is now, and it sounds like her hip was bad 13 years ago, you know, either it went dormant to where her symptoms did not need treatment or she learned to live with bad pain.

Q: Okay. So if she had testified it had resolved and she was doing okay, then that would take us back to the idea of it being dormant?

A: Yes.

Q: And if she had continued to have the same level of symptoms all along then it would definitely be an active problem?

A: Right.

Q: Is that fair?

A: I think that would be, yes.

Significantly, Dr. Craig acknowledged he had to rely upon the history he received from Nalley in making his diagnosis. Dr. Craig testified, as documented by the MRI and bone scan, Nalley had severe arthritis in her left hip which pre-dated the October 30, 2010, event. The following exchange took place between Dr. Craig and Active's counsel:

Q: Alright. Now, in reference to - Mr. Haydon made reference to this lady being seen by Dr. Pomeroy, and in that note from Dr. Pomeroy he indicates that she had relayed to him that she had been having problems with her hip for five or six years and that his recommendation at that time was a total hip replacement.

A: Okay.

Q: So would that indicate that we're probably dealing with a condition that's been fairly active for a period of time and may wane or get better and become worse or as an alternative she learned to live with the pain as you earlier suggested?

A: Yes.

[text omitted]

Q: Now, the question is with the information you've received today, is it still your opinion that the injury is - that she had on October 30th is the reason that she needs a hip replacement or is it for this degenerative

condition that's been present for quite a long time?

A: Right, I would say the reason she needs a hip replacement is twofold, one is because her hip is so bad, it's worn out and then the other reason is for pain relief.

Q: Right.

A: And so, I guess, the question becomes when did the pain get bad enough that it required a surgery, obviously, 13 years ago it - she had bad x-rays, but evidently her pain wasn't bad enough because she decided to wait. But here lately, all I have from what she told me is that she was - the pain was tolerable up until the incident.

Q: Okay. What would indicate or what would be your medical opinion as to, would you say that this condition was probably symptomatic and she was living with it or asymptomatic?

A: When you see the x-rays you would think how has this lady walked on this hip for the past 30 years.

Q: Okay. And she also testified that she's had a limp forever, I think.

A: I would think that she probably did.

We believe the above testimony also rebuts Nalley's testimony that her left hip was completely asymptomatic before October 30, 2010. The ALJ in rejecting Nalley's testimony referenced the MRI, x-rays, and bone scan, as well as Dr. Pomeroy's notes which we conclude,

along with Dr. Craig's testimony, provide sufficient reasons for the ALJ to reject Nalley's testimony.

Likewise, we find no merit in Nalley's assertion the ALJ erred in failing to analyze this case pursuant to Finley v. DBM Technologies, supra. In his July 23, 2011, report, Dr. Martin G. Schiller noted the bone scan indicated no signs of an acute injury and the MRI revealed no fracture or signs of an acute injury. Dr. Schiller stated his opinion expressed in a supplemental letter dated February 23, 2011, was that the injury was a soft tissue injury and should not cause the degree discomfort or inability to walk of which Nalley complained.² Dr. Schiller indicated he had been provided with the 1998 medical records from Dr. Ellis' office which indicates Nalley "had significant pre-injury symptomatology" and the diagnosis was "'severe arthritis of the left hip secondary to old congenital hip dysplasia.'" Although Dr. Schiller stated he was not sure of the nature of the surgeries, he stated "this failed reconstruction of the hip is responsible for Nalley's hip symptoms." Dr. Schiller observed Dr. Pomeroy had noted Nalley had increasing discomfort in her left hip

² In its "Notice of Filing," Active indicated it was filing the January 27, 2011, and July 23, 2011, medical records of Dr. Schiller. However, only the July 23, 2011, letter is contained in the record.

over the last five to six years and had difficulty walking any long distance because of the pain. Therefore, Dr. Schiller concluded as follows:

[Nalley] falsely indicated to [him] that she had no symptoms prior to the injury which at best could have been considered a soft tissue injury which would have had a very minimal effect on her hip and would have lasted only a short period of time in terms of the disability that she was complaining of.

(emphasis not ours).

Dr. Schiller concluded Nalley "did not have an acute injury such as a fracture or dislocation or anything that would show up on a bone scan or MRI study" of her left hip. In Dr. Schiller's opinion, Nalley had not been injured at work and at most had a soft tissue injury which should have long ago resolved. He also believed a "total hip replacement would have absolutely nothing to do with the work-related injury."

The August 24, 2011, independent medical examination ("IME") report of Dr. Gregory E. Gleis was introduced. Dr. Gleis' diagnosis is left hip degenerative arthritis. Based upon the surgery Nalley underwent as a child and the September 18, 1998, report of Dr. Pomeroy, Dr. Gleis concluded her "left hip was an actively symptomatic condition." Dr. Gleis also stated as follows:

"10/30/10 work-related incident with left hip worsening pain." He concluded the recommended treatment for her left hip was the same as in 1998 when Dr. Pomeroy recommended total hip replacement.

