

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 18, 2014

CLAIM NO. 201260720

CHARLES SELIGMAN DIST.

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

KEITH SCHNUR
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Charles Seligman Dist. ("Seligman")
appeals from the February 14, 2014 Opinion and Award and
the March 21, 2014 Order on Reconsideration rendered by
Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ")
awarding Keith Schnur ("Schnur") temporary total
disability, permanent partial disability benefits and

medical benefits as a result of a November 30, 2012 injury. On appeal, Seligman argues the ALJ erred in finding an injury occurred on November 30, 2012, and in awarding benefits for a cumulative trauma injury. Seligman also argues there is no evidence of a permanent injury to Schnur's cervical or thoracic spine, and the award of benefits relative to those conditions is arbitrary and capricious. Because the ALJ's determination is supported by substantial evidence, we affirm.

Schnur began working for Seligman in 2005, on a beer delivery route. His work involved delivering cases and kegs of beer, requiring him to handle up to 1,500 cases in a day. Schnur testified he had no problems performing his duties until he was injured on Friday, November 30, 2012 while working in a small cooler in a store in Frankfort. Only one person could work in the cooler, so he and a helper split the work. The helper brought the beer from the truck to the door of the cooler. Schnur was inside rotating stock when he bent down with a case of beer and felt a pull in his lower back.

At his deposition, Schnur testified he was working with Matt Koch who witnessed the incident and the two later discussed the injury during the ride home. However, at the hearing, Schnur testified he could not

remember with whom he was working and was not sure whether the other worker witnessed the incident. Regardless, the other worker was not qualified to drive a semi-truck, so Schnur had to continue on his route for the remainder of the shift. At the end of the day, he parked his truck at Seligman's distribution center in Walton, Kentucky. He turned in his paperwork but did not report his injury because he believed he could "work through it" and it "wasn't that bad." Schnur indicated his pain at that time was a three on a scale of one to ten.

Schnur drove home and told his wife he had hurt his back. He sat on the couch and used a heating pad. His pain increased on Saturday and he alternately applied heat and ice. Sunday was about the same. When he woke on Monday, his pain had increased to a level of ten. When he got out of bed, he fell and was unable to rise from the floor without assistance from his wife. He was not scheduled to work on Monday.

Schnur sought treatment with Dr. Edward Isaacs, his family physician. He drove from Dr. Isaacs' office to Seligman's distribution center, where he left his off work statement with the warehouse manager because Sandy Robinson, the Human Resources director, and other managers were in a meeting and could not be disturbed. He returned

on December 4th and reported his injury to Ms. Robinson, who gave him an FMLA form to take to Dr. Isaacs. According to Schnur, he attempted to characterize his injury as work-related, but Ms. Robinson did not believe or accept his assertion. Schnur met with Ms. Robinson on December 7th and again told her he was hurt on the job and wanted to run his claim through workers' compensation. Schnur returned to work on light duty on February 3, 2013, and to regular duty in April 2013.

Regarding the reporting of the injury, Ms. Robinson's testimony directly contradicted Schnur's and provided the basis for Seligman's assertion he had fabricated the work-related injury. She testified she was in a meeting on December 3rd and saw Schnur through the window. It was obvious to her that he was hurt. Later, she spoke to the warehouse manager and inquired if Schnur was injured. She spoke with Schnur on December 4th and asked him if he had been hurt at work. According to Ms. Robinson, Schnur indicated he did not know what he had done. Robinson gave Schnur paper work for FMLA leave and short term disability benefits. She testified that Schnur asked if this was for the same insurance "Troy" used. Robinson told Schnur "Troy" received workers' compensation benefits and Schnur could not apply unless his condition

was work-related. Ms. Robinson stated Schnur first claimed his condition was work-related at the December 7th meeting. She completed a first report of injury at that time because this was the first time he claimed it was work-related.

Schnur saw Dr. Edward P. Isaacs for back pain on December 3, 2012. Dr. Isaacs recorded the following history:

This is a new problem. The current episode started today. The problem occurs constantly. The problem has been rapidly worsening. Associated symptoms include numbness. Associated symptoms comments: Shooting pain down both legs.

The symptoms are aggravated by twisting, walking and standing. He has tried nothing for the symptoms. The treatment provided no relief.

