

OPINION ENTERED: NOVEMBER 16, 2012

CLAIM NO. 201082713

MICHAEL LAYNE

PETITIONER

VS.

**APPEAL FROM HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE**

INFORMA USA, INC.
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

SMITH, Member. Michael Layne ("Layne") appeals from the Opinion and Order¹ rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), dismissing Layne's claim upon finding he failed to meet his burden of proving he suffered an injury as defined by the Act. On appeal, Layne

¹ The Opinion and Order was dated June 5, 2012. However, the ALJ issued a "Corrective Order" on July 31, 2012 indicating the opinion was issued in July.

argues the ALJ's decision is clearly erroneous and arbitrary and capricious.

Layne testified by deposition on November 2, 2011 and at the hearing held May 7, 2012. Layne was employed as an equipment operator for Informa USA, Inc. ("Informa") which warehouses reference books for schools. Layne testified at the time of the accident he was on a forklift, approximately fifteen feet above the floor, stacking boxes on a pallet. He was wearing a full body harness attached to a six-foot lanyard. He picked up a case, turned, and stepped on the pallet. The boards broke and he fell approximately six feet until the lanyard stopped him. He stated he immediately felt a sharp stab and pull in his back and groin. He was helped down by Penny Wolfe, the plant manager. An incident report was prepared and he sought medical treatment at Concentra where he was prescribed anti-inflammatories and NSAIDs.

Layne sought treatment with Dr. Brent Haskell at St. Elizabeth Business Health. Layne testified he underwent physical therapy which did not improve his condition. He continued working at Informa with restrictions. Layne testified he quit working for Informa because he felt he was being harassed. Layne moved to Middletown, Ohio and began treating with Dr. Randall Fick, a chiropractor. Layne

testified his chiropractic visits enabled him to straighten up and gave him more flexibility. He performs home exercises and stretching but continues to have pain in his lower back and down his legs.

On cross-examination at the hearing, Layne admitted he signed a report of injury that was attached as an exhibit to the hearing transcript. The form noted Layne had scrapes on his left leg and he stated he was okay and did not need medical attention. Layne agreed the report did not refer to back pain, but he did not agree with the statement that he was okay and did not need medical attention. Layne admitted he continued working through September 10, 2010 but with restrictions.

Informa submitted records from Dr. Haskell, who initially saw Layne at St. Elizabeth Business Health, on July 28, 2010. Dr. Haskell diagnosed a lumbar strain and groin contusion. He prescribed medications and allowed Layne to work at restricted duty. A September 3, 2010 MRI revealed multi-level degenerative disc and facet changes, no high-grade central canal or foraminal stenosis, and a small central left paracentral disc protrusion or sub-ligamentous herniation at L4-5 with minimal thecal sac indentation.

Layne submitted the June 10, 2011, Form 107 and reports of Dr. Fick. Dr. Fick opined Layne suffered a work-related

back injury and sustained a 25% functional impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). In the May 8, 2011, May 11, 2011, and January 16, 2012 reports, Dr. Fick disagreed with the findings of Dr. Sheridan and Dr. Rozen. Dr. Fick reiterated his belief that Layne retains a 25% functional impairment rating as a result of the work-related back injury and needs additional chiropractic treatment.

Informa submitted the report of Dr. Richard Sheridan, who evaluated Layne on January 18, 2011. Layne complained of pain in the low back to both knees. Walking made his left leg hurt and he complained of intermittent paresthesia throughout the left leg. Dr. Sheridan diagnosed a resolved acute lumbar strain. He indicated Layne achieved maximum medical improvement ("MMI") and could return to work with no restrictions. Dr. Sheridan stated no further medical treatment was necessary. Dr. Sheridan assigned a 0% functional impairment rating pursuant to the AMA Guides. In an October 3, 2011 supplemental report, Dr. Sheridan opined Layne reached MMI on October 22, 2010.

Dr. Michael Rozen, an orthopedic surgeon, evaluated Layne on November 7, 2011. Layne complained of back pain, pain in his buttocks, and pain radiating down the posterior

aspect of his thigh, but not below the knee. Dr. Rozen opined Layne sustained a lumbar strain as a consequence of the work-related incident. Dr. Rozen indicated Layne sustained a soft tissue injury that, by definition, would resolve within a relatively short time. Dr. Rozen stated Layne had multi-level degenerative arthritis of his lumbosacral spine unrelated to the work incident and which predated the incident. Dr. Rozen felt Layne recovered from his work injury and had a 0% functional impairment pursuant to the AMA Guides related to the work incident. Dr. Rozen assigned a 5% functional impairment rating for a pre-existing active impairment. Dr. Rozen stated Layne could return to his job without restrictions.

