

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 6, 2013

CLAIM NO. 201084657

LEROY CONNER

PETITIONER

VS. APPEAL FROM HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

LEGACY CARTING, LLC
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Leroy Conner ("Conner") seeks review of the opinion and order rendered August 6, 2013 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") dismissing his claim against Legacy Carting, LLC ("Legacy") after finding pursuant to KRS 342.165(2) he falsely represented his physical condition or medical history in an

employment application. Conner also seeks review of the August 20, 2013 order dismissing his petition for reconsideration. The sole issue on appeal is whether the ALJ erred in his application of KRS 342.165(2). We therefore will only discuss lay and medical evidence relevant to this issue. Because the ALJ's findings are supported by substantial evidence, we affirm.

Conner filed a Form 101 on August 27, 2010, alleging he injured his "low back, right leg, neck and right shoulder" on April 7, 2010 when he slipped while lifting a garbage can. He disclosed he had previously received a settlement stemming from a December 6, 2005 work-related back injury. A scheduling order was issued on September 1, 2010. Legacy timely filed a special answer on September 16, 2010 asserting Conner's claim is barred pursuant to KRS 342.165(2).

The medical records reflect Conner was treated at the Urgent Care Center and the VA Hospital following the April 7, 2010 work accident. The Urgent Care Center provided conservative treatment through May 2010 and restricted Conner to light duty. A September 24, 2010 lumbar MRI demonstrated the prior left laminectomy at L4-5 and discectomy. It also demonstrated mild broad based right paracentral protrusion at L5-S1 with mass effect on the

thecal sac and bilateral foraminal narrowing. An October 20, 2010 EMG/NCV study showed evidence of right acute on chronic S1 radiculopathy. On February 8, 2012, Dr. Greg Wheeler with the VA Hospital performed a bilateral L5-S1 laminectomy and right discectomy.

Legacy also filed the records from 2005 through 2007 of Drs. A.C. Wright and Alexis Norelle for the treatment of the previous 2005 low back injury. A January 13, 2006 lumbar MRI demonstrated a large herniated disc at L4-L5 to the left with a large free fragment severely indenting the thecal sac and nerve roots displaced to the left; and a small to moderate disc protrusion to the right at L5-S1. Dr. Norelle diagnosed left L5 radiculopathy due to a herniated L4-L5 disc and recommended surgery. The March 3, 2006 operative report reflects Dr. Norelle performed a left L4-L5 discectomy. Conner followed up with Dr. Norelle until August 31, 2006. Conner continued to complain of pain in his left foot and occasionally in his back. Dr. Norelle noted "His [FCE] is in the chart and he does have restrictions, which will be permanent. He has currently reached his MMI. His PPD is 5 percent."

Conner also followed up with Dr. Wright on several occasions. Dr. Wright prescribed Neurontin after noting the surgery did not resolve his pain. The July 21, 2006

function capacity evaluation ("FCE") noted the following lifting limits:

Dynamic lift capacity:		
	OCCASIONAL/	FREQUENT
Knuckle to shoulder:	30 lbs	15 lbs
Floor to knuckle:	20 lbs	15 lbs
Floor to shoulder:	15 lbs	15 lbs

The evaluator noted Conner had pain limitations especially when lifting from the floor and is "intolerable of repetitive forward bending/stooping."

Legacy also submitted the Form 110-I settlement agreement approved on January 24, 2007 by Hon. Sheila Lowther, Chief Administrative Law Judge. The agreement reflects a low back injury in December 2005 sustained while working for the City of Cynthiana as a public works supervisor. The parties agreed to a compromised lump sum settlement of \$15,335.91. The agreement included waivers of future medical benefits, vocational rehabilitation and the right to re-open.

Conner testified by deposition on September 28, 2010 and July 31, 2012. He also testified at the hearing held June 18, 2013. Conner, born on September 19, 1959, is a resident of Cynthiana, Kentucky and is a high school graduate. He has a commercial driver's license. Conner previously worked for the City of Cynthiana for

approximately twenty-two years. During his employment with the city, he injured his low back in December 2005 while lifting a tool box for which he treated with Dr. Norelle. Conner was initially placed on light duty but resigned from his position for reasons unrelated to his injury. Dr. Norelle performed surgery in January 2006. Subsequently, Conner underwent physical therapy and a work hardening regimen.

