Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 15, 2016

CLAIM NOS. 201490414, 201389996, & 201370160

LANDMARK MEDIA PUBLISHING, LLC
d/b/a STANDARD PUBLISHING COMPANY
AS INSURED/ADMINISTERED BY PRAETORIAN/QBEAI PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE,**
ADMINISTRATIVE LAW JUDGE

MARK BRANHAM
LANDMARK MEDIA PUBLISHING, LLC d/b/a STANDARD
PUBLISHING COMPANY AS INSURED BY TRAVELERS
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Landmark Media Publishing, LLC d/b/a Standard Publishing Company as insured/administered by Praetorian/QBEAI ("Landmark") appeals from the October 4, 2015 Opinion, Award and Order, and the November 16, 2015 Opinion and Order on Reconsideration rendered by Hon. R.

Roland Case, Administrative Law Judge ("ALJ"). Landmark argues the ALJ abused his discretion and erred in finding Mark Branham ("Branham") sustained a work-related hernia. We affirm.

Branham's claims for four injuries were consolidated. Branham sustained knee injuries on June 16, 2012 and October 26, 2013 which are not an issue in this appeal. He alleged hernia injuries on July 8, 2013 and April 1, 2014.

Branham testified by deposition on March 23, 2015 and June 3, 2015, and at the hearing held August 7, 2015. He has been employed by Landmark since 1988 and has worked as a press operator since 1995. His work duties include loading the machines with rolls of paper weighing between 900 and 2,000 pounds. He uses a hoist to pick up the rolls and place them on the press, but he has to physically manipulate the rolls to position them. He also has to "level out the ink" which requires him to climb on top of the machine or squat under the unit. Every six months, he has to conduct maintenance on the press, including replacing approximately twenty-four large rubber mats that transfer the ink to the paper. He uses a three-foot wrench when performing maintenance on the press.

Branham was changing rubber mats on the press on July 8, 2013 when he felt a tearing sensation in his abdomen as he pulled on a wrench. He felt excruciating pain that he had never before experienced. He later further aggravated his condition by lifting computer monitors at work. Despite the pain, Branham continued to work until his knee injury on October 26, 2013. He underwent a hernia repair in December 2013 while off work for the knee injury.

Branham returned to regular duty work in March 2014 following the knee injury and hernia repair. He experienced no symptoms relating to the hernia surgery. On April 1, 2014, Branham was tightening a bolt in a press machine when he felt a ripping sensation in his abdomen. He underwent a second hernia repair in October 2014.

Landmark relied on evidence concerning Branham's prior medical history which included treatment for abdominal pain. Branham saw Dr. Paul A. Rafson in December 2012 for pain in his sides and into his ribs. Dr. Rafson indicated Branham's stomach was not emptying properly, and prescribed a probiotic, which was effective. Dr. Rafson also identified a small umbilical hernia, possibly related to a laparoscopic procedure in 1999 when he had a kidney

removed. Dr. Rafson confirmed the hernia on a December 2012 CT scan.

Branham again experienced pain in his stomach in April 2013, but stated “it wasn’t something I couldn’t bear.” Dr. Rafson discussed surgery, but Branham elected not to have it. He indicated the pain he experienced in 2012 was different than the later pain related to the work injuries. In 2012, the pain was in the sides of his abdomen. Following the work injuries, the pain was above his bellybutton. Furthermore, he was not experiencing any symptoms in his abdomen between 1999, when he had a kidney removed, and 2012.

Dr. Rafson’s medical records confirm Branham reported abdominal complaints in the right upper quadrant in December 2012. On August 14, 2013, Branham reported he was having more discomfort from his umbilical hernia. He stated heavy lifting at work had been exacerbating his symptoms. Branham underwent hernia repair surgery on December 13, 2013.

Dr. Richard Pokorny treated Branham from September 8, 2014 through October 16, 2014. Branham presented with increased abdominal pain just above the umbilicus over the past several weeks. Branham reported the pain occurred off and on, particularly when he

performed heavy lifting at work. Dr. Pokorny performed a hernia repair on October 7, 2014.

Branham filed medical records of Dr. Elizabeth Doyle documenting treatment from August 15, 2012 through July 31, 2013. Branham presented on September 17, 2012 with a chief complaint of flank pain beginning seven days earlier. Branham had pain in the lumbar spine radiating into the left upper quadrant of the abdomen. The condition was exacerbated by eating or having a bowel movement. Dr. Doyle noted associated symptoms included abdominal pain. Physical examination of the abdomen revealed no tenderness, rebound or guarding. Branham was seen on December 7, 2012 for right lower quadrant abdominal pain. His pain started around the umbilicus two weeks earlier then moved down the right lower quadrant. A CT scan on December 13, 2013 included a small fat-containing umbilical hernia in the findings, but Dr. Christopher M. Massey did not list the hernia in the impressions section of the report.

