OPINION ENTERED: JUNE 6, 2012

CLAIM NO. 201091621

IRVING MATERIALS INCORPORATED PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

LARRY SMITH
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

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

SMITH, Member. Irving Materials Incorporated ("IMI") appeals from the November 22, 2011 Opinion, Award and Order rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), awarding Larry Bruce Smith ("Smith") permanent partial disability (“PPD”) benefits based upon an 8% impairment rating arising out of an injury which occurred on April 1, 2010. IMI also appeals from the ALJ's order on reconsideration rendered January 18, 2012. IMI

argues the ALJ failed to consider uncontradicted, compelling medical evidence demonstrating a pre-existing lumbar condition which was actively symptomatic less than 30 days prior to Smith's alleged work injury.

Smith filed a Form 101 on November 5, 2010, asserting that on April 1, 2010, he injured his low back while kicking a stuck valve in order to open it. Smith, now age 59, is a resident of Nicholasville, Kentucky, where he lives with his wife of over 38 years. He completed a high school education and possesses a Commercial Driver’s License ("CDL"), but has no specialized vocational training. He began working for IMI in January 2006.

On April 1, 2010, Smith was working as a concrete truck driver with duties that required loading the truck, and pushing, pulling and pouring concrete. As he was filling a water tank on his truck, he noted the tank's valve was stuck and in an effort to loosen it, he kicked it with the heel of his right foot and felt something pop in his back.

IMI sent Smith to Dr. Snider for treatment which included medications, x-rays and a referral to physical therapy. Smith was later seen by Dr. Vascello who took Smith off work. Dr. Vascello performed a medical procedure involving the burning of nerves in Smith's back. When that

procedure proved unsuccessful, Dr. Vascello recommended surgical intervention.

Smith submitted the report of Warren Bilkey, M.D., who conducted an independent medical evaluation on April 26, 2011. Smith related to Dr. Bilkey, a history of employment with IMI as a concrete truck driver. He explained that on April 1, 2010, when the water tank valve had become stuck, he attempted to kick it loose with his right heel when suddenly he experienced an onset of low back pain radiating into the right lower limb. Smith told Dr. Bilkey he continued to have low back pain radiating into the right lower extremity principally in the buttock. Smith indicated he experienced aching and sharp pains which are aggravated if he sits more than 20 minutes at a time or stands for more than 10 minutes at a time. His ability to bend and do heavy lifting is also impaired.

Dr. Bilkey noted Smith’s past medical history was positive for a lumbar strain injury occurring approximately eight years ago. Smith had undergone physical therapy but did not have surgery. His back pain resolved requiring no restrictions or permanent impairment. Also, prior to this work injury, Smith had an onset of chronic pain in his lower right extremity. He underwent a series of pain

management injections. However, prior to the April 1, 2010 work injury, he had no complaints and was on no medication.

Dr. Bilkey conducted a physical examination and reviewed records provided him. In his opinion, Smith did not have an active lumbar impairment prior to the April 1, 2010 work injury. Dr. Bilkey also determined that Smith had not reached maximum medical improvement ("MMI"). He stated:

> In my opinion, Mr. Smith is not at MMI. He has an ongoing back pain condition. He has a structural abnormality which may be the source of back pain. Mr. Smith I think is a good candidate for evaluation by an orthopedic spine surgeon. There may be a need for additional diagnostic testing including bone scan, and flexion extension x-rays. There may be need for surgery in this case. These treatment recommendations are for the 4/1/10 work injury. I recognize that Mr. Smith may not have access to any further evaluation or treatment for his condition according to denial by the insurance carrier. If so then from the procedural standpoint he would be at MMI.

Noting Smith had resumed regular duty work, Dr. Bilkey diagnosed Smith with lumbar strain, lumbar degenerative disc disease, and chronic low back pain, all of which were work-related. Although he believed Smith not to be at MMI until further evaluation by an orthopedic surgeon, he assessed an 8% impairment pursuant to the American Medical

Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

IMI submitted the independent medical examination of Bart Goldman, M.D., conducted on June 30, 2010. Dr. Goldman took a history that Smith had felt a pop in his back when he was trying to unstick a water valve on a truck. Smith was seen by a physician's assistant at an occupational medicine clinic and then went to physical therapy two times a week for four weeks "until the therapist decided they were not doing him any good". Smith was later referred to Dr. Vascello who recommended injections.