Concerning whether the October 30, 2010, incident was the cause of Nalley's current condition and her need for total hip replacement, Dr. Gleis stated the "left hip was a pre-existing condition which was symptomatic" and the need for the hip replacement existed in 1998. Dr. Gleis stated at most the October 30, 2010, event was an exacerbation of this pre-existing condition.

Regarding whether Nalley had an injury as defined by the Act as a result of events which occurred on October 30, 2010, Dr. Gleis stated the October 30, 2010, event caused an exacerbation of Nalley's underlying pre-existing actively symptomatic condition in the left hip. After citing to the December 16, 2010, MRI and the February 10, 2011, bone scan, Dr. Gleis concluded as follows: "Therefore, these were pre-existing changes and not from a new acute injury."

Dr. Gleis noted that "by Ms. Nalley's memory, the left hip was not a symptomatic problem despite the documentations in the medical record." He stated a patient's 'memory' is notoriously faulty when it comes to

pre-existing conditions subject to litigation." Dr. Gleis concluded Nalley "definitely had a pre-existing impairment rating before the October 30, 2010 incident." Based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"), Dr. Gleis opined the "left hip impairment rating before October 30, 2010," would merit a ten and twenty percent whole person impairment.

The opinions of Drs. Schiller and Gleis support a finding Nalley had pre-existing severe hip problems and the event of October 30, 2010, did not cause an injury. Both physicians expressed the belief that Nalley provided an inaccurate history regarding her pre-existing left hip problems. Both physicians stated, at best, Nalley may have suffered a temporary injury or exacerbation of her hip problem. Significantly, both physicians expressed an opinion that Nalley did not sustain a work injury on October 30, 2010. The opinions of Drs. Schiller and Gleis permit the ALJ to find an injury did not occur as a result of the October 30, 2010, event.

Further, we believe the ALJ concluded there was no further exacerbation of Nalley's pre-existing chronic left hip condition to the extent she sustained an impairment as a result of the October 30, 2010, event.

Rather, based upon the diagnostic tests conducted after October 30, 2010, Dr. Pomeroy's September 18, 1998, report, and the opinions of Drs. Schiller and Gleis, the ALJ believed Nalley did not sustain a work-related injury as a result of the October 30, 2010, event. That being the case, we agree with Active that Finley v. DBM Technologies, supra, is not applicable. In Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829, 833 (Ky. 2008), the Supreme Court noted as follows:

Finally, the ALJ did not misapply the law regarding pre-existing conditions. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001), stands for the principle that "[w]here work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury." [footnote omitted] It is inapplicable in the present situation because the ALJ relied on medical evidence that work-related trauma caused no permanent harm and because no overwhelming medical evidence compelled otherwise.

We believe the above language to be applicable in the case *sub judice*. This claim does not involve a situation where the claimant sustained a work-related injury resulting in a permanent impairment, and also had a pre-existing active condition which merited an impairment rating necessitating

the impairment attributable to the active condition be carved out of the award. Since the ALJ determined there was no work-related trauma causing permanent harm then there was no reason to conduct an analysis pursuant to Finley v. DBM Technologies, supra.

We believe the language of the Supreme Court in Blankenship v. Wal-Mart Stores, Inc., 2011-SC-000131-WC, rendered September 22, 2011, Designated Not To Be Published, to be applicable. In Blankenship v. Wal-Mart Stores, Inc., supra, the Supreme Court stated:

The court determined ultimately that the dispute over whether the injury caused a dormant pre-existing condition to become disabling was inapplicable because the ALJ found the critical issue to be whether a work-related injury actually occurred. Noting that the ALJ found the claimant to be untruthful, the court found no error in the decision to reject his evidence of causation because the physicians testifying on his behalf based their opinions on a false history.

[text omitted]

Finley and *McNutt* were inapplicable because the ALJ found the claimant not to be credible and, as a consequence, rejected medical opinions based on a history that the ALJ concluded was false.

Slip Op. at 5.

The situation here is the same as in Blankenship v. Wal-Mart Stores, Inc., supra. Since the ALJ found no work-related injury occurred, Finley v. DBM Technologies, supra, is not applicable. Therefore, because the ALJ's determination Nalley did not sustain a work-related injury is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Accordingly, the January 3, 2012, opinion and order and the February 6, 2012, order ruling on the petition for reconsideration of Hon. Chris Davis, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON BEN T HAYDON JR
HON AUDREY HAYDON
P O BOX 1155
BARDSTOWN KY 40004

COUNSEL FOR RESPONDENT:

HON JAMES A WAGONER
333 GUTHRIE GREEN STE 203
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
410 WEST CHESTNUT ST STE 700
LOUISVILLE KY 40202