On July 31, 2013, Branham presented with abdominal pain beginning with a lifting incident at work on July 8, 2013, with several episodes thereafter. Branham reported a tearing sensation at the time of the July 8, 2013 event. Dr. Doyle noted tenderness and a small area of prominence just lateral to the umbilicus on the right.

Branham filed the report of Dr. Warren Bilkey who performed an independent medical evaluation ("IME") on March 2, 2015. Dr. Bilkey diagnosed a July 8, 2013 work injury abdominal strain and umbilical incisional hernia, and an April 1, 2014 work injury abdominal strain and recurrent umbilical incisional hernia. The diagnoses were related to the work injuries. Dr. Bilkey assigned no impairment rating for the first hernia injury and assigned a 2% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, for the April 1, 2014 injury. He opined the laparoscopic surgery caused a weak spot in the abdominal wall making a hernia more likely. He stated the hernia did not exist as a symptomatic concern until July 8, 2013. The second injury on April 1, 2014 caused a recurrent symptomatic hernia. He noted Branham was asymptomatic prior to the injury dates.

In a June 3, 2015 supplemental letter, Dr. Bilkey indicated Branham suffered a work-related injury on July 8, 2013 while pulling on a wrench, an action that aggravated a pre-existing hernia into disabling reality. He reaffirmed his assessment of the impairment rating for the recurrence of the hernia as a result of pulling on a wrench on April 1, 2014.

Landmark filed the April 1, 2015 report of Dr. Ellen Ballard who performed an IME. Dr. Ballard opined the hernias were caused by twisting and heavy work at his job. She stated it is possible the prior surgery may have led to the hernia/abdomen condition, but his work appeared to have aggravated it, causing the need for surgery.

Landmark filed the August 6, 2015 supplemental report of Dr. Ballard. After further review of the records, Dr. Ballard opined Branham was symptomatic from the umbilical hernia on April 13, 2013. The umbilical hernia is likely related to the laparoscopic procedure performed to remove his kidney. His subsequent complaints are related to the non-work-related problems rather than his work.

The ALJ found as follows regarding the first alleged hernia injury:

> . . . Dr. Ellen Ballard initially stated, "In my opinion, the first and second hernias were caused by twisting and heavy work at his job." By a later report dated August 6, 2015 she indicates on further review of the records the plaintiff was symptomatic for his hernia on April 13, 2013 and the hernia repair was recommended prior to the date of his reported work injury of July 8, 2013. Dr. Warren Bilkey opined the hernia condition was related to the July 8, 2013 injury. Of particular note to the Administrative Law Judge is that on July 31, 2013 the

plaintiff's family physician, Dr. Elizabeth Doyle, recorded under abdominal pain on page 126, "patient was at work on July 8, 2013 and was lifting something heavy and has been having abdominal pain ever since."

It is hard for the Administrative Law Judge to understand Dr. Ballard's change of opinion. In her original report she recorded under review of records some twenty (20) items and came to her original conclusion that the hernias were work-related. In her subsequent report at the request apparently of counsel for the defendant she begins by stating, "On further review of the records…". There is no indication that she reviewed additional records and the basis for her change of opinion. In her original report in answer to question 17 she stated "It is possible that a history of prior surgery may have led to this problem but his work appeared to have aggravated it and caused him to need to have his surgery". Further, in answer to question 17a as to what portion of his condition can be contributed [sic] to the incision in 1999 she unequivocally said "none".

Although the prior surgery in 1999 and complaints and findings prior to July 8, 2013 are worrisome to the Administrative Law Judge, the plaintiff's report of the injury to his family physician and the original opinion of Dr. Ellen Ballard and the opinion of Dr. Warren Bilkey persuade the Administrative Law Judge the injury of July 8, 2013 further aroused a pre-existing condition into disability [sic] reality necessitating the surgery and the Administrative Law Judge therefore finds the July 8, 2013 injury to be work-related and will award

> medical expenses but no permanent partial or temporary total.
>
> The Administrative Law Judge will note in passing he has great respect for the opinion of Dr. Ballard as his experience is that she will make findings when they are warranted regardless for whom the examination is conducted. The Administrative Law Judge is simply unable to find any basis for her change of opinion and will therefore go with her initial finding and opinion.

Regarding the last injury on April 1, 2014, the ALJ found as follows:

> The Administrative Law Judge will not repeat his review of Dr. Ballard's two (2) reports. However, the Administrative Law Judge would note that in the second report Dr. Ballard does not clearly state whether her revised opinion applies to the April 1, 2014 injury. The Administrative Law Judge is again persuaded by Dr. Ballard's original [sic] as supported by the opinion of Dr. Warren Bilkey that the injury of April 1, 2014 made a pre-existing condition symptomatic and hence work-related. The plaintiff again underwent surgery as a result of the April 1, 2014 injury. The Administrative Law Judge finds that this injury was work-related and that the plaintiff was temporarily totally disabled from October 7, 2014 through November 3, 2014.