Dr. Vascello had already been seeing Smith for two years, and he treated him with multiple injections for right lower extremity pain. Smith indicated that in February and March of 2010, under Dr. Vascello's care, he underwent medial branch rhizotomies first on the left and then on the right which completely stopped his pain until this injury. Dr. Goldman noted although Smith rated his pain 4 out of 10, he was "sitting quite comfortably during the interview". He had not undergone surgery, but was taking 12 or more pain medications per day.

Dr. Goldman reviewed medical records and conducted a physical examination. He determined Smith may have had a

mild strain injury to his low back while trying to kick a stuck water valve on April 1, 2010. He then stated:

> This gentleman has obviously had back and right lower extremity pain for some time. MRI after the injury in question is minimally changed as compared to the one performed with three years ago. The only changes appear to be increased degenerative change. There is no acute injury seen on the MRI.

Dr. Goldman diagnosed a resolved lumbar strain related to the work injury. He noted Smith was at or very near his pre-injury baseline since it appeared the medial branch rhizotomies had worn off. He concluded Smith was at MMI with a 0% impairment rating.

IMI also submitted the independent medical examination of John B. Kelly M.D., conducted June 20, 2011. He noted Smith reported a history of injuring his right leg after forcefully attempting to dislodge a stuck valve. He was treated by Dr. Snider's physician's assistant, placed on modified duty and given medication (Flexeril) which did not help. Smith then was referred to physical therapy, but with the same result.

Smith was referred to Dr. Vascello who had seen him in the past for right leg pain attributed to "nerve damage". Dr. Kelly noted that Smith was seeing Dr. Vascello regularly for approximately three years preceding this

injury. He had undergone lumbar medial branch blocks and subsequently underwent an ablation procedure in February and March shortly before the work injury.

Dr. Kelly noted, upon further questioning, Smith indicated he previously had pain only on the right lateral aspect of the lower leg. However, following the April 1, 2010 incident, the pain was different "in that it started in the right mid lumbar region and related to the right buttock, hip and leg to the ankle". Smith indicated he had not had the low back pain in the past, "only occasional pulled muscle or lumbar strain in the remote past but not recently".

Dr. Kelly noted that Smith improved with treatment and that he had undergone additional injections providing a 25% improvement overall. At the time Dr. Kelly performed this evaluation, Smith had returned to full duty performing his usual job, but with some pain.

Dr. Kelly performed a physical examination and reviewed medical records from Dr. Goldman, Dr. David Blake, Dr. Vascello, Dr. Bilkey, and Dr. Snider. Dr. Blake had initially conducted an evaluation on August 9, 2007, when Smith was complaining of shock-like neuritic pain around the fibular head, radiating down the leg. At that time, this had been present for approximately a year and a half.

Dr. Blake diagnosed "peroneal neuritis with no findable pathology". After unsuccessful treatment with Lyrica and Trileptal, Smith was then referred to Dr. Vascello for pain management.

Dr. Kelly diagnosed a lumbar strain injury and aggravation of a pre-existing symptomatic lumbar facet arthropathy as a result of the April 1, 2010 work injury. He determined the work injury was the primary cause of the lumbar strain injury and Smith clearly had pre-existing symptomatic lumbar facet arthropathy for which he had undergone treatment just one month prior to the work injury. In Dr. Kelly's opinion, the primary cause of Smith's complaints of low back pain was an aggravation of facet arthropathy which was a pre-existing degenerative condition. The work injury temporarily aggravated his pre-existing condition, but did not cause it. Smith's complaints of back pain were solely related to his pre-existing lumbar facet arthropathy and his complaints of right leg pain were solely related to his pre-existing peroneal neuropathy. In Dr. Kelly's opinion, Smith's current complaints are not related to the April 1, 2010 work injury. He noted although Smith denies any history of low back pain preceding the April 1, 2010 work injury, the medical records of Dr. Vascello "clearly refute this and

clearly state that Mr. Smith did have chronic lower back pain".

