Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 8, 2014

CLAIM NO. 201291895 & 201201337

JERRY SIZEMORE PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

SAVER GROUP, INC.
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

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

STIVERS, Member. Jerry Sizemore ("Sizemore") seeks review of the May 31, 2012, opinion and order of Hon. John B. Coleman, Administrative Law Judge ("ALJ") dismissing his claim for permanent income and medical benefits against Saver Group, Inc. ("Saver Group"). Sizemore also appeals

from the August 7, 2013, order denying his petition for reconsideration.

In claim no. 201291895, Sizemore alleged a March 15, 2012, injury to his back and left leg with psychiatric complications of anxiety and depression. Sizemore alleged he was injured when he "picked up a box, and twisted, feeling a sharp shooting pain in his back and down his left leg, which then became numb."

In claim no. 201201337, Sizemore alleged he sustained repetitive and cumulative trauma to his back and left leg over a period of time manifesting on March 15, 2012.[1]

Sizemore testified at a January 16, 2013, deposition and at the April 3, 2013, hearing. Sizemore began working for Saver Group in the meat department in 1991. In 1999, he was promoted to "meat manager." Sizemore acknowledged he had lower back and leg problems prior to March 15, 2012, for which he had received treatment for approximately a year before the injury. He explained after the work injury his problems in these areas worsened and he developed psychological problems as a result of these problems.

[1] By order dated August 23, 2012, the ALJ ordered the claims consolidated.

Sizemore introduced the Form 107 dated November 5, 2012, completed by Dr. James C. Owen. He also introduced the November 1, 2012, psychological report and Form 107 of Dr. Eric Johnson, a Ph.D. psychologist.

Saver Group introduced the medical records from McDowell Appalachian Regional Hospital ("McDowell ARH") and Eula Hall Health Center, the January 10, 2013, report of Dr. David E. Muffly, the May 30, 2012, report of Dr. David J. Jenkinson, and the February 12, 2013, report of Dr. Robert Granacher.[2]

The May 31, 2012, opinion and order contains the following analysis and conclusions:

> The plaintiff has filed a claim for specific injury of March 15, 2012 as well as the allegation of cumulative trauma injury with a disability onset date of March 15, 2012. The defendant contests threshold issues of causation, work relatedness, injury versus exacerbation and whether the plaintiff sustained an injury as defined by the Act. At the outset, I think it is worthy to note that I felt the plaintiff was credible in his complaints of pain and limitations and also note the medical evidence does indicate the plaintiff has significant physical disability. However, the question arises as to whether any portion of his disability or impairment is related to his work with the defendant. In this case, the medical

[2] Saver Group also deposed two co-workers whose testimony is not relevant to the issue on appeal and thus will not be discussed further.

evidence is clear the plaintiff was suffering substantially from stenosis and arthritic conditions for a period of time preceding the event of March 15, 2012. The mere fact the plaintiff was suffering and treating prior to that date would not necessarily be fatal to the plaintiff's claim if he could prove his condition was related to the cumulative or repetitive nature of his work. When the causal relationship between an injury and a medical condition is not apparent to a lay person, the issue of causation is solely within the province of a medical expert. *Elizabethtown Sportswear v. Stice*, *720 SW2d 732, 733 (Ky.App.1986)*; *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc. ,618 SW2d 184 (Ky. 1981)*. In this particular case, the plaintiff does not find support in his medical records that his work was the cause of his condition. The plaintiff's counsel went the extra mile in an attempt to make out a claim for benefits and engage the services of an independent medical evaluator, most likely at his own expense. However, even the medical evaluator could not relate the plaintiff's condition to his work within the realm of reasonable medical probability. The plaintiff does find a little support for the temporary total disability benefits that he received in the opinions of Drs. Jenkinson and Muffly who noted the plaintiff may have had a temporary flare of the prior active condition as the result of the March 15, 2012 incident. In *Finley v. DBM Technologies*, *217 S.W.3d 261 (Ky. App. 2007)*, the Court dealt with the situation wherein an individual's pre-existing scoliosis made her more likely to suffer injury. The Court noted the Administrative Law Judge must determine whether the pre-existing condition was

permanently or temporarily aroused by the work injury and further noted that to be characterized as an active condition; an underlying pre-existing condition must be symptomatic and have impairment pursuant to the *AMA Guidelines* immediately prior to the occurrence of the work related injury. In order to qualify or [sic] permanent partial disability under *KRS 342.730*, the claimant is required to prove not only the existence of a harmful change as a result of the work related traumatic event, but also required to prove the harmful change resulted in a permanent disability as measured by an AMA impairment. Where no permanent disability or change is caused by the injury, the claimant is entitled to medical expenses that were incurred while treating the temporary flare-up of symptoms or temporary total disability benefits that resulted from the incident. See *Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001).* Therefore, the law and the evidence make it clear the plaintiff's claim for physical injuries is limited to an award of temporary total disability during this period of exacerbation which lasted two months from the work injury.

