

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 7, 2014

CLAIM NO. 201260499

ERIN GIAMBRA

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

PREFERRED STAFFING
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Erin Giambra ("Giambra") seeks review of the opinion and order rendered September 13, 2013 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), dismissing her claim. Giambra also seeks review of the October 15, 2013 order overruling her petition for reconsideration.

On appeal, Giambra argues the evidence of record compels a finding her alleged low back injury was caused by a November 30, 2012 accident at the Nasty Gals' warehouse, where she was assigned to work by Preferred Staffing. We disagree and affirm, finding substantial evidence in the record supports the ALJ's determination and no contrary result is compelled.

Giambra filed a Form 101 on April 29, 2013 alleging she sustained a low back injury with tingling and numbness in her legs on November 30, 2012, when a wheel from the cart she was pushing caught in a pallet lying on the floor. Giambra's previous employment consisted of working for various employers including fast food restaurants, as a call center representative, as a cashier, as an order selector, and as a Certified Nurse's Assistant.

Giambra testified by deposition on June 12, 2013, and at the hearing held September 4, 2013. She was born on January 31, 1991 and resides in Louisville, Kentucky. She is a high school graduate, and currently attends college.

Giambra testified Nasty Gals is a California based company which supplies shoes, jewelry, clothing, and hair products. Preferred Staffing is an agency which provides workers for various employers, including Nasty Gals. Nasty Gals has a warehouse facility in Shepherdsville, Kentucky

which fills orders for its products. As part of picking or selecting orders, carts are utilized to transport the merchandise. Her primary job with Nasty Gals consisted of packaging and shipping orders brought to her by pickers. On November 30, 2012, due to the work volume, she was required to work as a picker. As she was pushing a cart, one of the wheels caught in a pallet, causing her to jerk and twist. She stated she felt or heard a pop in her low back, and later her legs began tingling. She reported the incident to Nasty Gals' personnel, and completed an incident report which indicated she developed a sharp pain in her back. She did not specify whether this was in the upper or lower back. On December 3, 2012, she submitted a report to Preferred Staffing complaining of injuries to her back "(lower and right side)". She also complained of numbing and tingling in her back and legs.

Giambra did not immediately seek medical treatment because she believed she would get better. Later that evening, she drove herself to Jewish Medical Center South in Louisville, Kentucky where she sought treatment in the emergency room, and was provided medication. She denied being physically examined by anyone at the emergency room. She also denied advising emergency room personnel her complaints were in her upper back and shoulder. She

subsequently treated with Dr. Mark Green, a chiropractor in Elizabethtown, Kentucky; Dr. Jason Lewis, a pain management physician; Dr. Norman Lewis an orthopedic surgeon and Dr. Joseph Werner, another orthopedic surgeon. Dr. Werner recommended a discectomy at L5-S1. All of these medical providers opined Giambra's condition was caused by her work injury. She also saw Dr. Alex Argotte, a physician in southern Indiana, who prescribed pain medication. Giambra later treated at the Ireland Hospital at Ft. Knox.

The records from Jewish Medical Center South reflect she complained of pain in her upper back and right shoulder. Dr. Everette Stephens, the emergency room physician who examined Giambra, diagnosed a thoracic muscle strain for which he administered a Toradol injection and provided medication. The emergency room record makes no notation of low back or lower extremity complaints.

Dr. Stephens testified by deposition on August 15, 2013. He examined Giambra on November 30, 2012 for complaints of pain in her right upper back. He detected right paraspinal muscle tenderness exacerbated by range of motion maneuvers of the right upper extremity. He limited his examination to the cervical and upper back because she had no low back complaints. If she had complaints in either the low back or lower extremities, they would have been

documented. He disagreed with Giambra's assertion of the inaccuracy of the record, or that he physically did not examine her. He stated he had to physically touch her to determine she had muscle spasm. He noted her complaints of pain were in the thoracic spine, close to the shoulder area.