Having concluded that all of Smith's current complaints related to pre-existing conditions, Dr. Kelly determined there was no objective evidence of a residual injury attributable to the April 1, 2010 work injury and, therefore, merited a 0% impairment pursuant to the AMA Guides.

The ALJ reviewed the relevant lay and medical evidence, and issued very lengthy findings of fact and conclusions of law. On the question of causation/work relatedness, he stated:

> [T]he defendant concedes that the plaintiff sustained an injury on April 1, 2010, which it characterizes, based on its view of the medical evidence, as a "temporary lumbar strain." Although the parties did not specifically preserve an issue as to whether Smith had sustained an injury as defined by the Act, in light of the defendant's refusal to stipulate to a work-related injury, and in reliance upon plaintiff's testimony as well as uncontroverted medical evidence including the opinions of the defendant's own medical experts, Drs. Goldman and Kelly, I find and conclude that Smith sustained a work-related injury to his lumbar spine on April 1, 2010.
>
> There being no real dispute as to whether the plaintiff sustained a work-related injury on April 1, 2010, the

central issues in this claim center around whether the injury was temporary or permanent and whether Smith's current symptoms and complaints are causally related to the work injury as opposed to a pre-existing condition. In a sense, these issues are inter-related. Smith testified that while he had had what he described as sciatica symptoms prior to April 1, 2010 for which he received treatment at the hands of Dr. Vascello, the symptoms associated with that condition were limited to an area from the back of his right knee down to his foot and that he was not experiencing any low back pain as of April 1, 2010. As a result of the work injury, however, he had a new onset of symptoms which were different than anything he had had in the past and consisted of pain right at the beltline radiating into his right hip but no lower. The defendant, for its part, argues that the records of Dr. Vascello, as reviewed by its evaluating physicians, Goldman and Kelly, establish that Smith had an ongoing active lumbar spine condition which was only temporarily aggravated by the present work injury and that his current symptoms and complaints relate to the pre-existing active and non-work-related condition. Having carefully reviewed all of the evidence submitted by the parties as summarized above and as otherwise included in the record herein, I find the opinion of Dr. Bilkey to be the most authoritative and persuasive with respect to the issue of work-relatedness/causation and permanency. I note initially that while all of the evaluating physicians apparently reviewed Dr. Vascello's treatment records including records of treatment prior to the date of injury, and that each of the evaluating physicians commented on those records

to one extent or another, neither party submitted the records into evidence. While the plaintiff was questioned with respect to prior treatment with Dr. Vascello at the time of the Formal Hearing, reference to Dr. Vascello's records and notations at the Hearing were made for the purposes of impeaching Smith's credibility. It is further clear from reading the reports of Drs. Bilkey and Kelly that those physicians reviewed and considered the treatment notes from Dr. Vascello in arriving at their opinions with respect to the issue of causation. Both physicians specifically referenced the first treatment note attributed to Dr. Vascello after the subject work injury as reflecting that the plaintiff was complaining of new symptoms in a new location and clearly different symptoms than he had been treated for previously. That is entirely consistent with Smith's own testimony regarding the immediate onset of new symptoms on April 1, 2010, symptoms located specifically at his beltline and radiating into his right hip. While the records from Dr. Vascello have not been admitted into evidence, it is not clear to the undersigned from the summary of those records described by any of the evaluating physicians herein whether Dr. Vascello was treating the plaintiff for a lumbar condition or peroneal neuropathy, or both. Plaintiff testified that Dr. Vascello was treating him with different modalities in an attempt to address "sciatica" which he described as producing symptoms in his right lower extremity below the knee. Further, plaintiff testified that he was not having any symptoms as of April 1, 2010, testimony which is consistent with Dr. Vascello's treatment note described by Dr. Bilkey indicating that