Landmark filed a petition for reconsideration making the same arguments it raises on appeal. By order

dated November 16, 2015, the ALJ overruled the petition for reconsideration as merely a re-argument of the merits.

On appeal, Landmark argues the ALJ abused his discretion in finding the hernia work-related. Landmark contends the evidence establishes Branham had an umbilical hernia that was diagnosed, visible, symptomatic and disabling prior to the alleged work injuries. The hernia was confirmed by CT scan and by physical examination by Dr. Rafson in December 2012. Dr. Rafson recommended surgery on April 13, 2013, prior to the first alleged work injury. Landmark concedes Dr. Ballard initially opined the hernias were caused by work. However, she later corrected the opinion upon further review of the evidence. Landmark contends that when a physician offers an opinion then admits that opinion was wrong by correcting it in a second opinion, it is unreasonable for an ALJ to rely on the first opinion. Landmark views the ALJ's stated reason for relying on the original opinion, *i.e.* that he could not find any basis for the change in opinion, as inadequate for rejecting the second opinion. Landmark notes the basis for the change in her opinion is further review of the records. Landmark contends Dr. Ballard realized her mistake after the second review and corrected her opinion to conform to the facts. The ALJ was arbitrary and unreasonable in

finding Dr. Ballard did not address the relationship between the two hernias because she consistently stated the hernias were "caused by the same problem."

In a related argument, Landmark contends Dr. Bilkey's opinion is not substantive evidence. It asserts his opinion is contradicted by the medical records and the history he recorded. Further, he did not refer to the December 12, 2012 CT scan and it is possible he was not aware of the CT scan. Landmark notes a medical opinion based upon incomplete or inaccurate medical history cannot be considered to be substantial evidence. Cepero v. Fabricated Metals Corporation, 123 S.W.3d 839 (Ky. 2004).

The question on appeal is whether there is substantial evidence to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Here, Branham testified he experienced specific traumas on the two alleged injury dates. A bulge in his abdomen was first observed after the 2013 work injury. Branham testified the type of pain he experienced following the work injuries was different than any pain he experienced prior to the injuries. Although a December 2012 CT scan revealed a small umbilical hernia, a reasonable inference is that this was only an incidental finding and not a cause of the complaints since the reviewing physician did not

list the umbilical hernia in the impressions in his CT report. Although surgery had been discussed prior to the work injuries, Branham had been able to work continuously with his condition. It was not until he experienced the work traumas that he viewed his condition as serious enough to warrant surgery. After recovering from the first hernia repair, Branham returned to work performing his regular duties without difficulty until he experienced additional trauma at work on April 1, 2014 when he again experienced a tearing sensation while pulling on a wrench.

Dr. Bilkey believed the incident of pulling on a wrench on July 8, 2013 aggravated the pre-existing hernia into disabling reality, and the April 1, 2014 incident caused a recurrence of the hernia. Substantial evidence supports a conclusion Branham experienced a harmful change as a result of the work-related traumas. Dr. Bilkey's opinion is substantial evidence that the July 8, 2013 incident made Branham's condition materially worse and necessitated surgical repair. Likewise, Dr. Bilkey's opinion is substantial evidence the incident on April 1, 2014 also caused a harmful change necessitating the additional surgical repair.

We are not convinced Dr. Bilkey's report is unreliable because he does not discuss the December 2012 CT

scan in detail. Dr. Bilkey refers to the CT scan which he states was “unremarkable” which comports with the reviewing physician’s impression. Dr. Bilkey also reviewed Dr. Rafson’s medical records and acknowledged “there was a small umbilical hernia thought to be related to prior laparoscopic procedure for kidney removal in 1999.” Thus, Dr. Bilkey was aware of the umbilical hernia which existed as of December 2012. His opinion is clearly not based on a medical history so incomplete as to render it unreliable.

We find no error in the ALJ’s reliance on the original opinion of Dr. Ballard. Dr. Ballard originally opined the physical nature of Branham’s work caused the hernias. Dr. Ballard never explained with specificity why she reached a contrary opinion regarding causation upon a second review of the same evidence. Dr. Ballard’s original opinion is consistent with Dr. Bilkey’s opinion and Branham’s account of the work-related incidents and the tearing sensations he experienced on those occasions. It is within the ALJ’s discretion as fact-finder to determine the quality of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Because Dr. Ballard did not give a detailed or precise reason for the change in her opinion, we conclude it was within the ALJ’s discretion to afford more weight to Dr. Ballard’s first opinion.

Accordingly, the October 4, 2015 Opinion and Award and the November 16, 2015 Opinion and Order on Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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