Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 22, 2015

CLAIM NO. 201492342

KAY TRUCKING PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

TOM MILLER
and HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Kay Trucking appeals from the May 19, 2015 Opinion, Award and Order and the July 22, 2015 Order on Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The ALJ determined Tom Miller ("Miller") is permanently totally disabled following three work-related accidents. On appeal, Kay Trucking challenges the ALJ's reliance on Miller's medical expert,

and the finding timely notice was given of the first work accident. Additionally, Kay Trucking argues the ALJ erred in finding any permanent injury or impairment resulted from the work incidents. For the following reasons, we affirm.

Miller and his wife opened Kay Trucking in 1995. Miller repaired and operated several trucks owned by the company, and his wife handled the business operations. On November 16, 2013, Miller testified he fell twenty feet from a ladder while working on a truck in his service lot. He experienced pain in his back and both shoulders. Miller told his wife about the accident, but did not visit a doctor until January, 2014 because he believed the injury would resolve.

Miller alleged two other injuries in his Form 101. On January 23, 2014, he strained his back while lifting a hood of a coal truck. He was trapped between the tire and the frame of the truck by the weight of the hood. He injured his back and right shoulder as a result of this incident. His wife witnessed this accident, and called Kay Trucking's workers' compensation insurer. During this call, she also reported the November 16, 2013 incident.

Miller sought treatment a few days later at Pikeville Medical Center. A CT scan of his lumbosacral spine revealed mild diffuse degenerative change. He was

diagnosed with a back injury, back pain and lumbar strain, and was administered epidural shots. Miller was prescribed pain medication and was restricted from working.

On February 19, 2014, Miller testified he was lifting a 100-pound tire when he injured his low back, shoulders, groin, neck and hips. He sought treatment with Dr. Ronnie Parker, his primary care provider, the same day. Dr. Parker prescribed pain medication and recommended physical therapy.

Kay Trucking submitted evidence concerning Miller's medical history before the three work-related incidents. Dr. Parker treated Miller on October 22, 2013 for chronic neck and back pain, for which he was prescribed narcotic pain medication. In April 2000, Miller treated with Dr. Glenn Irwin for scattered pain and discomfort in his lower thoracic spine and lumbosacral area following a coal truck accident. X-rays performed at the time were normal.

Miller was again treated in May 2002 for left shoulder pain related to a work injury. He reported another motor vehicle accident in December 2004, and was treated for neck and back pain. Again, cervical and lumbar x-rays were normal. A year later, in May, 2005, Miller again reported neck and back pain following a car accident.

An MRI revealed disc disease at C4-C5, C5-C6, and C6-C7. In June 2005 he treated with Dr. Ziad Arabi following a fall from a ladder. He was treated for left shoulder pain and a fracture in his left leg.

Two independent medical evaluations ("IME") were conducted. Dr. Anbu Nadar examined Miller on June 17, 2014 and reviewed his medical records. According to Dr. Nadar's report, Miller claimed he had chronic neck and back pain for several years. Dr. Nadar was also provided reports of MRIs performed in 2005 and 2010, which showed minimal right paracentral disc protrusion at T5-6.

Dr. Nadar diagnosed cervical and lumbrosacral strain with non-verifiable radiculopathy, bilateral shoulder strain, and rotator cuff tendonitis. Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, he assessed a 5% impairment for the cervical spine, 8% for the lumbar spine, and 10% for bilateral shoulders. He further indicated Miller had a pre-existing, active impairment prior to the work injuries due to neck and back complaints, and concluded 30% of Miller's overall impairment rating is attributable to these pre-existing conditions. Dr. Nadar opined Miller lacks the physical capacity to return to work.

On September 10, 2014, Dr. Nadar wrote a supplemental report, which outlined his findings on physical examination. In this report, he clarified his impairment rating for Miller's bilateral shoulder injury. He assessed 6% for the right shoulder and 4% for the left shoulder.

Dr. David Jenkinson conducted an IME on January 27, 2015. He performed a physical examination and records review. Dr. Jenkinson believed Miller exhibited self-limiting behavior during the exam, and found no objective evidence of a significant work-related injury. He opined Miller reached maximum medical improvement approximately three weeks after the November, 2013 work accident. Dr. Jenkinson assessed a 0% impairment rating resulting from the three work incidents. He further opined Dr. Nadar's assessment of impairment was based solely on Miller's subjective complaints of pain.

