Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 4, 2015

CLAIM NO. 201401914

LOUISVILLE & JEFFERSON CO. METRO
SEWER DISTRICT PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF**
ADMINISTRATIVE LAW JUDGE

ELIZABETH PAYNE
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Louisville & Jefferson County Metropolitan Sewer District ("MSD") appeals from the July 17, 2015 Opinion and Order and the August 17, 2015 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ determined Elizabeth Payne ("Payne") sustained a permanent partial

disability as a result of an October 21, 2012 work-related injury. MSD challenges the ALJ's findings concerning the sufficiency of notice, causation of Payne's back condition, and the existence of a pre-existing condition. MSD also contends the ALJ abused his discretion in finding it waived its right to submit the report of Dr. Ellen Ballard. For the reasons set forth below, we affirm.

Payne testified by deposition on March 13, 2015 and at the hearing held June 23, 2015. Her work for MSD included lifting bags of concrete and mortar weighing sixty to eighty pounds, operating a jackhammer, lifting and rolling manhole covers weighing more than one hundred pounds, and frequently bending and squatting. Payne testified she experienced back and leg pain after lifting an eighty pound bag of concrete on October 21, 2012. She verbally reported the incident on that date to her supervisor, Gary Trowel. Payne did not complete a written incident report because of previous experience with a hostile work environment toward work-related injuries.

Payne indicated her work was very physically demanding and she had several visits to the emergency room prior to the 2012 incident. Her symptoms were intermittent prior to October 21, 2012. After the incident, her pain was

significantly worse and constant, and she developed symptoms into her left leg.

Gary Trowel testified by deposition on April 30 and July 7, 2015. Trowel indicated Payne had not reported a work injury to him on October 21, 2012. Had Payne informed him of an injury, he would have called his supervisor and would have shut down the job site until the supervisor arrived. Then, Payne would have to go to the hospital or to Occupational Physician Services.

Normally, Trowel would load any supplies into the van before going to a job site. He stated Payne might have assisted him that day, but he did not specifically recall that she did. Trowel also did not remember Payne having any difficulty with walking or having excruciating pain on October 21, 2012. He indicated he only had one project involving a catch basin on that day, and denied performing any restoration work involving use of topsoil that day.

Payne and MSD filed medical records from Dr. Michael Casnellie and Dr. David Rubin of River City Orthopaedic Surgeons. Payne was evaluated on November 16, 2012 by Michael Gilbert, a physician’s assistant who noted Payne’s complaints of low back pain radiating into her left leg began a month earlier. She had a history of heavy work and prior falls. Payne had been unable to work since

October 21, 2012 when she noticed left leg pain, numbness and tingling. Michael Gilbert reviewed a lumbar MRI and diagnosed spinal stenosis and degenerative disc disease with exacerbation for one month. An epidural steroid injection was administered at L4-5 on December 12, 2012. Dr. Casnellie released Payne to return to work on December 15, 2012, noting the injection relieved her symptoms.

Payne and MSD filed records of Dr. Jeremy Thornewill. Payne was seen on October 22, 2012 for complaints of pain in the left low back, left leg and knee. Payne did not report a work injury. Dr. Thornewill noted Payne had fallen from a truck in August. On October 30, 2012, Dr. Thornewill diagnosed spinal stenosis and degenerative disc disease L4-5 with some nerve impingement on the left, degenerative disc disease and left lumbar radiculopathy.

Payne filed the report of Dr. Warren Bilkey, who performed an independent medical evaluation on April 22, 2015. Dr. Bilkey diagnosed recurrent lumbar strain and aggravation of degenerative disc disease related to an October 3, 2012 work injury. He diagnosed recurrent lumbar strain and aggravation of prior lumbar strain related to an October 21, 2012 work injury. Dr. Bilkey opined Payne did not have any permanent impairment regarding her lumbar spine

prior to the October 21, 2012 injury. Although Payne previously visited the emergency room, she did not require interim treatment and was not limited in her activities prior to October 21, 2012. He assigned a 5% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), and apportioned 40% to the October 21, 2012 injury and 60% to a subsequent work injury on April 9, 2014.

MSD filed medical records from St. Mary & Elizabeth Hospital. Payne presented on October 21, 2012 with complaints of a left groin injury with pain radiating to the left leg. Payne did not indicate she had a work injury. Rather, she reported a prior fall from a truck on July 12, 2012. The note indicated a question of muscle strain with neuropathy. A CT scan revealed no acute findings in the abdomen or pelvis. Payne had severe lumbar central canal stenosis at L3-4 and L4-5 secondary to a combination of congenitally short pedicles, disc bulging and facet hypertrophy.