The plaintiff further argues that he should be entitled to continuing temporary total disability benefits based upon the psychological report and opinion of Dr. Johnson. In *Lexington-Fayette Urban County Government v. West, 52 SW3d 564 (Ky. 2001)*, the Kentucky Supreme Court held that a compensable psychiatric condition must directly result from a work related physically traumatic event, even if the physical injury does not result in substantial permanent disability or impairment. Although the term “physical

injury" is not defined in the Workers' Compensation Act, the Kentucky General Assembly has defined the term in *KRS 500.080(13)* as "substantial physical pain or impairment of physical condition." In *West*, the injured police officer sustained some cuts and abrasions during an assault and was sore for several days thereafter, but was not permanently impaired. However, she developed post-traumatic stress disorder and became increasingly symptomatic following subsequent work events. The Supreme Court held the minor physical injuries from the assault could constitute a sufficient physical injury to trigger the resultant compensable psychiatric condition. However, the problem the plaintiff in this case faces is the fact that his physical injuries have not been related to his work in the first place. Dr. Granacher explained the plaintiff's psychiatric impairment was related to his pain from spinal stenosis. This condition clearly pre-existed the alleged specific injury date and has not been proven to be related to either the specific injury date or cumulative trauma. The employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his workers' compensation claim. *Snawder v. Stice*, *576 S.W.2d 276 (Ky. App., 1979).* In this particular case, the plaintiff has been unable to show convincing medical evidence that his physical or mental health conditions were related to either a specific injury of March 15, 2012 or cumulative trauma injury manifesting itself on March 15, 2012. Therefore, his claim for permanent income and medical benefits must be dismissed.

The order stated the claims for permanent income and medical benefits were dismissed. Sizemore filed a petition for reconsideration arguing the ALJ erroneously found he had a pre-existing active condition and his psychological condition was a result of this condition. He asserted the pre-existing condition was not disabling at the time of the work injury. Sizemore contended the ALJ erred in relying upon Dr. Granacher's report relative to his psychological impairment. Significantly, Sizemore did not request any additional findings of fact. Rather, he demanded the ALJ enter an order sustaining his petition for reconsideration and requested any and all other relief to which he may appear entitled.

In the August 7, 2013, order denying Sizemore's petition for reconsideration, the ALJ stated the claim was dismissed because Sizemore failed to prove the physical injuries were the result of his work, and he could not meet his burden of showing his psychological condition was related to the "work-related physically traumatic event."

On appeal, Sizemore argues the ALJ's decision he failed to show his physical and mental condition were a result of the March 15, 2012, work-related injury or the cumulative trauma manifesting on March 15, 2012, is "unreasonable and against the weight of the substantial

evidence." He contends the uncontradicted evidence establishes that due to the combination of his back and leg injuries and the complications resulting from those conditions, he is permanently totally disabled as defined by KRS 342.0011(11)(c).

With regard to his cumulative trauma injury claim, Sizemore argues his testimony established he "experienced a number of minor traumas to his back and left leg while performing his job duties" of unloading delivery trucks and lifting and carrying boxes weighing fifty to sixty pounds. Sizemore requests the opinion and order be reversed with direction the ALJ find him to be totally and permanently disabled.

Sizemore's brief contains nothing more than a re-argument of the evidence. Sizemore impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence for that of the ALJ. That is not the Board's function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

As the claimant in a workers' compensation proceeding, Sizemore had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Sizemore 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 medical records of Eula Hall Health Center clearly reflect Sizemore was treated for significant low back and hip problems prior to the injury. A July 2, 2011, report concerning an MRI of the left hip performed that same day notes "a focal tear at the insertion site of the gluteus minimus tendon" and "fluid surrounding the distal gluteus minimus tendon consistent with peritendinitis." The impression was:

> 1. Partial tear at the insertion site of the gluteus minimus tendon with peritendinitis.

> 2. Small mass in the intertrochanteric region of the left proximal femur, favor a benign etiology such as an enchondroma.

