Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 8, 2014

CLAIM NO. 201169615

FLUOR FACILITY & PLANT SERVICES PETITIONER

VS. **APPEAL FROM HON. CHRISTOPHER DAVIS, ADMINISTRATIVE LAW JUDGE**

TERRY WILSON
and HON. CHRISTOPHER DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Fluor Facility and Plant Services ("Fluor") appeals from the January 7, 2014 Opinion, Award and Order and the February 18, 2014 Order rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ") awarding Terry Wilson ("Wilson") temporary total disability ("TTD")benefits, permanent partial disability benefits and

medical benefits for a low back injury. On appeal, Fluor argues the ALJ erred in relying on Dr. Phillip Singer's impairment rating and in awarding TTD benefits from January 29, 2012 through May 11, 2012. We disagree and affirm.

Wilson testified he began performing maintenance work for Fluor in 2008. He was injured on November 1, 2011 when he either slipped or his ladder moved, causing him to fall approximately fourteen feet to a concrete floor. When he regained consciousness, Wilson experienced pain in his head, mid back and lower back.

He was transported to his home by a supervisor and later began vomiting and sought treatment at Logan Memorial Hospital where a CT scan and x-rays were taken. He had headaches, dizziness, back pain and pain into his left leg down to his toes. He was diagnosed with an L-1 compression fracture, and was referred to Dr. Lynn D. Olson.

Dr. Olson treated Wilson conservatively with medication and physical therapy. He visited Dr. Olson four times between November 3, 2011 and December 28, 2011. In the office notes of each visit, Dr. Olson recorded Wilson's complaints of discomfort in his left leg and back pain. He eventually released Wilson without restrictions on January 29, 2012.

However, he never returned to employment with Fluor. Wilson continued to have worsening low back pain, numbness and pain down his left leg. For several weeks, Wilson attempted to contact the adjuster regarding the need to see Dr. Olson again. He was finally able to get an appointment in May 2012. Dr. Olson obtained an MRI, which revealed a large disc herniation at L5-S1. He recommended surgery, and referred Wilson to Dr. Singer.

Dr. Singer testified by deposition on May 14, 2013. He initially saw Wilson on referral from Dr. Olson on June 12, 2012. Dr. Olson had already taken Wilson off work. Dr. Singer opined that, assuming no prior or intervening injury, Wilson's L5-S1 herniated disc was caused by the November 1, 2011 injury.

Dr. Singer offered an opinion as to why Dr. Olson had not previously diagnosed the herniation. He was familiar with Dr. Olson for twenty three years. Dr. Singer noted Dr. Olson has a very high pain threshold and discounts complaints of pain. Dr. Singer emphasized that Dr. Olson's records consistently refer to complaints of left leg discomfort or pain.

Dr. Singer performed a left-sided L5-S1 hemi-laminectomy and discectomy on September 19, 2012. As of May 14, 2013, he had not released Wilson to return to work.

Dr. Singer placed Wilson at maximum medical improvement ("MMI") as of March 5, 2013. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assigned a 33% impairment consisting of a 10% impairment for the compression fracture and a 25% impairment for the herniated disc.

Dr. Singer explained he placed Wilson in DRE Category V for a disc herniation with radiculopathy, unresolved after surgical intervention. He indicated Wilson met the criteria for Category V because he met the requirements of Categories III and IV *i.e.* he has both radiculopathy and alteration of motion segment integrity. He stated significant lower extremity impairment is present as indicated by atrophy or loss of reflexes, pain or sensory changes. He also explained loss of motion segment integrity may consist of loss of disc height. Dr. Singer acknowledged it can be argued the AMA Guides provide the loss of segment integrity must be due to fusion. He further acknowledged one can argue Wilson would be more properly placed in DRE category III. However, after questioning on his placement of Wilson in DRE Category V, Dr. Singer remained firm in his assessment.

Dr. Calvin Dyer testified by deposition on September 24, 2013. He evaluated Wilson on July 31, 2012 and June 4, 2013. Dr. Dyer stated Wilson had a 30% L1 compression fracture resulting in a 10% impairment rating pursuant to the AMA Guides. He assigned a 10% impairment rating for the herniated disc at L5-S1. However, he did not believe the herniated disc is related to the November 1, 2011 work injury. He stated that, had the disc herniation been present at the time of the work injury or at the time of Wilson's release from physical therapy, it would have been apparent and symptomatic at the time of the injury and in January 2012. A traumatic disc herniation is a clear and distinct injury which would not be missed by neurosurgeons or orthopedic surgeons. Dr. Dyer indicated the records show Wilson had new symptoms in May, 2012 which were not present in November, 2011 or January, 2012. Dr. Dyer testified that, in his view, a disc herniation falls within DRE category III. Placement in a higher category requires arthrodesis or loss of motion segment integrity, whether developmental or surgically involved. Nonetheless, Dr. Dyer acknowledged the rating process is complex and vague, and there is room for interpretation.

At the time of the hearing, Wilson was employed part time at a friend's car lot answering the phone and

running errands. Wilson did not believe he could return to his employment at Fluor due to poor balance, inability to climb ladders or use heavy tools. Wilson indicated he cannot sit or stand for long periods due to back pain.

In the Opinion, Award and Order, the ALJ noted the work-relatedness of the compression fracture and resulting impairment rating were not disputed, and the primary contested issue involved the herniated L5-S1 disc. The ALJ discussed the conflicting views of Dr. Dyer and Dr. Singer, and found the opinion of Dr. Singer more persuasive. The ALJ awarded permanent partial disability benefits based upon the 33% impairment rating assigned by Dr. Singer and awarded TTD benefits from November 1, 2011 through March 5, 2012, the date Dr. Singer placed Wilson at MMI.