MSD filed records from Audubon Hospital. An MRI on October 24, 2012 showed degenerative endplate changes at L5-S1 with mild retrolisthesis of L5 on S1 of 4mm due to degenerative facet osteoarthopathy. Payne had a small disc bulge at L3-4 and mild effacement of the thecal sac. There

was a moderate size circumferential disc bulge at L4-5, moderate facet osteoarthropathy and ligamentum flavum hypertrophy. Payne had mild effacement of the lateral recess bilaterally and moderate to severe spinal canal stenosis. There was moderate spinal canal stenosis at L5-S1 due to a circumferential disc bulge, moderate facet arthropathy and mild retrolisthesis.

Evidence of Payne's prior emergency room visits was admitted. Payne was treated for heat exhaustion on July 18, 2012 after falling from a truck. On September 5, 2007, she presented to Jewish Hospital reporting low back pain resulting from an injury a few weeks prior. She denied any pain, numbness or tingling in her legs.

Payne sought treatment at the University of Louisville Hospital on February 26, 2010 after falling at work and sustaining a laceration to her arm. EMS records note Payne was not experiencing neck or back pain. She returned to the emergency room on March 3, 2010 and was diagnosed with neck pain and a cervical strain.

On October 3, 2012, a few weeks before the injury herein alleged, Payne presented to the emergency room and was evaluated for acute left sided lumbar radiculopathy, low back strain and left hip strain. She did not experience radiation into the legs and she had a normal gait. Payne

gave a history of onset of back pain two months earlier when she picked up a jackhammer. She also noted she may have hurt herself when she fell from a dump truck at work. She reported intense pain since the night before the visit.

MSD filed records concerning short term disability and a leave of absence. Dr. Thornewill completed the physician's section of the application, indicating diagnoses of acute low back pain and left leg pain likely related to lumbar spinal stenosis and degenerative disc disease. He indicated this was not an occupational injury. In the employee statement portion of the application, Payne indicated the lumbar stenosis and degenerative disc disease were not the result of her employment.

The ALJ found as follows regarding work-relatedness/causation and notice:

> Based upon the credible and convincing lay testimony of Ms. Payne, as covered above, and the persuasive, compelling and reliable medical evidence from Norton Spine Specialists dated November 16, 2012, as well as the persuasive, compelling and reliable medical evidence from the examining physician, Dr. Bilkey, all of which medical evidence is covered in detail above, I make the determination that on October 21, 2012, while employed by the defendant, the plaintiff Ms. Payne sustained significant work-related injuries to her low back and left lower extremity.

> . . . .
>
> The plaintiff insists that she gave notice of her October 21, 2012 injuries to Gary Trowel the day of the injury and told him that she had pain in her back and left leg. Mr. Trowel denies that Ms. Payne ever gave him any notice of her alleged work-related injuries.
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> Based upon the plaintiff's sworn testimony and the applicable law, including the *Marc Blackburn* case, I make the determination that the plaintiff did give due and timely notice of her work injuries to her employer as soon as practicable after the happening thereof, and that there was no prejudice to the defendant.

The ALJ accepted the 5% impairment rating assessed by Dr. Bilkey, and the apportionment of 40% of that rating to the October 21, 2012 injury, resulting in a 2% impairment rating attributable to the work injury. The ALJ then made the following findings regarding pre-existing active condition:

> The correct standard regarding a carve-out for a pre-existing active condition is set forth by the Court of Appeals in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). In *Finley, supra*, the Court instructed in order to be characterized as active, it must be both *symptomatic* and *impairment ratable* pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. *Finley v. DBM Technologies, supra*.

> Based upon the plaintiff's credible and convincing lay testimony, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Bilkey, as covered above, I make the determination that the [plaintiff] did not not [sic] have any pre-existing active occupational disability prior to her work-related injuries on October 21, 2012. I further make the determination that the defendant has not met the burden of proving the existence of a pre-existing active occupational disability on the part of the plaintiff before her injuries on October 21, 2012.

MSD filed a petition for reconsideration arguing the ALJ's finding regarding notice was not supported by substantial evidence. MSD also noted the opinion and award did not list or acknowledge a report from Dr. Ballard.

In the August 15, 2015 Opinion and Order on Reconsideration, the ALJ indicated he considered all of the evidence identified by the parties in the hearing order. At the hearing, he specifically asked the attorneys to review the order to be sure that all proof was in the record. The ALJ noted the attorneys listed additional evidence on the order, but MSD's attorney did not list Dr. Ballard's report. Therefore, the ALJ concluded MSD waived its right to rely upon Dr. Ballard's report.