the plaintiff had responded well to previously performed lumbar medical branch rhizotomies and had been essentially pain-free. Likewise, Dr. Bilkey noted that a previous electrodiagnostic study was positive for peroneal neuropathy but inconclusive for an L5 radiculopathy. On the basis of his examination of the plaintiff and his review of prior medical records, Dr. Bilkey opined that prior to April 1, 2010 Smith was suffering from peroneal neuropathy but that as a result of the work injury, he had sustained a lumbar strain with degenerative disc disease and chronic low back pain. He noted that there was nothing in prior medical records that would "otherwise point to an active lumbar impairment." Although a prior diagnostic imaging study demonstrated relatively limited degenerative disc disease of the lumbar spine, it did show a significant structural problem, but Smith, as reflected in Dr. Vascello's treatment notes, did not have back pain. He concluded that the "current pain problem that Mr. Smith has is new."

The defendant argues that the only evidence that Smith has new or different symptoms now than prior to April 1, 2010 is his own testimony and that plaintiff's testimonial credibility has been significantly impeached. With respect to that issue, the defendant questioned Smith at length at the Formal Hearing and, to some extent, at his deposition regarding prior workers' compensation claims and/or injuries, and Smith testified at his deposition that he recalled having a hernia and although he did not remember specifically, "probably had other" workers' compensation claims. His testimony at

the Formal Hearing followed the same line in that when questioned about different work injuries and first reports of injury, he remembered some and did not remember others. Having had the opportunity to observe the plaintiff at the Formal Hearing, I found him to be a credible witness and I decline the defendant's invitation to take the view that the plaintiff was untruthful in preparing his workers' compensation claim forms or in testifying regarding prior work injuries. In any event, it does not appear to the undersigned, even accepting that other work-related injuries have been reported for or by Smith in the past that any of those injuries appear to have resulted in significant or permanent injury and none are relevant or probative in any sense with respect to the present lumbar injury claim. In reliance upon the plaintiff's credible testimony as well as the report and opinions of Dr. Bilkey, I find and conclude, therefore, that Smith's current lumbar and right hip symptoms are directly and causally related to the work injury of April 1, 2010 described by Dr. Bilkey as a lumbar strain.

With regard to whether Smith's lumbar strain (which all of the physicians attribute to the work injury) was only temporary or has become a permanent injury, I again rely upon the plaintiff's testimony as well as the report of Dr. Bilkey and find that the lumbar strain has produced a permanent injury. While I acknowledge that both Drs. Goldman and Kelly felt that Smith had only a temporary lumbar strain/sprain type injury resulting in merely a transient condition, neither offers an explanation satisfactory to the undersigned as to the basis of

their conclusions. Dr. Goldman indicated that although Smith's leg symptoms completely disappeared after medial branch rhizotomies less than a month prior to injury, that those rhizotomies "simply did not last any longer than a month." He did not offer an explanation or basis for that opinion, however, and surmises, in the absence of any reference to specific medical record [sic] establishing prior lumbar symptoms, that the plaintiff must have had prior lumbar symptoms. In the face of the plaintiff's testimony that the work injury resulted in new and different symptoms than he had been treated for previously, as reflected in Dr. Vascello's treatment notes, I find Dr. Goldman's assumption that the rhizotomies simply wore off to be an unconvincing explanation of the plaintiff's current symptoms. Dr. Kelly simply opined that Smith had low back pain prior to the incident, has low back pain presently and that "therefore the primary cause of Mr. Smith's complaints of low back pain was an aggravation of the facet arthropathy which is a pre-existing degenerative condition. The work injury did temporarily aggravate this pre-existing condition, but did not cause it." There is no evidence, however, that the plaintiff was experiencing any low back pain on April 1, 2010, immediately before he lifted his right foot to kick the value on the water tank, and Dr. Kelly offers no explanation as to why the work injury only "temporarily" aggravated the pre-existing condition. Even if plaintiff had lumbar-related pain prior to April 1, 2010, as Drs. Kelly and Goldman surmise, there is no evidence that plaintiff had any lumbar pain <u>immediately</u> prior to April 1, 2010 or that he ever had any right hip pain. Taking Smith's "baseline" condition as

> that which existed immediately prior to April 1, 2010, it is clear that he has not returned to his baseline. In reliance upon Smith's testimony regarding his ongoing symptoms and the report and opinion of Dr. Bilkey, I find and conclude that Smith sustained a permanent injury consisting of a lumbar strain as a result of the incident of April 1, 2010.

