Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 8, 2014

CLAIM NO. 201288787

MICHAEL ROSA PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

PLY TECH,
DR. BARRETT LESSENBERRY
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Michael Rosa ("Rosa") appeals from the September 23, 2013 Opinion, Award and Order and the October 31, 2013 Order on Petition for Reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), finding he sustained a permanent knee injury and a

temporary low back strain. On appeal, Rosa argues the evidence compels a finding he suffered from a pre-existing dormant condition prior to the April 12, 2012 work-related accident. He also claims the ALJ erred in limiting his medical benefits related to the low back and knee injuries. We affirm.

Rosa testified by deposition on May 14, 2013 and at the hearing held July 24, 2013. He was injured when he tripped over a pallet while walking through the Ply Tech Corporation plant. Rosa fell, twisting his leg and striking his back on the floor. He experienced pain so severe he became nauseated. He was taken by ambulance to TJ Samson Community Hospital.

The hospital's records indicate Rosa presented on the day of the accident with complaints of injuries to his head, lower back and right knee. X-rays of the lumbar spine showed moderate degenerative changes, bilateral L5 pars defects and grade 1 spondylolisthesis. X-rays of the knee revealed mild degenerative joint changes.

Rosa testified he suffers constant pain between his shoulder blades and in the low back radiating down both legs. He is not able to participate in many activities, including working in his yard or around his farm, hunting

or riding a motorcycle. He does not believe he is capable of performing any of his past jobs.

Rosa acknowledged suffering a back injury in the 1980s. After a period of physical therapy and rest, he was released to work with no restrictions. Rosa denied any other back pain or treatment for several years immediately prior to the work injury.

Eventually, Rosa came under the care of Dr. Barret Lessenberry, whose records document treatment from April 17, 2012 through May 2013 for back and right knee pain. After obtaining an MRI and EMG testing, Dr. Lessenberry performed a right knee arthroscopy on May 21, 2012. The scope revealed grade III changes in the medial tibial plateau in the medial femoral condylar region. However, x-rays showed maintenance of the joint space medially and laterally with no destructive change. He also administered Celestone and Supartz injections, which provided temporary relief.

In a November 15, 2012 note, Dr. Lessenberry indicated some of Rosa’s knee pain was due to radicular pain in the right leg. Dr. Lessenberry noted Rosa has arthritic change in the right knee, in part related to the work condition and injury. The spondylolisthesis was not related to his work and was a longstanding problem.

In his May 9, 2013 note, Dr. Lessenberry concluded Rosa's persistent knee pain is due primarily to arthrosis in the right knee. A lumbar MRI showed disc bulging at the L4-5 level with spondylolisthesis at L5-S1 from a bilateral pars defect that is "not acute but chronic".

Upon referral from Dr. Lessenbery, Rosa saw Dr. Vivek Jain for evaluation and treatment of pain. Dr. Jain diagnosed right knee osteoarthritis, lumbar facet arthropathy, lumbar degenerative disc disease, lumbar radiculopathy, right sacroiliitis and myofascial pain. Rosa reported pain was so intense he could not sleep well or work. Dr. Jain noted Rosa is morbidly obese and suspected he has sleep apnea.

Dr. Jarred Madden conducted an independent medical evaluation ("IME") on January 5, 2013. He diagnosed right knee internal derangement secondary to fall; medial and lateral meniscal tears; chronic pain due to trauma; osteoarthritis, right knee; somatic dysfunction of the lower extremity, thoracic, and lumbar regions; low back pain; thoracic pain; and insomnia secondary to chronic pain syndrome. Dr. Madden opined Rosa's complaints are the result of the work injury, identifying the knee injury as the primary source of chronic pain. Rosa also had an acute

exacerbation of stable, chronic lumbar dysfunction as a result of the fall. Dr. Madden found Rosa was at maximum medical improvement ("MMI") by the time of the examination, more than six months after the accident. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assigned a 15% impairment rating due to the work injury based upon mild gait derangement of the knee. Dr. Madden opined Rosa had no active impairment prior to the injury.

Dr. Michael Best conducted an IME on December 12, 2012. In addition to the work injury on April 12, 2012, Rosa provided a prior medical history of a low back strain in the 1970s and a re-injury during the 1980s after which he was off work for five years. He settled a workers' compensation claim for that injury in 1995. Rosa also reported a back injury in a motor vehicle accident in the 1970s after which he was off work for one year. He sustained injuries to his head and knee in a February 2002 motor vehicle accident. Finally, he acknowledged a low back injury on June 1, 2004 while working for Tokio Marine.

Dr. Best diagnosed medial and lateral meniscus tears, grade III chondromalacia of the medial and lateral femoral condyle, status post arthroscopy and chronic low back pain. Dr. Best noted Rosa had a long history of pre-

existing back pain. Regarding his examination, Dr. Best stated as follows:

> The physical examination of Mr. Rose [sic] today is impossible to perform. He provides no effort. He resists all testing. He has submaximal and inconsistent efforts. Indeed, even with functional testing, the patient has marked inconsistency in effort, even when comfortably seated in a chair.
>
> Clearly, an element of the patient's back and knee pain is his ***malignant*** obesity. He is 5'4½" in height and weighs 323 pounds. This results in a body mass index of 55.4. (BMI greater than 30 equals obesity.)