Conner testified he also underwent an FCE. Conner testified he was given restrictions as a result of the evaluation, but does not remember what they were. He admitted he was provided a document informing him of his restrictions, which including lifting limitations. At the hearing, Conner testified Dr. Norelle restricted him from "no real heavy lifting and not a whole lot of stooping and bending" and to his knowledge he has never been released from restrictions resulting from his 2005 injury and surgery. Conner last treated with Dr. Norelle in August 2006. Conner testified the surgery relieved his symptoms, but he continued to experience tingling in his toes. Conner testified he had no additional medical treatment and was not taking any medications until the April 7, 2010 accident.

Shortly after the settlement for his 2005 injury, Conner worked for Aerotek for six months driving cars off

an assembly line. He then worked on the floor crew with Wal-Mart in 2008 where he waxed and cleaned floors, and operated a buffer. Conner reported he had no problems performing either job and experienced no back pain.

Conner stated he approached Aaron Hopper ("Hopper") in September 2008, who was running a garbage truck on his street, and asked if Legacy, a garbage collection service, needed drivers. Conner insists he told Hopper about his previous 2006 back surgery and even lifted his shirt to show him the resulting scar. Conner was subsequently hired, and stated he understood his job to be as follows:

A: I was supposed to drive a truck and get out of the truck once in a while.

Q: Get out of the truck and do what?

A: Roll the can, empty the can.

Q: Roll and lift cans?

A: Yes.

Conner explained he was hired as a driver, but occasionally helped collect and dump garbage. Conner testified he had to roll the garbage cans to the back of the truck and position them on a lift. Conner explained during his employment with Legacy he mostly drove the truck while a co-worker emptied the garbage. However, he helped with the garbage when it

needed to be collected from both sides of a street. Conner also acknowledged he occasionally worked alone, performing both driving and collecting duties. Conner testified he had to lift up to seventy pounds and was informed of this requirement in the following manner:

Q: Up to 70 pounds. Was this something that was explained to you, then, and you understood that might-

A: Well, it was on the application. It wasn't - - he didn't sit down and explain it to me.

Q: But you read the application?

A: Yes.

Q: So it was your understanding that you would have to lift up to 70 pounds?

A: Yes, so many pounds . . . seventy or more because you don't know what you're going to run into.

Q: So the description was that you could lift up to 70 pounds or more?

A: Yes.

Q: And this was something you understand just by reading the application form?

A: Yes.

The employment application specifically asked if there is any reason Conner may be unable to perform the function of the job for which he had applied, and Conner stated "no." Conner testified he believed this statement to be true at

the time he was hired. Conner understood the nature of the job and in fact worked for Legacy for almost two years without issue before he was injured.

On April 7, 2010, Conner was working alone performing both driving and garbage collecting duties. As he was lifting a garbage can, his foot slipped causing him to do a half-split. The garbage can was filled with grass clippings and weighed approximately fifteen to twenty pounds. Conner stated he experienced immediate pain in his low back, hips, upper back and right shoulder, as well as numbness in both lower extremities. Low back surgery was eventually performed in February 2012, and provided significant relief. Conner testified following the April 2010 accident, he was placed on light duty which Legacy accommodated for approximately three or four months. Thereafter, he was terminated after Legacy advised they could no longer accommodate his restrictions. Conner has not worked since.

Hopper, the owner and manager of Legacy, testified by deposition on October 21, 2010 and June 23, 2011. Hopper confirmed Conner approached him in September 2008 asking about a job. Hopper stated he offered him a job which would require him to drive, exit the truck, pick up the garbage and transfer it to the landfill. He confirmed Conner would

have to lift garbage cans, the majority of which weighed more than thirty pounds. Hopper testified Conner neither told him about a previous back injury or surgery, nor of his previous permanent restrictions. He denied Conner showed him his surgical scar. Hopper stated Conner would have never been hired had he told him of the restrictions stemming from his previous back injury.

Hopper testified Conner worked with a helper until January 2010. When he had a helper, Conner was supposed to drive the truck and collect garbage on one side of the street, while the helper collected garbage on the other side. Beginning in January 2010, Conner worked alone performing both driving and collection duties. Hopper admitted Conner worked approximately fifty hours per week, had no attendance issues, and he never observed him having any back pain or problems prior to the accident.