In a January 30, 2012 supplemental report, Dr. Rozen indicated he disagreed with Dr. Fick's findings and assessment of impairment. In a second supplemental report dated May 2, 2012, Dr. Rozen stated he disagreed with the findings and assessments of impairment by Dr. Lutz.

Dr. James Lutz, who evaluated Layne on February 27, 2012, noted Layne's current symptoms included constant low back pain with intermittent radiation, numbness and tingling down the left leg to the knee, intermittent numbness and tingling in both buttocks, and pain exacerbated with exertional activities, prolonged sitting, standing, walking,

and weather changes. Dr. Lutz diagnosed a lumbar sprain, herniated L4-5 disc, aggravation of pre-existing lumbar degenerative disc disease, and pre-existing lumbar spondylosis. He stated the conditions were caused by the work injury. Dr. Lutz placed Layne in DRE category III and assigned a 12% functional impairment rating pursuant to the AMA Guides. He indicated Layne had reached MMI but would need additional medical treatment.

After summarizing the evidence and noting the parties' positions, the ALJ made the following findings:

In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds persuasive and relies upon the opinions of Dr. Rozen and Dr. Sheridan and finds that Mr. Layne has not met his burden of proving that he suffered an injury as defined by the Act as a result of the July 22, 2010, work-related incident. In so finding, the Administrative Law Judge believes that Mr. Layne did suffer a minor low back strain as a result of the July 22, 2010, incident that has long since resolved and there are no objective findings to substantiate his subjective complaints of pain as testified to by Dr. Sheridan and Dr. Rozen. In addition, Mr. Layne voluntarily resigned his position with the Defendant Employer where he was earning equal or greater wages as a result of what he believed to be harassment, an argument that is not substantiated. Therefore, the Administrative Law Judge finds that Mr. Layne did not meet his burden of proving that he suffered an injury as defined by

the Act and that current lumbar spine condition is not causally related to the effects of the July 22, 2010, work-related incident.

Layne did not file a petition for reconsideration and appealed directly to the Board.

On appeal, Layne argues the ALJ's decision is clearly erroneous based upon the reliable probative evidence. Layne argues his treating physicians who saw him at the time of the injury offered the most probative evidence. Layne notes he had been a hard worker with a consistent history of employment until the injury after which he was "forced out of the workforce." Layne contends there is no basis for Dr. Rozen's opinion regarding a pre-existing condition. Layne further contends he had no prior lumbar condition nor did he sustain an intervening injury.

It is well-established a claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Layne was unsuccessful in his burden of proof regarding whether the physical injury to his back generated a permanent impairment rating and the need for future medical expenses, the question on appeal is whether, upon consideration of the whole record, the evidence compels a

finding in his favor. 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).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of 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 ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by the ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Layne must show there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, in reviewing an ALJ's decision, is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a

matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). As an appellate tribunal, the Board may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail in his burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Robertson, supra.

Layne's arguments on appeal are essentially an attempt to have the Board re-weigh the evidence and substitute its opinion for that of the ALJ. We may not do so. Layne has identified evidence upon which the ALJ could have relied to find in his favor. However, conflicting evidence alone does not require reversal on appeal. Whittaker v. Rowland, supra. The sole issue on appeal is whether the opinions of Dr. Sheridan and Dr. Rozen constitute substantial evidence supporting the ALJ's dismissal of the claim for permanent income and medical benefits as it applies to the low back injury.

The opinions of Dr. Sheridan and Dr. Rozen constitute substantial evidence supporting the ALJ's decision. The ALJ was well within his role as fact-finder in accepting the opinions of Dr. Sheridan and Dr. Rozen who determined Layne sustained only a soft tissue injury which resolved, with no need for additional medical treatment or restrictions and resulted in no permanent impairment. Dr. Rozen specifically found Layne recovered from the injury

sustained at work. In light of the medical opinions, the injury in question was temporary in nature, the evidence did not compel a finding Layne was entitled to income benefits and/or for future medical benefits to treat his low back injury

The ALJ properly considered all evidence of record, weighed the evidence, and reached a decision supported by substantial evidence and in conformity with the law. Thus, we are without authority to direct a different result.

Accordingly, the July 31, 2012 Opinion, Order and Award rendered by Hon. R. Scott Borders, Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MICHAEL WEBER
1726 YOUNG ST
CINCINNATI, OH 45202

COUNSEL FOR RESPONDENT:

HON SCOTT C WILHOIT
9300 SHELBYVILLE RD STE 700
LOUISVILLE, KY 40222

ADMINISTRATIVE LAW JUDGE:

HON R. SCOTT BORDERS
8120 DREAM STREET
FLORENCE, KY 41042