Dr. Best observed obesity has been implicated in the development and progression of low back pain and knee osteoarthritis. He cited several studies indicating obesity leads to an excess load on the joint, increased cartilage turnover, increased collagen type 2 degradation products, and increased risk of degenerative meniscal lesions. According to the cited studies, for every two units of BMI gain, the risk of knee osteoarthritis increases by 36%.

Furthermore, Dr. Best opined Rosa engaged in significant gross magnification of symptoms, and his subjective complaints far outweigh any objective findings. Rather, Dr. Best opined malignant obesity is the primary

causative factor in Rosa's persistent complaints. He had pre-existing degenerative arthritis and chronic low back pain that caused him to be off work for six years. He was not capable of performing unrestricted work activities as a result of the malignant obesity and pre-existing degenerative arthritis only. By the time of the IME, Dr. Best placed Rosa at MMI for the medial and lateral meniscus tears. He stated, within reasonable medical probability, Rosa's current complaints are not a function of the work event or meniscal tears. He assigned a 4% impairment, noting the meniscus tears are the only abnormality directly and causally related to the work event. Dr. Best believed "[a]ny additional impairment rating is secondary to the patient's obesity and pre-existing arthritic degeneration of the knees, and this should be appropriately apportioned."

The ALJ concluded Rosa suffered a permanent impairment to the right knee and a temporary exacerbation of a pre-existing, active lumbar spine condition, and awarded temporary total disability benefits from April 13, 2012 through January 31, 2013. The ALJ relied on the 15% impairment rating assessed by Dr. Madden for the knee injury and awarded permanent partial disability benefits enhanced by a 3.2 multiplier based upon Rosa's lack of

physical capacity and age. Additionally, she awarded medical benefits for the initial treatment of the temporary back strain. The ALJ found as follows concerning medical benefits for the knee:

> Furthermore, injury to the right knee has been surgically repaired and Defendant Employer is liable for that treatment. While it is not completely clear from the record to what the ongoing injections for the right knee are related, the obligation of Defendant Employer relates only to the meniscal repair and not to long standing degenerative changes in the knee.

Rosa filed a petition for reconsideration raising essentially the same arguments asserted on appeal. In her October 31, 2013 order denying the petition for reconsideration, the ALJ reiterated her finding that Rosa sustained a permanent injury to his knee, but there was no persuasive evidence of anything other than degenerative changes in the low back. The ALJ then additionally found as follows:

> For clarification purposes, it has been found Plaintiff suffered permanent injury to the knee. Plaintiff argues the injury aroused pre-existing dormant non-disabling conditions. That position is not adopted herein. The pre-existing conditions were not changed or affected by the meniscal tear, which is the only permanent injury found herein.

On appeal, Rosa asserts the ALJ erred in concluding his back condition was pre-existing and active at the time of the work accident. He notes no medical records predating the injury were submitted to establish the conditions were active. While Rosa acknowledges his pre-existing degenerative conditions, he contends they were asymptomatic. Citing to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), he argues the evidence compelled a finding his back condition had reverted to its pre-injury dormant state prior to the work accident. Finley states:

> [A] pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition. When a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable. A pre-existing condition may be either temporarily or permanently aroused. If the pre-existing condition completely reverts to its pre-injury dormant state, the arousal is considered temporary. If the pre-existing condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent, rather than temporary.

Id. at 265.

As the claimant in a workers' compensation proceeding, Rosa 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). Because he was unsuccessful in proving a permanent injury to his low back, the question on appeal is whether the evidence compels a different result. 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). While Rosa has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. The ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Although Rosa testified his back pain following his earlier injuries had resolved and he had returned to work, his testimony does not compel a finding he sustained a permanent back injury. Rosa had been off work for a total of six years as a result of prior low back injuries. Only Dr. Best was provided with the history of those

injuries and the resulting significant loss of time. He opined the meniscus tears are the only abnormality directly and causally related to the work event. As noted by the ALJ, Dr. Lessenberry indicated the spondylolisthesis was a longstanding problem unrelated to the work injury. No doctor assessed an impairment rating relative to the low back condition. In her order on reconsideration, the ALJ specifically found the pre-existing conditions were not changed or affected by the work injury. The ALJ was only persuaded the work injury caused a temporary back strain. The evidence does not compel a finding of any harmful change to the low back as a result of the work injury.

Similarly, Rosa argues the ALJ erred in limiting future medical expenses related to his knee. Rosa contends any pre-existing degenerative condition was dormant and non-disabling prior to the work injury. He emphasizes Dr. Lessenberry's belief the knee injury contributed to the arthritis in the knee, and that the knee was asymptomatic prior to the work injury.

The ALJ specifically found the degenerative condition of the knee was not changed by the work event. Dr. Best stated the meniscal tear was the only work injury to the knee. He found the current complaints were subjective and not work-related, but the result of

malignant obesity. Dr. Best explicitly stated the entirety of the degenerative arthritic condition of the knee was pre-existing. Substantial evidence supports the ALJ's conclusion that the work-related knee injury included only the meniscal tear. Thus, the ALJ correctly limited the award of future medical benefits to expenses related to the meniscal tear.

Accordingly, the September 23, 2013 Opinion, Award and Order and the October 31, 2013 Order on Petition for Reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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