Similarly, a report concerning an MRI of the lumbar spine performed on July 2, 2011, notes Sizemore had complained of low back and left hip pain for six months and denied an injury. The report reads, in part, as follows:

> L3-L4: Circumferential disc bulge. Moderate facet arthritis. Findings result in mild central canal narrowing. There is also mild to moderate left foraminal narrowing a mild right foraminal narrowing. This touches the existing left L3 nerve but without definite displacement.
>
> L4-L5: Mild circumferential disc bulge and facet arthritis. Findings result in minimal central canal narrowing. Mild to moderate left greater than right foraminal narrowing. This also contacts the exiting left L4 nerve but without displacement.

The impression is multi-level facet arthritis and disc bulges with areas of canal and foraminal narrowing as detailed above.

The August 17, 2011, September 14, 2011, October 12, 2011, November 11, 2011, and December 12, 2011, office notes of Dr. Anant Chandel, with the Eula Hall Health Center, reflect Sizemore had the following symptoms:

> Back movements are painful with flexion, right lateral bending and left lateral bending. On examination of the

> paravertebral muscles, tenderness and trigger point is noted on both the sides. Spinous process tenderness is noted on both sides at L2, L3 and L4.

Among the multiple diagnoses made by Dr. Chandel was "spinal stenosis of lumbar" and "nerve root impingement."

When Dr. Chandel saw Sizemore on February 13, 2012, his diagnosis was again spinal stenosis of lumbar and nerve root impingement and he prescribed Gabapentin and Lorcet Plus.

Dr. Chandel again saw Sizemore on March 9, 2012, six days before the alleged work injury. On that date he noted Sizemore was there for a routine follow-up for back pain which Sizemore rated as nine on a scale of zero to ten. Dr. Chandel wrote a prescription for a refill of Lorcet Plus 7.5. His findings were as previously set out in his other notes and the diagnosis was again spinal stenosis of lumbar and nerve root impingement.

The records of McDowell ARH reveal that on June 9, 2011, Sizemore was seen for lower back pain and x-rays were ordered. Sizemore was seen on June 30, 2011, for lower back pain and left hip pain and an MRI of the left hip was requested. Sizemore was again seen on July 14, 2011, complaining of lower back pain and left hip pain. The handwritten note appears to reflect Sizemore was to be

referred to a specialist. A December 4, 2011, note of the Emergency Department reveals Sizemore had a history of back pain and noted lumbar disc disease. It specifies Sizemore had lower back pain. The primary diagnosis was back pain and lumbar radiculitis. The discharge instructions pertained to “back pain.”

Dr. Jenkinson’s May 16, 2012, report reveals he obtained a history of the injury, past medical history, and reviewed x-rays of the pelvis and left hip dated May 9, 2011, and May 30, 2012. He also reviewed an MRI of the lumbar spine dated April 4, 2012. Dr. Jenkinson also reviewed the reports concerning the MRIs of the lumbar spine and the left hip both performed on July 2, 2011. He also reviewed the medical records from Eula Hall Health Center generated by Dr. Chandel and the record from St. Joseph Hospital, Martin dated March 15, 2012. Based on his review of the medical records and his physical examination, Dr. Jenkinson diagnosed a “history of possible minor sprain or strain of low back with previous history of chronic back pain.” Dr. Jenkinson found no evidence Sizemore had a significant injury as a result of the March 15, 2012, incident. Rather, he believed the medical records reveal Sizemore had longstanding complaints of back pain which pre-existed the incident of March 15, 2012. Giving

Sizemore "the considerable benefit of the doubt," he opined it was possible he had a minor sprain or strain aggravating his pre-existing chronic complaints. Since there was no evidence of any significant departure from Sizemore's pre-existing condition and assuming a minor sprain or strain may have occurred on March 15, 2012, Dr. Jenkinson believed Sizemore had reached maximum medical improvement ("MMI") "long ago." However, for "administrative purposes," he stated Sizemore reached MMI as of the date of the evaluation. Based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Jenkinson concluded Sizemore had no permanent impairment rating as a result of the event occurring on March 15, 2012. He believed Sizemore could return to work without any restrictions and needed no further medical treatment.

Dr. Muffly's report reveals he conducted a physical examination and reviewed the following relevant reports: the June 9, 2011, report of an x-ray of the lumbar spine; the July 2, 2011, report concerning MRI of the lumbar spine; the July 22 [sic], 2011, report of the x-ray of the left hip; and the April 4, 2012, report concerning an MRI of the lumbar spine. He also reviewed numerous records which included records from the Eula Hall Health

Center and McDowell ARH. Dr. Muffly provided the following assessment:

> Temporary flare up low back pain related to the 3-15-2012 work injury. He has chronic pre-existing active low back pain referred into his left leg well documented by medical records despite the denial of the patient. At most the temporary low back flare up would have been 2 months duration at which point Dr. Jenkinson felt that he was at maximum medical improvement.