He awoke this morning with level 9/10 pain in the right lower back, radiating down the back of his right leg to the foot. Denies incontinence or saddle anesthesia.

Dr. Isaacs diagnosed lumbar radiculitis and administered a DEPO-MEDROL injection. He obtained an MRI from the T11-T-12 level through L5-S1. The MRI revealed discogenic changes from L3-4 through L5-S1 with mild to moderate narrowing of the inferior aspect of the right L5 neural foramen without definite evidence of right L5 nerve compression within the neural foramen.

Dr. Michael Grefer completed a Form 107 on May 28, 2013, indicating he provided treatment from December 14, 2012 to April 15, 2013. He diagnosed cervical, thoracic and lumbar sprain and strain with multilevel discogenic disease and radicular symptomatology. He indicated, within reasonable medical probability, the work injury was the cause of Schnur's complaints. Dr. Grefer explained as follows:

It is my opinion within reasonable medical certainty that the mechanism of injury on 11/30/12 is consistent with his complaints and findings with activities performed at his job over several years making his neck and back more susceptible to injury.

Dr. Grefer assessed a 15% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He stated Schnur did not have an active impairment prior to the injury. Dr. Grefer indicated Schnur retains the physical capacity to return to the type of work performed at the time of injury and restricted him to activities with lifting, bending and stooping as tolerated.

Schnur introduced Dr. Grefer's notes documenting treatment from December 14, 2012 through April 15, 2013. In the initial note, Schnur reported problems with his back, right SI joint area and pain into the right buttock

and into his leg, worse over the past two weeks. He initially indicated the problems "started just out of the blue", but then provided an account of work in a cramped area resulting in stiffness and tightness in his back which worsened over the weekend to the point he could not get out of bed. Schnur's wife indicated he fell to the floor "and could not do much of anything." He stated his problem started in the lower back and right side but progressed through his entire spine. Dr. Grefer's impression was cervical, thoracic, lumbar and sacroiliac strain and sprain with discogenic disease, possible radiculopathy and possible occult fracture. His notes indicate cervical dysfunction and pain, mild spasm in the cervicothoracic spine, and moderate spasm in the thoracolumbar spine.

In a January 18, 2013 note, Dr. Grefer stated he was "afraid about" an occult fracture primarily in the SI joint area, indicating "I think that all of this is related to that incident that happened on Friday as well as repetitive activities over 20 to 30 years that he was working." On February 18, 2013, Dr. Grefer noted a bone scan did not show any major changes and EMG/NCV studies were normal. In the final note on April 15, 2013, Dr. Grefer stated Schnur was "doing a whole lot better" and had

been discharged from physical therapy. Dr. Grefer planned to recheck Schnur in three months.

Dr. Gregory Fisher performed an independent medical examination on October 10, 2013. He reviewed treatment records from Drs. Isaacs and Grefer, as well as diagnostic studies. Dr. Fisher conducted a physical examination which revealed normal neurological results over the lower extremities with no radicular signs/symptoms or complaints. There were no objective findings over the back and some subjective complaints of low back soreness. Schnur had no objective or subjective complaints over the cervical and thoracic areas. Dr. Fisher noted discrepancies between the history provided by Schnur and the medical records. He also opined the objective findings noted in the examinations by Dr. Isaacs and Dr. Grefer in December were not due to an incident on November 30, 2012, but were due to the age appropriate degenerative findings noted on the MRI of December 11, 2012. He further concluded there was no objective evidence of a harmful change to the human organism or permanent impairment rating as a result of the alleged November 30, 2012 incident.

The ALJ found Schnur sustained a work injury on November 30, 2012. After first acknowledging the many conflicts between the documentation and the testimony of

Schnur and Ms. Robinson, she found as follows concerning the occurrence of the injury:

The medical records are not decisive on the issue of whether a work injury occurred on 11/30/2012 or not. However, in reviewing the medical history given to Dr. Greber [sic] - on 12/14/2014 [sic] it is in keeping with Plaintiff's testimony of an event while he was delivering beer in a tight, close place. Dr. Greber's [sic] narrative opinion indicates that the nature of the work (repetitive lifting for years) was causally related to his medical condition. In any respect, the combination of the evidence in this case convinces the undersigned that Plaintiff sustained a work injury on 11/30/2012 and reported to his employer on 12/03/2012. In making this finding I rely on the testimony of the Plaintiff. The causal connection of the injury to Plaintiff's back condition was convincingly made by the opinion of Dr. Greber [sic] in his Form 107. Despite Defendant/employer's argument the Dr. Greber [sic] did not have an accurate history of Plaintiff's medical condition - I find Dr. Greber [sic] was keenly aware of the job Plaintiff performed ten hours a day for the Defendant. He describes the repetitive lifting of heavy cases of beer over several years. I rely on Dr. Greber's [sic] opinion and find the plaintiff's injury was the cause of his complaints and caused the harmful change in the human organism. (See Dr. Greber's [sic] Form 107).