On April 7, 2010, Hopper was telephonically notified by Conner he had slipped and hurt his back and buttocks. Conner was subsequently placed in the office doing office work to accommodate his light duty restrictions. Hopper notified the worker's compensation insurer of the April 2010 injury. His insurer then initiated an investigation which revealed Conner's previous 2005 back injury, surgery and restrictions. Hopper insists this was

the first time he was aware of Conner's previous back issues. Thereafter, Hopper terminated Conner on July 9, 2010 because he could no longer perform the work due to the restrictions assigned as a result of the 2005 injury.

Todd Hopper ("Todd"), owner and office manager of Legacy and Aaron Hopper's brother, testified by deposition on October 21, 2010. His testimony is largely consistent with Hopper's. Todd confirmed Conner completed an application for employment with Legacy, which was attached as an exhibit and he was hired on October 3, 2008. Conner wrote "no" to the question "is there any reason you might be unable to perform the functions of the job for which you have applied." Todd testified Conner was hired to drive the garbage truck. The position required him to pick up garbage in addition to driving. Todd testified Conner never informed him of his prior back injury, surgery or restrictions. Todd did not discover the previous work injury and restrictions until after Conner filed a claim for the April 2010 incident. Todd testified "under no circumstances could we have hired Leroy Conner had we known of any of those restrictions" due to the position requirements. Conner was subsequently terminated in July 2010 when his restrictions stemming from the 2005 injury came to light.

Gerald Poff ("Poff") testified by deposition on October 21, 2010. He performed a route audit on the truck driven by Conner. Thereafter, he spoke with Conner about the low speed at which the route was completed. Conner did not advise he was under restriction, or had difficulty lifting the garbage cans. Poff testified the permanent restrictions would have precluded Conner from being hired as a garbage man since the position requirements exceeded the limitations. Had he known of the restriction, Conner would have never been hired. Poff admitted, notwithstanding the restrictions, Conner had worked for Legacy on a regular basis for over a year and a half with no apparent physical problems and did not miss work.

Keith Lewis ("Lewis") testified by deposition on May 26, 2011. He worked with Conner as a helper on the truck from November 2008 through July 2009. Lewis testified he typically picked up the garbage while Conner drove the truck since his back was "messed up." He later clarified Conner occasionally helped him collect the garbage. Lewis testified Conner told the owners of Legacy his back was "messed up" at the warehouse soon after November 2008. Lewis was not working for Legacy at the time of the April 7, 2010 accident.

Dr. Burke testified by deposition on November 15, 2011. He performed an independent medical evaluation on August 17, 2011. Dr. Burke acknowledged that as a consequence of Conner's 2005 injury and subsequent surgery, he had continuing residuals and would have qualified for an impairment rating. Dr. Burke stated he would have recommended restrictions as a result of the 2005 injury and subsequent surgery of no excessive lifting, pushing, or pulling.

Dr. Burke testified he was aware Dr. Norelle had assigned permanent restrictions pursuant to the FCE, and stated as follows:

Q: Well, based on good medical practice and your experience as a treating surgeon having seen patients like this over the years having done the same kind of surgery and faced with the same scenario of ongoing symptoms, FCE results, residual numbness, would you have given him the restrictions permanently per the FCE?

A: It's a great question. If a person has stable symptoms, which is what this guy ended up having, his symptoms were there post, before surgery, they never recovered entirely, the nerve was dead, that that part - - some part of the nerve was dead, and that's what you see with tingling. Part of the nerve was actually working So the guy had a physical capacity, it was defined in the FCE at that time. I think that if a person is - - has stable symptomatology, the usual story is, you know, yeah, you

should be real cautious about going out and doing this, you are at a higher risk of doing this, but I can't tell you that you shouldn't do this. This is what your FCE had said. **Personally, I would not want him being out there doing lifting, pushing and pulling because I think is[sic] his risk is much higher of re-injuring that disk.**

(emphasis added).

. . . .

A: He didn't injure that; he injured a different disc. And so that's why it's always uncertain as to what you should do with this versus what people do. **Personally, I think he's at higher risk of injuring his back because of his scarification and so forth in there.**

(emphasis added).