The ALJ then addressed the issues of extent and duration and the possible exclusion for pre-existing impairment. He found as follows:

> Smith contends that he is entitled to an award of permanent partial disability benefits based on the 8% AMA rating assigned by Dr. Bilkey. The defendant contends that Smith has not sustained a permanent injury as a result of the April 1, 2010 work event and that, based on the opinions of Drs. Goldman and Kelly (both of whom have assigned a 0% AMA rating), plaintiff is not entitled to an award of permanent disability benefits. As set forth above, I find the opinion of Dr. Bilkey to be more persuasive than the opinions of Drs. Kelly and Goldman, and in reliance thereon, I find and conclude that Smith has sustained an 8% permanent impairment rating as a result of his lumbar injury of April 1, 2010. Accordingly, I find that Smith has a permanent disability rating of 6.8% (8% X .85).
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> Although the defendant preserved a contested issue regarding pre-existing impairment/disability, no evidence has been submitted to support such a finding. In *Finley v. DBM Technologies,* 217 S.W.3d 261 (Ky.App. 2007), the Court of Appeals held that a

pre-existing condition is deemed active and therefore not compensable if it is "symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." The burden of proof on the affirmative defense of pre-existing active condition rests with the defendant/employer. As set forth above, there is no evidence establishing that the plaintiff's low back or right hip were symptomatic immediately prior to April 1, 2010. Likewise, there is no medical evidence establishing that the plaintiff had any degree of permanent impairment referable to the lumbar spine immediately before April 1, 2010. Accordingly, the defendant has failed to establish that any portion of the plaintiff's present impairment is excludable as a pre-existing active impairment.

With respect to the issue of statutory multipliers, KRS 342.730(1)(c)(1) provides that an employee does not retain the physical capacity to return to the type of work performed at the time of the injury, the benefit for permanent partial disability shall be three times the amount otherwise determined under paragraph (b) of KRS 342.730. Smith testified that he was released to return to his regular employment by Dr. Snider, the "company doctor", although Dr. Snider did not want to release him without restrictions. He testified he told Dr. Snider that the defendant would not accept him back for employment if he had restrictions and that Dr. Snider acquiesced but advised him of some informal restrictions. In any event, he returned to work performing his regular job duties as of August 2, 2010, although he indicated

> that other people now voluntarily assist him with lifting the chutes on his cement truck and that his supervisors "help" him by not making him climb stairs. There is no evidence that Smith has missed any time from work since he returned more than a year ago nor does it appear that he currently requires medication over and above over-the-counter analgesics. Moreover, although he imposed specific restrictions in the addendum to his medical report, Dr. Bilkey indicated that the plaintiff is not medically disqualified from returning to his pre-injury work activities as a cement truck driver with moderate to heavy physical activities. Further, both Drs. Goldman and Kelly were of the opinion that the plaintiff does not require any restrictions as a result of his work injury. Based upon the opinions and reports of Drs. Bilkey, Goldman and Kelly, I find and conclude that Smith retains the physical capacity to return to the type of work performed at the time of injury and that he has, in fact, worked in that capacity for approximately 16 months since his return to work. Plaintiff is not, therefore, entitled to the application of the three multiplier of KRS 342.730(1)(c)(1).

Both parties filed petitions for reconsideration. Smith argued the ALJ had miscalculated his temporary total disability ("TTD") benefits. IMI took issue with the ALJ's observation that although both parties referred to Dr. Vascello's involvement in Smith's care, neither party introduced the records into evidence. IMI also argued the ALJ should have noted Smith had significant symptoms and

pains similar to the alleged work injuries and, therefore, should have allowed impeachment testimony at the formal hearing. IMI also once again argued Smith's testimony contradicted medical notes from Dr. Vascello and the medical evidence submitted in Dr. Kelly's report. Thus, IMI requested the ALJ reverse his findings on these issues.