Seligman filed a petition for reconsideration requesting additional findings of fact and raising essentially the same arguments it makes on appeal.

Relevant portions of the ALJ's order on reconsideration are as follows:

The Defendant/employer also avers the undersigned overlooked or did not consider Dr. Hughes' impairment rating that preceded the instant work injury. To the contrary, on page 23 of the Opinion and Award, the undersigned discussed the legal standard by which pre-existing active impairment/disability is to be measured. In discussing Plaintiff's pre-existing impairment it is noted: "While there may have been an impairment rating in 1999 --- there is no substantial evidence indicating the pre-existing condition was symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." (Opinion and Award, p. 23). Dr. Hughes' impairment rating from 1999 was clearly considered and was found less than convincing of evidence of an active impairment immediately prior to Plaintiff's 2012 work injury when combined with the other requirements of determining active pre-existing impairment/disability.

Lastly, the Defendant/employer argues that the Plaintiff's treating doctor, Dr. Michael Grefer, lacks credibility and that his impairment rating was in error. The treating physician in this case was given significant weight as to his opinions. Certainly the diagnostic testing, clinical observations, treatment and the results of a variety of prescriptions, physical therapy and other treatment puts Dr. Grefer in a unique position to judge the impairment of Mr. Schnur. I find no error in Dr. Grefer's application of the AMA Guides, 5th Edition to Mr. Schnur's condition.

On appeal, Seligman raises three arguments. It first asserts the ALJ erred in finding an injury occurred on November 30, 2012, due to the conflicting nature of the testimony. It also argues the ALJ erred in finding Schnur suffered a cumulative trauma. Finally, it contends there is no evidence of a permanent work-related injury to the cervical and thoracic spine.

We conclude the ALJ was presented sufficient evidence upon which to conclude Schnur suffered a work-related injury on November 30, 2012. As the ALJ acknowledged in both the Opinion and the Order on Reconsideration, the evidence on this point was conflicting, and Ms. Robinson directly contradicted Schnur's testimony in several respects. Acting within her discretion, the ALJ simply found Schnur's account most credible. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). His testimony constitutes the requisite substantial evidence upon which to conclude a work-related injury occurred on November 30, 2012 while he was lifting cases of beer. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

As part of this argument, Seligman points to several discrepancies in the evidence, which it claims

undermines the ALJ's ultimate holding that a work-related injury occurred. First, we are unconvinced the ALJ failed to appreciate Ms. Robinson's version of events, as Seligman asserts. At the outset of her analysis, the ALJ explained that "the crux of this argument is whether [Schnur] sustained a work-related injury or "fabricated" his work injury." The ALJ reconfirmed this understanding in her Order on Reconsideration. Further, the ALJ's summary of the evidence demonstrates she comprehended Ms. Robinson's explanation as to why the first report of injury was not completed until December 7th; that is, because Schnur told her "he didn't know what happened" to his back. Again, the ALJ acted within her discretion in relying upon Schnur, who indicated he tried to tell Ms. Robinson on December 4th that the injury was work-related, but she didn't believe him.

Next, Seligman points to statements in the histories recorded by Dr. Isaacs and Dr. Grefer as indicating the problem did not begin on November 30th. However, in each instance, it is reasonable to interpret these histories as Schnur reporting his condition began on Friday, but significantly worsened the following Monday morning.

Finally, we disagree with Seligman's claim Schnur's testimony was so inconsistent, it cannot be

considered substantial evidence. Certainly, Schnur's testimony may be called into legitimate doubt. He originally claimed he was accompanied by Matt Koch on the day he was injured, but later indicated it was another co-worker. He also gave somewhat evasive testimony concerning a prior workers' compensation claim in Ohio. However, it is not the duty or the province of this Board to reweigh the evidence or assess the witness' credibility. That authority lies solely with the ALJ. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997).