In the August 6, 2013 opinion, the ALJ summarized the lay testimony of Conner, Hopper, Todd, Lewis, and Poff. He also summarized the deposition testimony of Dr. Burke. The ALJ ultimately dismissed Conner's claim pursuant to KRS 342.165(2) stating as follows:

Pursuant to 803 KAR 25:101 Sec. 5, an employer's defense of an injured worker having given false written information in his employment application, is an affirmative defense. Herein, Defendant gave timely notice of its intention to raise the defense afforded it under KRS 342.165 (2). An affirmative defense places the burden of proof on the employer. One with the burden of proof and the risk of non-persuasion must convince the ALJ of every element of the affirmative defense. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

To successfully use this defense, a defendant must prove each of the following elements:

- (a) the employee knowingly and willfully made a false representation as to his physical condition or medical history;
- (b) the employer relied upon the false representation, and this reliance was a substantial factor in hiring Plaintiff; and,
- (c) there is a causal connection between the false representation and the injury for which compensation is claimed.

. . . .

Defendant has clearly proven the three (3) factors set forth in KRS 342.165 (2), and consequently, Defendant may rely upon the affirmative defense provided therein and not be obligated to pay Plaintiff any benefits under the Act.

The persuasive proof is that Plaintiff knowingly and willfully made a false representation as to his physical condition and medical history when applying for work with Defendant. Despite his knowing of his prior low-back injury, his low-back surgery, his permanent lifting restrictions, and that the work he was applying for required lifting far in excess of his lifting restrictions, he declined to indicate such when he was asked in the written application if there was "any reason you might be unable to perform the functions of the job for which you have applied..."

The believable persuasive proof indicates Defendant would not have hired Plaintiff for the garbage-man job if it

was made aware of Plaintiff's prior back problems, surgery, and permanent lifting restrictions.

As indicated by Dr. Burke, as a result of Plaintiff[sic] initial low-back injury, Plaintiff was at greater risk for sustaining another low back injury while he worked for Defendant.

It is anticipated Plaintiff may contend that Plaintiff's second injury is not at the same level of Plaintiff's spine as the first injury and thus it cannot be assumed there is a relationship between the first and second injuries. Plaintiff's work injuries were to two spinal levels, one on top of the other. Herein, that contention does not fly. This is true based upon the medical testimony of Dr. Burke - "he's at higher risk of injuring his back because the scarification and so forth in there" - and, as set forth in Daniels v. B.R. and D. Enterprises, Inc., 2006 WL 734407 (Ky.) No. 2005-SC-0652 - WC (unreported), "it is significant that the false representation and subsequent injury both involved the same portion of the body...In the presence of a reasonable finding that the claimant's failure to disclose the 1998 back injury was a substantial factor in the hiring and the claimant's own testimony regarding the physical demands of the work and the events of June 11, 2002, it was reasonable for the ALJ to conclude that a causal connection existed between the false representation and the 2002 back injury, which occurred while pulling on a miner cable."

The undersigned recognizes the filing and pursuit of a workers' compensation claim is a serious matter for all involved, the undersigned has never dismissed a claim pursuant to KRS 342.165 (2), but herein it would be

inherently unfair to require Defendant to pay Plaintiff workers' compensation benefits in light of how the employment relationship came to be. Plaintiff's claim against Defendant shall be dismissed in its entirety with prejudice.

Conner filed a petition for reconsideration, essentially raising the same argument it now raises on appeal. The ALJ summarily denied the petition by order dated August 20, 2013.

On appeal, Conner argues the ALJ's application of KRS 342.165(2) is erroneous as a matter of law. Conner asserts the central issue to this appeal is whether Conner falsely represented in writing his physical condition when he completed the employment application for Legacy. Conner argues his "no" response to the question "is there any reason you might be unable to perform the functions of the job for which you have applied?" does not constitute a written falsification of his physical condition.

Conner points out the application did not inquire about Conner's previous medical history or treatment, he was not required to take a pre-employment examination and he in fact worked for Legacy from October 2008 up until his April 7, 2010 injury. Conner argues as follows:

All of the law addressing KRS 342.165(2) requires that there be a written

falsification in order for the statute to apply. In the case at hand, Mr. Conner did **not** misrepresent his physical condition in any way in completing the application. The question submitted to Mr. Conner at the time that he completed the employment application is so open-ended as to not even coming close to complying with the requirements of KRS 342.165(2). It is patently unfair to apply the statute relied upon by the [ALJ] to any workers compensation claimant looking at such an application.