Pursuant to the AMA Guides, Dr. Muffly assessed an 8% impairment rating none of which he attributed to the March 15, 2012, work injury. He noted a comparison of an MRI performed on April 4, 2012, with the MRI performed on June 2, 2011, revealed no change. Accordingly, he considered the 8% impairment to be pre-existing and active prior to the March 15, 2012, work injury. Dr. Muffly believed Sizemore no longer needed treatment and could return to his previous job without restrictions.

Dr. Granacher's February 12, 2013, report was based on a "psychiatric examination of three components." Dr. Granacher provided the following diagnosis:

> Axis I: Major depression, partially in remission with Prozac, currently mild, related to pain.
>
> Axis II: Borderline intellectual capacity and below average reading skills.

> Axis III: Preexisting spinal stenosis verified in 2011, in the same anatomical area as his current pain complaints.
>
> Axis IV: Not employed.
>
> Axis V: Current GAF = 61-70.

Consequently, Dr. Granacher opined that immediately prior to the accident of March 15, 2012, based on the AMA Guides, Sizemore had no psychiatric impairment. However, he believed Sizemore has a 5% psychiatric impairment for depression due to pain. Dr. Granacher indicated the impairment for depression was not causally connected to the alleged work injury. Rather, the "pain started in 2011 with spinal stenosis at the same anatomical site that [Sizemore] complains was caused by a work injury." Thus, no impairment was caused by the alleged work injury. Further, Sizemore needed no further medical treatment and could return to work with no mental restrictions.

The above medical evidence constitutes substantial evidence which supports the ALJ's decision that Sizemore was not entitled to permanent income and medical benefits. Further, as noted by the ALJ, the report of Dr. Owen does not establish Sizemore sustained a work-related injury meriting an impairment rating. Pursuant to the AMA

Guides, Dr. Owen assessed an 8% impairment. However, with respect to causation, Dr. Owen stated as follows:

> Within reasonable medical probability, I cannot say the origin of this problem. He clearly had a positive MRI a full year prior to the episode and he had an MRI of the hip. Those are not documented on chart. There is no documentation from Dr. Tibbs or from Dr. Myers. Therefore, I cannot reasonably say that this was definitely onset at 3-15-2012. …

Dr. Owen was unable to relate the impairment rating to the March 15, 2012, injury or the cumulative trauma which manifested on that same date. Thus, the ALJ correctly determined Sizemore did not meet his burden of proving he sustained a physical injury which merited an impairment rating and the award of permanent income benefits.

Further, in his November 11, 2012, report, Dr. Johnson provided the following diagnosis:

> Axis I: Major Depressive Disorder, Single Episode, Mild to Moderate.
>
> Axis II: No Diagnosis.
>
> Axis III: Medical conditions as noted.
>
> Axis IV: Stresses; Medical conditions/pain, financial difficulties.
>
> Axis V: Current GAF: 57.

However, with respect to the existence of an impairment rating, Dr. Johnson stated as follows:

> Permanent impairment cannot be estimated at this time because he has not reached MMI. The following estimate of current impairment is based on depression due to chronic pain and changes in life changes brought on by the work-related injury.

Dr. Johnson assessed a 30% "temporary total impairment." He indicated the impairment should decrease significantly with treatment. Dr. Johnson's report does not establish Sizemore had an impairment rating justifying an award of permanent income benefits for a psychological injury.

Clearly, the record does not compel a different result. Therefore, the decision of the ALJ dismissing Sizemore's claim for permanent income and medical benefits must be affirmed.

That said, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). The ALJ relied upon the opinions of Drs. Jenkinson and Muffly "who noted [Sizemore] may have had a temporary flare up of a prior active condition" due to the March 15, 2012, incident and later stated the "law and evidence make it clear [Sizemore's] claim for physical injuries is limited to an award of temporary total disability during this period of exacerbation which lasted

for two months from the work injury." Therefore, the ALJ erred in dismissing Sizemore's claims in total.

Accordingly, the ALJ's decision dismissing Sizemore's claim for permanent income and medical benefits is **AFFIRMED**. The ALJ's opinion and order is **VACATED** to the extent it dismissed Sizemore's claim in *total*. This matter is **REMANDED** to the ALJ for entry of an award of temporary total disability benefits and medical benefits commensurate with the ALJ's findings.

ALL CONCUR.

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