Fluor filed a petition for reconsideration arguing the ALJ erred in adopting Dr. Singer's 25% impairment rating assessed for Wilson's disc herniation, asserting the rating was not rendered in accordance with the AMA Guides. In the order on reconsideration, the ALJ reiterated that he found Wilson sustained both a compression fracture and herniated disc as a result of the work injury. The ALJ noted Dr. Singer assigned his

impairment rating pursuant to the AMA Guides. Accordingly, the petition for reconsideration was overruled.

On appeal, Fluor again argues the ALJ erred in relying on the impairment rating assessed by Dr. Singer for the herniated disc. Fluor insists placement in DRE Category V requires that the alteration or lost integrity must result from either a "developmental fusion" or a "successful or unsuccessful attempt at surgical arthrodesis." It contends Dr. Singer refused to honor or follow the AMA Guides when confronted with the clear, express definitions and requirements. Fluor argues benefits for the herniated disc must be limited to a 10% impairment rating which, when combined with the rating for the compression fracture, produces a 19% impairment rating.

At the heart of Fluor's argument is the disagreement between Dr. Singer and Dr. Dyer as to how the AMA Guides are to be interpreted. The key portion of Table 15-3 at issue concerning DRE Category IV provides:

> Loss of motion segment integrity defined from flexion and extension radiographs as at least 4.5 mm of translation of one vertebra on another or angular motion greater than 15° at L1-2, L2-3, and L3-4 greater than 20° at L4-5, and greater than 25° at L5-S1 (Figure 15-3); may have complete or near complete loss of motion of a motion segment due to developmental

> fusion, or successful or unsuccessful attempt at surgical arthrodesis.

Dr. Dyer interprets the portion beginning with "may have" as requiring a fusion for placement in DRE Category IV or V. Dr. Singer does not, although he concedes one can argue the point. Rather, he subscribes to an equally reasonable reading of the provision: that one qualifies based upon the specified measurements, and the portion following the semi-colon is an alternative means of qualifying based upon a developmental fusion or arthrodesis. Using this interpretation, Dr. Singer placed Wilson in this category. Simply put, the ALJ was faced with conflicting interpretations of the AMA Guides and was free to choose either interpretation.

Essentially, Fluor's argument regarding Dr. Singer's rating goes to the weight to be accorded the evidence. Certainly, Dr. Dyer's opinion could have provided a basis for the ALJ to reject Dr. Singer's assessment. However, the ALJ was not required to do so. Dr. Singer stated his impairment rating was assessed pursuant to the AMA Guides and he explained his methodology. In further support of the ALJ's ruling, Dr. Dyer acknowledged the rating process is complex, vague and subject to interpretation. A physician's disagreement with

an assessment is an argument going to the weight of the evidence, not the substantiality. For this reason, this case is factually distinct from Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006).

The assessment of an impairment rating is a medical question. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). Where there are conflicting opinions from medical experts as to the appropriate percentage, it is the ALJ's function as fact-finder to weigh the evidence and select the rating upon which permanent disability benefits, if any, will be awarded. Knott County Nursing Home v. Wallen, 74 S.W.3d 706, 710 (Ky. 2002). Here, the ALJ was faced with conflicting medical opinion as to the proper impairment rating and the application of the AMA Guides. The ALJ was well within his role as fact-finder in choosing to rely upon Dr. Singer's opinion as to Wilson's permanent impairment rating. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993).

Fluor also argues the ALJ erred in awarding TTD benefits from January 29, 2012 through May 11, 2012. It notes Wilson's initial treating physician, Dr. Olson, released Wilson to work without restrictions or limitations on January 29, 2012 and no physician modified that full

release until May 11, 2012 when Wilson returned to Dr. Olson. Although the condition resurfaced in May 2012, Fluor contends there is no basis for the award of TTD benefits during the interim period. “Temporary total disability” is defined as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Generally, the duration of an award of TTD benefits may be ordered only through the earlier of those two dates. A "return to employment" means the claimant is capable of returning to "customary" work or work that he or she was "performing at the time of [the] injury." Central Kentucky Steel v. Wise 19 S.W.3d 657 (Ky. 2000).

Dr. Olson treated Wilson for the compression fracture, but did not initially provide treatment for the herniated disc. Dr. Olson had only reviewed x-rays and a CAT scan during the initial period of treatment. As noted by Dr. Singer, a CAT scan will not show a herniated disc. Although Dr. Olson noted left leg discomfort, he was apparently not aware of the disc herniation until after the MRI was obtained in May 2012. While Wilson had improvement of the compression fracture following his initial treatment, Dr. Singer had not placed him at MMI regarding

the disc injury and Wilson did not have improvement of that condition during the period of contested TTD benefits. To the contrary, Wilson testified he had continual worsening of his condition following the initial release by Dr. Olson and had difficulty getting approval from the carrier for additional treatment. Based upon the totality of the evidence, the ALJ could reasonably conclude Wilson had not reached a level of improvement for the disc injury permiting a return to his customary work during the period from January 12, 2012 through May 11, 2012.

Accordingly, the January 7, 2014 Opinion and Order and the February 18, 2014 Order rendered by Hon. Chris Davis are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON F ALLON BAILEY
3151 BEAUMONT CENTER CL #200
LEXINGTON, KY 40513

COUNSEL FOR RESPONDENT:

HON CHRISTOPHER G SAFREED
POB 549
OWENSBORO, KY 42302

ADMINISTRATIVE LAW JUDGE:

HON CHRISTOPHER DAVIS
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601