The ALJ concluded all three alleged work-related accidents resulted in harmful changes to Miller's neck, back and shoulders. She also determined Miller suffered a pre-existing active condition immediately before the three work incidents. The ALJ relied upon Dr. Nadar's opinion and assigned a 5% impairment for the neck injury, 4% impairment rating for the left shoulder, 6% impairment

rating for the right shoulder, and 8% impairment for the back injury. The bilateral shoulder injuries resulted from the November 13, 2013 work accident, and the neck and back injuries resulted from the February 19, 2014 work accident. She concluded Miller suffered no permanent injury from the January 23, 2014 work incident. Again relying on Dr. Nadar, she attributed 30% of the whole person impairment to pre-existing, active conditions.

Further, the ALJ determined Miller had provided due and timely notice of the injuries by informing his wife. Finally, she concluded Miller is permanently totally disabled as a result of the February 19, 2014 work injuries. Miller was awarded temporary total disability and permanent total disability benefits, as well as medical benefits.

Kay Trucking petitioned for reconsideration, first challenging the ALJ's reliance on Dr. Nadar's report. It argued Dr. Nadar was not provided office notes from Miller's October 22, 2013 visit to Dr. Parker. At this visit, a few weeks before the alleged work accident, Miller complained of neck and back pain, and was prescribed narcotic pain medication. Kay Trucking also argued the ALJ should have apportioned pre-existing disability from the permanent total disability award, because Miller was

disqualified from truck driving as of October 22, 2013 due to the narcotic pain medication prescription. Finally, Kay Trucking challenged the finding Miller provided due and timely notice, arguing the workers' compensation insurance carrier was not notified of the November, 2013 incident until January, 2014.

The ALJ denied the petition, first addressing Dr. Nadar's report:

> Dr. Potter's October 22, 2013 office note was attached to Plaintiff's final hearing testimony. It notes Plaintiff "has been tolerating his chronic neck and back pain well on present meds." Dr. Jenkinson, the Defendant's expert, also noted this on page 7 of his report. Plaintiff was prescribed narcotics on October 22, 2013, but the ALJ is hard-pressed to find what limitations, if any, Plaintiff retained at the time of that office visit. Plaintiff's job duties were laborious in nature, and this ALJ does not believe Plaintiff could perform his job duties if he was as occupationally disabled as the Defendant claims.
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> Dr. Nadar was aware of Plaintiff's prior neck and back condition, and adequately assessed impairment for such. Considering the October 22, 2013 office note indicates Plaintiff's neck and back symptoms were adequately controlled with medication, this ALJ finds that Dr. Nadar's apportionment for pre-existing impairment for Plaintiff's neck and back constitutes substantial evidence.

Dr. Nadar specifically noted Plaintiff's prior right shoulder treatment. Dr. Nadar reviewed Plaintiff's treatment records from Pikeville Medical Center and Dr. Potter, as noted on Page 3 of his September 10, 2014 report. Importantly, Dr. Potter's October 22, 2013 office note does not mention any shoulder symptoms. The ALJ concludes Plaintiff was not receiving any ongoing treatment for his shoulders immediately prior to the work accidents, and there is no evidence that Plaintiff retained a permanent impairment rating for his shoulders immediately prior to the work accidents. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) and McNutt Construction/First Gen. Services v. Scott, 40 S.W. 3d 854 (Ky. 2001).

Plaintiff reported left shoulder pain at Pikeville Medical Hospital on May 10, 2012 as the result of a work injury. Plaintiff was diagnosed with a left shoulder sprain. On June 26, 2005, Plaintiff reported left shoulder pain following a fall from a ladder. Plaintiff underwent x-rays that showed non-displaced humerus fracture. Plaintiff was instructed to follow up with Dr. Shockey. The ALJ is not persuaded, by the evidence in the record, that Plaintiff continued to experience ongoing shoulder symptoms as a result of this accident. Considering the absence of medical records noting shoulder symptoms immediately prior to the work accidents, no evidence of any shoulder impairment prior to the work accidents, and Plaintiff's testimony that he did not have any shoulder limitations/symptoms immediately prior to the work accidents, this ALJ finds that Dr. Nadar's assessment of impairment [] constitutes substantial evidence.