After completing the examination, Dr. Stephens diagnosed a thoracic muscle strain, for which he recommended she not engage in lifting over ten pounds and to avoid twisting, stooping or bending for three days. He then administered a Toradol injection which is an anti-inflammatory medication used for musculoskeletal injuries. He also prescribed non-steroidal anti-inflammatory medication and a muscle relaxer.

Dr. Ellen Ballard examined Giambra on February 21, 2013 at Preferred Staffing's request. Dr. Ballard reviewed numerous records of other medical providers including Jewish Medical Center South; Dr. Green; Dr. Crecelius/Melinda Richards, APRN; Commonwealth Pain Management/Dr. Jason Lewis; Dr. Norman Lewis; and Dr. Werner. After performing a physical examination, Dr. Ballard determined Giambra was at maximum medical improvement ("MMI") for her thoracic injury, and the treatment received for the lumbar complaints was not due to the November 30, 2012 work injury. She further stated Giambra needs no restrictions for her work injury,

but may need to be restricted due to her unrelated lumbar complaints.

Giambra moved to bifurcate the claim for a decision on the issues of causation, reasonableness and necessity of ongoing treatment, and eligibility for ongoing medical benefits. Despite Preferred Staffing stating it had no objection to bifurcating the claim, the request was denied by order entered July 1, 2013. A telephonic conference was held on August 9, 2013. The ALJ then entered an order setting a hearing on September 4, 2013 on the "bifurcated issue of compensability of plaintiff's claims."

On September 11, 2013, the ALJ rendered an opinion and order dismissing Giambra's claim. He noted he had reviewed all of the medical evidence filed in the claim, and specifically outlined the treatment provided by Dr. Norman Lewis. The ALJ noted the records from Jewish Medical Center South, and the testimony of Dr. Stephens, clearly indicate she made no complaints of low back pain, or pain radiating into her lower extremities. He further noted Dr. Ballard's assessment of symptom magnification, and the fact the complaints for which Giambra initially sought treatment were for the thoracic spine and right shoulder, not the low back. He noted Dr. Ballard opined Giambra was at MMI for her thoracic complaints, and the low back complaints were

unrelated to her November 30, 2012 work injury. The ALJ then stated Giambra had not sustained her burden of proving she had sustained work-related injuries to her low back and legs on November 30, 2012, and dismissed her claim.

Giambra filed a petition for reconsideration arguing the ALJ failed to review her evidence, and provided an insufficient analysis to support his dismissal of her claim. She pointed to the numerous medical opinions supporting her allegation of a work-related low back injury. In an order issued October 15, 2013, the ALJ denied the petition for reconsideration as an attempt to reargue the merits of the case.

Authority has long established the claimant in a workers' compensation case bears the burden of proving each of the essential elements of her cause of action before the ALJ, including whether he or she sustained an "injury" as defined by the Kentucky Workers' Compensation Act. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Giambra was unsuccessful in her burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence 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).

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 sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his or her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

It is undisputed the emergency room records from November 30, 2012 reflect Giambra's complaints were for upper back and right upper extremity pain, not for her low back or lower extremities. Despite Giambra's testimony and

arguments to the contrary, indicating these notes and Dr. Stephens' testimony were incorrect, they constitute substantial evidence upon which the ALJ could rely. Likewise, it was not error for the ALJ to rely in part upon Dr. Ballard's report. Dr. Ballard stated she had reviewed the records of the numerous providers, and concluded Giambra's low back complaints were unrelated to her work injury. The ALJ stated he had reviewed all of the medical records, and outlined the basis for his decision. He further outlined why he chose to rely upon the information from Jewish Medical Center South, Dr. Stephens, and Dr. Ballard in arriving at his decision. While Giambra points to the opinions from numerous medical providers favorable to her, this merely establishes evidence existed upon which the ALJ could have relied, but chose not to. Based upon a review of the evidence, a contrary result is not compelled.

Accordingly, the September 11, 2013 opinion and order, and the October 15, 2013 order denying Giambra's petition for reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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