Conner, as the claimant in a workers' compensation proceeding, 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). However, Legacy had the burden of establishing the affirmative defenses pursuant to KRS 342.165(2) regarding whether Conner falsely represented in writing his physical condition or medical history. See Teague v. South Central Bell, 585 S.W.2d 425 (Ky. App. 1979). Because the ALJ determined Legacy met its burden of proof establishing the affirmative defense, the question on appeal is whether his determination is supported by substantial evidence. 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, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). 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, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the

evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

KRS 342.165(2) states as follows:

(2) No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his or her physical condition or medical history, if all of the following factors are present:

(a) The employee has knowingly and willfully made a false representation as to his or her physical condition or medical history;

(b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and

(c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

KRS 342.165(2) was enacted as a response to cases in which an injured worker misrepresented his physical condition to the employer in the process of obtaining employment and later received an injury which was causally related to the misrepresentation. Baptist Hospital East v. Possanza, 298 S.W.3d 459, 462 (Ky. 2009). The Kentucky Supreme Court found KRS 342.165(2)(a), (b) and (c) are three distinct

requirements, each of which must be present in order for compensation to be barred pursuant to the statute. Id. at 463. In Possanza, the Court concentrated on the proof required to establish a causal connection between the false representation and the injury for which compensation has been claimed. The Court found proof the injury would not have occurred because the worker would not have been hired had the employer known the truth is not enough. Rather, the Court held KRS 342.165(2)(c) involves a medical question. Id.

On appeal, Conner only challenges the ALJ's finding he falsely represented in writing his physical condition or medical condition when he completed the employment application for Legacy. As noted by the ALJ, Conner sustained a work-related low back injury in 2005, which eventually required surgical correction in 2006. On August 31, 2006, Conner's treating physician, Dr. Norelle, assessed a permanent impairment rating and assigned permanent restrictions pursuant to an FCE. Dr. Norelle's records reflect he was permanently restricted from lifting over fifteen to thirty pounds, and from repetitive forward bending or stooping. The claim was settled for a compromised lump sum payment and approved on January 24, 2007.

Conner testified he had been given restrictions by Dr. Conner as a result of the FCE of "no real heavy lifting and not a whole lot of stooping and bending." He stated he was given a document outlining his restrictions. To his knowledge he had never been released from the restrictions resulting from his 2005 injury and surgery.

Conner testified he returned to work following the January 2007 settlement. He worked short stints at Aerotekk and Wal-Mart and experienced no difficulty prior to pursuing a job with Legacy in September 2008, approximately two years after being assigned permanent restrictions for his prior 2005 injury. Conner testified Legacy hired him as a garbage truck driver. However, he acknowledged he occasionally had to get out of the truck to assist the helper to roll, lift and empty cans weighing up to seventy pounds. Conner was aware of this requirement at the time he applied for the job. Despite this requirement, Conner believed he was physically capable of performing the job. Conner testified he in fact worked for Legacy for almost two years without any difficulty before his April 2010 accident.

In light of the above testimony, the ALJ found Conner knowingly and willfully made a false representation as to his physical condition and medical history when applying for work with Legacy. Despite knowledge of his

prior low-back injury and surgery, his resulting permanent lifting restrictions, and the work he was applying for required lifting far in excess of his restrictions, "he declined to indicate such when he was asked in the written application if there was 'any reason you might be unable to perform the functions of the job for which you have applied'"

We find the medical records stemming from the undisputed 2005 work-related low back injury, and Conner's testimony constitute the requisite substantial evidence supporting the ALJ's factual determination. We acknowledge Conner is able to point to other parts of his testimony and the fact he worked with no issues for several years in support of his assertion he believed he was able to perform the job functions for which he was hired. However, the ability to point to conflicting evidence is not adequate for reversal on appeal. McCloud v. Beth-Elkhorn Corp., supra. The ALJ performed the appropriate analysis pursuant to KRS 342.165(2) and provided sufficient explanation regarding each requirement. Although not appealed by Conner, we also specifically find Dr. Burke's above referenced testimony constitutes substantial evidence supporting the ALJ's finding of a causal connection between the false representation and the low back injury for which Conner's

now seeks compensation. Therefore, we will not disturb the ALJ's decision on appeal.

Accordingly, the opinion and order rendered August 6, 2013 and the August 20, 2013 order denying Conner's petition for reconsideration by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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