Seligman next argues the ALJ erroneously awarded benefits for a cumulative trauma injury. Schnur did not allege a cumulative trauma injury, and the theory of a cumulative trauma injury was never specifically mentioned in the Benefit Review Conference Order and Memorandum. Furthermore, Schnur steadfastly argued he had injured his neck and back in a single work-related incident occurring on November 30, 2012. In fact, he denied any difficulty in performing his job prior to the alleged work incident. Seligman contends that by citing the report of Dr. Grefer, specifically his explanation of causation, the ALJ found Schnur sustained a cumulative trauma injury. Further, Seligman asserts the issue of cumulative trauma cannot be viewed as having been tried by consent.

At the outset, we agree with Seligman that benefits were awarded for a cumulative trauma, though not expressly stated. The ALJ stated she found "as a result of the November 20, 2012 work-related injury and the activities performed at his job over several years, [Schnur] suffered a functional impairment and occupational disability to his lumbar, thoracic and cervical spine." However, we disagree that the award of benefits for a cumulative trauma injury was in error because the issue was tried by consent. CR 15.02.

Though "cumulative trauma" was not specifically identified, the Benefit Review Conference Order reflects "injury as defined by the Act" and "causation" were preserved as contested issues. Moreover, Dr. Grefer's Form 107 was filed with Schnur's Form 101 Application. Thus, Dr. Grefer's statement that "the mechanism of injury on 11/30/12 is consistent with his complaints and findings with activities performed at his job over several years making his neck and back more susceptible to injury" was presented at the outset. Additionally, Dr. Grefer's January 18, 2013 note reiterates, in more clear terms, his belief Schnur's condition resulted both from the acute trauma as well as years of "repetitive" work activity. Seligman's evaluating physician, Dr. Fisher, reviewed Dr.

Grefer's Form 107 and medical records, including both of these statements as to the cause of Schnur's injury. Because Seligman had this information since the initiation of the claim, we do not believe the ALJ abused her discretion in awarding benefits for a cumulative injury. See Nucor Corp. v. General Elec. Co., 812 S.W.2d 136, 146 (Ky. 1991)(Implied consent involves an evaluation of whether a party was "unable to present a defense which would have otherwise been unavailable").

Finally, Seligman argues there is no evidence of a permanent work-related injury to the cervical and thoracic spine. It notes there is no mention of neck pain, middle back pain or pain between the shoulder blades in the record of Schnur's initial visit to Dr. Isaacs on December 3, 2012. When Schnur completed the Employee Statement at KESA's request, he noted his diagnosis as "lower lumbar pain." Seligman contends the cervical and thoracic claims were "manufactured through Dr. Grefer's assessment of an impairment rating for those regions" and is based upon Dr. Grefer's initial assessment which does not reflect Schnur's condition upon reaching maximum medical improvement. According to Seligman, Dr. Grefer gratuitously assessed a 5% rating for every region of the spine without any objective medical findings of injury.

In a form dated May 28, 2013, Dr. Grefer noted his initial examination revealed decreased range of motion, muscle spasm, muscle weakness, stiffness and tightness of the cervicothoracic and thoracolumbar spine. He diagnosed cervical, thoracic and lumbar strain. He assigned a 15% whole person impairment rating through reference to Tables 15-3, 15-4, and 15-5 of the AMA Guides.

The ALJ was faced with conflicting medical opinions regarding Schnur's impairment rating. Seligman emphatically challenged the validity of Dr. Grefer's impairment rating, highlighting the paucity of information contained in his medical report. Under such circumstances, the ALJ enjoys the discretion to choose which physician's opinion to believe and to select an impairment rating. See KRS 342.0011(35) and (36). See also Staples v. Konvelski, 56 S.W.3d 412 (Ky. 2001). Except under compelling circumstances, the issue of which physician's impairment rating is most credible is a matter of discretion for the ALJ. See REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in Haddock v. Hopkinsville Coating Corp.*, 62 S.W.3d 387 (Ky. 2001). Given that the impairment rating relied upon by the ALJ was assigned by a licensed physician, this Board is not at liberty to disturb the award.

Accordingly, the February 14, 2014 Opinion and Award and the March 21, 2014 Order on Reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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