On appeal, MSD first argues the ALJ erred in finding Payne gave sufficient notice of the injury. MSD contends Payne's testimony is not substantial evidence in

light of several inconsistencies, her failure to file a written report of the injury, the absence of any report of the work injury in the initial medical treatment records, and the testimony of her supervisor who denied she had reported the injury to him.

Payne had the burden of proving each of the essential elements of her cause of action, including the provision of due and timely notice of her work-related injury. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. 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). As the fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

The record contained conflicting testimony on the issue of whether Payne provided timely notice of her injury.

Although MSD presented significant proof that could have supported a finding in its favor on the issue, the ALJ was well within his authority in finding Payne's testimony persuasive and finding notice was sufficient. This Board is simply without authority to re-weigh the evidence and reach a different result, even when the alternative conclusion is well-supported by the evidence. The presence of evidence that might support a different result is not a sufficient basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Furthermore, the inconsistencies which MSD identifies do not render Payne's testimony inadmissible, but merely goes to the weight afforded to her testimony.

For its second argument, MSD alleges the ALJ erred in finding Payne sustained a work-related injury. MSD notes the medical evidence from St. Mary's Elizabeth Hospital on October 21, 2012 does not establish Payne mentioned her condition was related to or caused by a work-related injury. Rather, the records indicate she had been seen three weeks earlier for the same condition. The only prior injury referenced in the emergency room record is a fall from a truck in July, 2012. Payne also did not mention a work injury when she saw Dr. Thornewill on October 22, 2012. At that time, Payne mentioned falling from a truck in August,

but made no mention of an October 21, 2012 injury. Moreover, Payne had presented at the University of Louisville emergency room a month earlier with the same or similar complaints. Finally, in her application for short term disability benefits, Payne and her physician admitted that her low back and leg pain, lumbar spinal stenosis, and degenerative disc disease were not work-related.

The ALJ's findings regarding causation and work-relatedness are based on Dr. Bilkey's opinion, which constitutes the requisite substantial evidence to support the conclusion. Dr. Bilkey specifically stated that, although Payne had experienced pain and had visited the emergency room prior to the work incident, she did not have any permanent impairment affecting her back prior to October 21, 2012. Dr. Bilkey's opinion constitutes substantial evidence that the work incident produced a worsening of Payne's condition and produced a permanent impairment rating. As such, we are without authority to disturb this conclusion.

In related arguments, MSD asserts it was unable to meet its burden regarding a pre-existing condition because the ALJ abused his discretion in omitting the medical report of Dr. Ballard, who apportioned 5% of Payne's impairment to the prior low back condition. MSD contends this rating,

coupled with the medical evidence demonstrating a symptomatic condition prior to the alleged injury, compels a finding of a pre-existing active condition. MSD further argues the ALJ abused his discretion on reconsideration in determining it waived its right to the submission of Dr. Ballard's report. MSD notes it filed the report on April 15, 2015 in accordance with the regulations, and specifically stated in its statement of proposed stipulations and notice of contested issues that it intended to rely upon Dr. Ballard's report. MSD contends it was the ALJ's error that the report was not listed in the hearing order. Further, MSD contends the medical evidence printed on the hearing order by the parties only referred to evidence to be filed after the telephonic Benefit Review Conference and not to evidence previously filed with the ALJ.

It is well settled that an ALJ has broad discretion to control the taking and presentation of proof in a worker's compensation proceeding. New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004). Thus, as a general proposition, any purported error by the fact-finder must be reviewed under the abuse of discretion standard. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies

arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 191 S.W.2d 214 (Ky. 1945). Bullock v. Goodwill Coal Co., 214 S.W.3d 890 (Ky. 2007).

Here, the ALJ clearly instructed the parties to review the evidence listed in the hearing order and to print on the order additional evidence discussed at the hearing. Dr. Ballard's report was not listed on the order and was not discussed at the hearing. MSD did not ask that Dr. Ballard's opinion be added. MSD did not address the report in its closing argument at the hearing, nor did it discuss the report in its post-hearing brief. We find no abuse of discretion in the ALJ's decision not to consider Dr. Ballard's report on reconsideration.

Because MSD bore the burden of proof on the issue of pre-existing active impairment and was unsuccessful before the ALJ, the question on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). To succeed in proving an active, pre-existing condition, MSD must show the evidence compels a finding the condition was symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-

related injury. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). No physician of record assigned an impairment rating for Payne's condition immediately prior to the October 2012 work injury. We again note Dr. Bilkey specifically stated Payne did not have an impairment rating prior to October 21, 2012. His opinion is substantial evidence supporting the ALJ's determination. Therefore, it cannot be said the record compels a finding Payne had a pre-existing active impairment.

Accordingly, the July 17, 2015 Opinion and Order and the August 17, 2015 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED.**

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS IN RESULT ONLY.

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