The ALJ further reaffirmed her finding that timely notice was provided, noting no statute exists requiring notice must be given to the insurer.

Kay Trucking now appeals, first arguing Dr. Nadar's report cannot constitute substantial evidence. It asserts Dr. Nadar was not provided Dr. Parker's medical records, including the October 22, 2013 office visit, which would potentially affect his finding of causation. It also claims Dr. Nadar made no mention of Miller's significant prior shoulder treatment following a fall in 2005. In a related argument, Kay Trucking indicates Dr. Nadar's report is unreliable because he does not designate to which incident each impairment rating is attributed.

The ALJ is granted the sole authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). This discretion includes the authority to determine which evidence is reliable and substantial. "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 this case, the ALJ articulated her reasoning as to why Dr. Nadar's report constitutes substantial evidence. Miller reported his prior neck and back pain to Dr. Nadar, which he characterized as "chronic." Dr. Nadar addresses Miller's pre-existing active impairments due to this medical history. Furthermore, as stated by the ALJ, Dr. Parker's October 22, 2013 office note indicates Miller was tolerating his pain well with medication. Likewise, Miller received treatment for a left shoulder strain over a year before the first work injury. He received no ongoing treatment, and testified he experienced no symptoms before the work injuries.

These circumstances distinguish this case from the type of intentional concealment involved in Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004)(physician's report was not substantial evidence because doctor was unaware of significant prior left knee injury in calculating impairment to left knee following work-related injury). Any deficiency in Dr. Nadar's report due to the medical history provided to him goes to the weight of the evidence, and is a subject which might have been addressed via cross-examination, had he been deposed. However, we are unable to conclude Dr. Nadar's report is wholly unreliable because he was not provided reports to

substantiate a medical history of which he was already aware. For these reasons, we find no abuse of discretion in the ALJ's reliance on Dr. Nadar's report.

Additionally, we find no merit in Kay Trucking's assertion Dr. Nadar's report is invalid because he does not state which date of injury caused each impairment. The ALJ stated she considered the total evidence in this claim, which included Miller's testimony regarding which incidents caused his current conditions. She concluded the first work injury resulted in permanent injuries to Miller's shoulder, and the third work injury resulted in permanent injuries to Miller's neck and back. These conclusions are well-supported by Miller's testimony regarding his symptoms following the first and third work incidents. Therefore, we find no error in the ALJ's reliance upon Dr. Nadar's impairment ratings.

Kay Trucking next argues the ALJ erred in concluding due and timely notice was given. Miller testified he informed his wife of all three work incidents immediately after they occurred. This testimony was unrebutted. Kay Trucking asserts the notice was insufficient because its workers' compensation insurance carrier was not informed of the November, 2013 until January 2014, immediately after the second work injury.

KRS 342.185(1) and KRS 342.200 require timely notice to "the employer". There is no requirement in KRS Chapter 342 regarding timely notice to the insurance carrier. Furthermore, Miller testified he did not immediately believe the November 2013 accident caused substantial harm until his pain did not resolve over time. Finally, Kay Trucking has made no attempt to demonstrate it was misled by any supposed delay in notice. For these reasons, we find no error in the ALJ's conclusion timely notice was provided.

Kay Trucking asserts the ALJ erred in concluding Miller suffered any permanent injury or any permanent impairment. It claims the "better evidence" suggests Miller suffered from several pre-existing, active conditions. This assertion is merely a re-argument of the merits of the case. For the reasons explained above, Dr. Nadar's opinion, along with Miller's testimony, constitutes the requisite substantial evidence to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). While Dr. Jenkinson's opinion might have supported a different conclusion, such does not form a basis for reversal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

In a brief, undeveloped argument, Kay Trucking seems to assert Miller suffered a pre-existing, active disability because he was prescribed narcotic pain medication by Dr. Potter on October 22, 2013. As noted by the ALJ, there is no evidence Miller was given work limitations by Dr. Potter, or that he was unable to perform his job duties following this doctor visit. Kay Trucking submitted no evidence to substantiate the assertion Miller would have been prohibited from driving or servicing trucks due to this prescription. We find no abuse of discretion in the ALJ's conclusion Kay Trucking failed to sustain its burden of establishing a pre-existing, active disability.

For the foregoing reasons, the May 19, 2015 Opinion, Award and Order and the July 22, 2015 Order on Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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