The ALJ, on January 18, 2012, issued a detailed "Order on Petitions for Reconsideration" correcting benefit calculations but otherwise overruling all other requests.

On appeal, IMI argues the ALJ failed to consider uncontradicted, compelling medical evidence and, therefore, any award of impairment/disability and future medical treatment should be reversed. IMI argues the ALJ erroneously failed to determine the presence of Smith's pre-existing lumbar condition which was actively symptomatic less than thirty (30) days prior to the alleged injury. IMI also asserts the records show that Smith was treated for pain in his lower extremity long before this incident and he admittedly underwent two spinal cord stimulator trials, a pain pump trial and epidural injections shortly before the work incident of April 1, 2010. IMI argues that Smith's subjective complaints and statements are the only basis for the conclusion he

sustained a permanent impairment from the injury of April 1, 2010.

IMI argues Smith failed to recall filing six previous workers' compensation claims, one for a back injury similar to the present injury. Thus, his poor memory and self-serving testimony cannot serve as substantial evidence to support an award of permanent impairment.

In addition, IMI argues that Dr. Bilkey's opinion is not credible because it is based on Smith's subjective testimony and he was not provided with the 2010 MRIs demonstrating no discernible changes from a prior 2007 scan. Finally, IMI contends the records of Dr. Vascello are enough to impeach Smith's formal hearing testimony. Accordingly, IMI argues that in the face of overwhelming, compelling and uncontradicted medical testimony of a pre-existing condition, the ALJ's opinion should be reversed.

Smith, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Smith was successful in his burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is

defined as evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, the ALJ, as fact-finder, has the sole discretion to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). 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. Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

For the most part, IMI's arguments on appeal are essentially an attempt to have the Board re-weigh the evidence and direct a finding contrary to the ALJ's decision. We may not do so. We believe the ALJ's findings

are supported by substantial evidence and he had a sufficient understanding of the evidence in reaching his determination. We therefore affirm. The ALJ provided a detailed analysis of the issues of pre-existing active condition, permanent versus temporary injury and causation/work-relatedness. It is evident from the ALJ's detailed discussion of the evidence, he carefully weighed the evidence in reaching his conclusion. The ALJ was convinced the work injury produced new complaints that differed from Smith's prior condition. As noted by the ALJ, Smith testified his complaints stemming from this accident were different from those he experienced in the past and affect a different area.

The ALJ noted that Dr. Bilkey reviewed notes from Dr. Vascello, which indicated Smith had "new" back pain. Substantial evidence supports the ALJ's finding of a new injury affecting a different part of Smith's back. Smith's prior treatment was for sciatica, and hence not relevant to his later lumbar strain from the work injury. IMI points to no evidence of a prior ratable condition involving the lumbar area producing symptoms following the work injury.

It is also apparent the ALJ carefully considered the credibility to be given Smith's testimony. The ALJ was well aware of the prior claims and treatment Smith received

and how that history differed from Smith's recollections. The ALJ, as was his prerogative, found Smith credible regarding his complaints following the injury and his condition immediately prior to the work injury.

IMI had the burden of proving the existence of a pre-existing condition. *See* Wolf Creek Collieries v. Crum, supra, and Finley v. DBM Technologies, 217 S.W.3d 361 (Ky. App. 2007). Since IMI was unsuccessful in that burden, on appeal it must show the evidence compelled a finding of a pre-existing active impairment. The correct standard regarding a carve-out for a pre-existing active condition is set forth by the Court of Appeals in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). In Finley, supra, the Court instructed in order for a pre-existing condition to be characterized as active, it must be both *symptomatic* and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury.

Accordingly, the ALJ's Opinion, Award and Order on remand, rendered November 22, 2011, and order on reconsideration, entered January 18, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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