Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 8, 2015

CLAIM NO. 201401093

KENT SNYDER PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

UGN, INC.
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Kent Snyder ("Snyder") appeals from the December 22, 2014 Opinion and Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") and the January 23, 2015 Order on Reconsideration. The ALJ dismissed the claim, finding Snyder did not suffer a harmful change to the human organism as a result of a motor vehicle

accident. Snyder argues the ALJ erred in not addressing the correct standard for pre-existing active disability. We affirm.

Snyder testified by deposition on September 4, 2014 and at the hearing held October 23, 2014. He operated a machine for UGN, Inc. ("UGN") that made carpets for cars. Snyder alleged he sustained a low back injury as a result of a May 2, 2014 motor vehicle accident. He was sitting in his car having lunch in UGN's parking lot when another vehicle backed into a parking spot and struck the front of his vehicle. He called the police and an accident report was completed. Snyder testified he told the officer he did not need an ambulance and he would drive himself to seek medical attention. He has not worked since the accident.

Snyder admitted to a long history of low back pain beginning more than twenty years ago when he jumped off the back of a truck. He was employed by Sears Glass Shop at the time. However, he testified he had not missed work because of his back condition prior to the accident. He was not under restrictions and regularly worked overtime. He indicated his pain increased greatly as a result of the accident. Snyder believed that, had he not had the accident at work, he would have put off having the surgery.

UGN and Snyder filed medical records from Dr. Magdy El-Kalliny, who first saw Snyder on July 2, 2013 for complaints of low back pain radiating to the right knee. Snyder gave a history of back pain for twenty years. He rated his pain as a seven or eight on a scale of one to ten. On September 10, 2013, Dr. El-Kalliny recommended lumbar fusion surgery at L5-S1 due to a large central disc herniation. Snyder indicated he wanted to wait until 2014 to have surgery. However, he returned on November 20, 2013 reporting his pain had worsened and he now had pain radiating into his left leg. He rated his pain as a nine, prompting him to request the surgery be scheduled at the beginning of 2014. On March 19, 2014, Snyder indicated he wanted to have surgery in July when UGN would be shut down for two weeks. He reported low back pain with bilateral radiation and again rated his pain as a nine on a scale of one to ten. He was scheduled to receive an epidural steroid injection on March 26, 2014.

Snyder returned to Dr. El-Kalliny on May 7, 2014 complaining of low back pain radiating to both legs, but worse in the right leg. He reported the pain in his right leg was worse since the accident. Dr. El-Kalliny indicated he would schedule Snyder for surgery.

In response to a letter from the carrier dated August 1, 2014, Dr. El-Kalliny indicated 75% of his current treatment and the need for surgery is attributable to the work accident and 25% is related to prior conditions.

Dr. J. Rick Lyon reviewed Snyder's medical records and conducted a physical examination. He diagnosed spondylosis, degenerative disc disease, status post fusion and decompression of the lumbar spine. Dr. Lyon opined as follows:

> The medical records confirm that Mr. Snyder had a chronic history of low back and leg pain. He was undergoing active treatment for his back and leg pain and had been scheduled prior to the work event for the same surgical procedure that was eventually performed. Although Mr. Snyder insisted his pain was worse after the accident, there is no medical documentation of such other than Dr. El-Kalliny's charting of Mr. Snyder's subjective complaints. Of particular interest is the fact that Mr. Snyder graded his pain as a 9/10 both immediately before and immediately after the event.
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> It is my opinion Mr. Snyder had no injury as a result of the event of 05/02/14. There are no objective findings of any worsening of his condition and he has had no harmful change. Mr. Snyder has recently undergone surgery and will have a permanent impairment rating. However, this rating is unrelated to any work event. He is not at MMI at this time.

Snyder's claim was bifurcated on the issue of whether he suffered a work-related injury as defined by the Workers' Compensation Act. The ALJ issued his Opinion and Order on December 22, 2014. After noting the conflicting opinions of Drs. El-Kalliny and Lyon, the ALJ found Dr. Lyon more convincing. He determined Snyder had no objective findings of radiculopathy other than decreased subjective sensation and he did not suffer a harmful change to the human organism as a result of the motor vehicle accident. Accordingly, the ALJ dismissed the claim.

Snyder filed a petition for reconsideration requesting additional findings and raising the same arguments he makes on appeal. In his January 23, 2015 Order, the ALJ provided additional findings that Snyder's prior history of treatment included ten years of chiropractic treatment and treatment with Dr. El-Kalliny since July 2, 2013 for low back pain extending into the right lower extremity. The ALJ also noted Dr. El-Kalliny had recommended epidural steroid injections and pain medication prior to the alleged work injury, and a prior MRI had revealed severe degenerative disc disease. Additionally, Dr. El-Kalliny had recommended fusion surgery on three occasions prior to the alleged injury. The ALJ found all of these facts support the ultimate conclusion

reached in the opinion. Accordingly, the ALJ declined to disturb the Opinion and Order.

Snyder argues the ALJ erred as a matter of law by failing to address the correct legal standard for assessing pre-existing active disability. Snyder notes he never denied that he was receiving treatment for a significant low back condition prior to the injury. Rather, he argued the work incident caused a worsening of his condition which prohibited him from returning to work, resulting in the surgery by Dr. El-Kalliny. Snyder argues UGN had the burden of proving the existence of a pre-existing condition that was symptomatic and impairment ratable immediately prior to the work incident pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). He asserts UGN failed in its burden because it did not produce evidence of an impairment rating prior to the work incident. Further, he contends the evidence does not show his activities were restricted or affected by the pre-existing condition immediately prior to the incident. Snyder argues that, at the very least, he sustained an arousal of his low back condition evidenced by the fact he was not able to return to work following the work injury, had to undergo a lumbar fusion, and is unable to return to work activities at this time.

Snyder bore the burden of proof and risk of non-persuasion regarding every element of his claim, including the threshold issue of injury as defined by the Act. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008). To sustain that burden, a claimant must put forth substantial evidence in support of each element. Id. When the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Here, because Snyder was unsuccessful in proving he sustained an "injury" under the Act, we must determine if the record compels a different result.

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the

sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Additionally, if “the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe.” Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006).

Snyder’s argument puts the cart before the horse. Before the ALJ determines whether there is a pre-existing active impairment to be excluded, he must first determine whether the claimant has proven the occurrence of an injury as defined by the Workers’ Compensation Act. KRS 342.0011 (1) defines "injury" as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." Dr. Lyon was unequivocal in stating the work incident did not

produce a harmful change. He stated there were no objective findings of any change in Snyder's condition.

Snyder identifies evidence that could support a finding his condition worsened after the work incident. Snyder attempts to have the Board re-weigh the evidence and direct a finding contrary to the ALJ's decision. We may not do so. There was ample evidence in the record establishing Snyder had longstanding complaints of pain and extensive treatment for his back condition prior to the alleged incident. The condition was worsening prior to the alleged work injury. Dr. El-Kalliny's records establish Snyder had a large disc herniation at L5-S1 with collapse of the disc space for which surgery had been proposed prior to the work incident. Snyder had planned to undergo the surgery in July when the plant would be shut down for two weeks. Dr. Lyon opined Snyder did not suffer a harmful change as a result of the accident and his condition was unchanged due to the work event. The ALJ was well within his role as fact-finder in relying upon Dr. Lyon's opinion. Because the record contains substantial evidence the work incident did not produce a harmful change in the human organism evidence by objective medical findings, it cannot be said the evidence compels a finding Snyder sustained an injury as defined by the Act.

Accordingly, the December 22, 2014 Opinion and Order and the January 23, 2015 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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