Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 2, 2015

CLAIM NOS. 201401398 & 201401397

NALLY & HAMILTON ENTERPRISES INC. PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS ADMINISTRATIVE LAW JUDGE**

GARY SMITH
HON. CHRIS DAVIS
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Nally & Hamilton Enterprises, Inc. ("Nally & Hamilton") appeals from the March 20, 2015 Opinion, Award and Order and the April 20, 2015 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). Nally & Hamilton argues the ALJ erred in determining Gary Smith ("Smith") sustained

a permanent partial disability as a result of work-related cumulative trauma injuries to his neck and low back. We affirm.

Smith filed a Form 101 alleging injuries to his neck and back as a result of cumulative trauma. Smith testified by deposition on September 5, 2014 and at the hearing held January 22, 2015. He has worked in the mining industry for more than thirty-four years. He began working for Nally & Hamilton in 2007 as a repairman. His work involved carrying and lifting heavy objects, moving sections of beltlines, and climbing stairs.

Smith stated he injured his back in 1993 while pulling his children on a sled. He was able to work following the incident. He sustained another injury at Nally & Hamilton in 2011. On this occasion, he was standing on a belt line making repairs when someone started the belt. Smith was thrown into a chute and struck his head. He had pain in his neck and down his back, and was off work for four to six months. Upon his return, he continued to have pain but was able to work until he was laid off on February 2, 2014.

Smith does not believe he can return to work due to back pain. He has not worked anywhere since leaving Nally & Hamilton. He received unemployment benefits

following the layoff until he was awarded Social Security disability benefits.

Chad Morgan, D.C., examined Smith on May 29, 2014. Smith complained of pain in his neck, upper back, and low back. He also reported a motor vehicle accident five years prior wherein he injured his back, as well as the belt line incident in 2011. Dr. Morgan diagnosed cervicalgia, enthesopathy, thoracalgia, lumbago, cervical subluxation, thoracic subluxation, and lumbar subluxation. Dr. Morgan noted aggravating conditions of work-related microtrauma and work-related physical jarring. On May 29, 2014, Dr. Morgan completed a questionnaire indicating Smith's neck and back issues are caused in whole or in part by his job activities. He advised that continuation of these activities would have adverse health consequences.

Dr. Arthur L. Hughes performed an independent medical examination ("IME") on August 27, 2014. Smith reported the 2011 beltline incident to Dr. Hughes. He acknowledged ongoing pain since that incident, but indicated he "dealt with it" and continued working. Dr. Hughes noted Smith's condition worsened and he eventually had to quit in February 2014 because he "couldn't do it." Smith reported he felt slightly better since being off work.

Dr. Hughes diagnosed neck pain with probable radiculopathy, lower back pain with probable radiculopathy, gait disorder of uncertain cause, and Huntington's chorea. He noted Smith's pain may have begun around 2011, but it worsened over time to the point he was no longer able to perform his duties, necessitating that he stop work. Dr. Hughes opined the pain and limitation of function were due to cumulative trauma affecting Smith's bones, joints, muscles, tendons and ligaments. In Dr. Hughes' opinion, the symptoms had been asymptomatic, dormant and non-disabling, but have been aroused into a disabling condition by the latest employment. He assigned a 5% impairment rating for the cervical condition and 5% for the low back condition for a combined 10% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Hughes indicated Smith did not have an active impairment prior to this injury.

Nally & Hamilton filed medical records concerning Smith's condition following the 2008 motor vehicle accident and the 2011 belt line incident. Records from Harlan Appalachian Regional Hospital indicate Smith was examined on July 31, 2008 following the motor vehicle accident. X-rays of the cervical spine was essentially normal. A subsequent

lumbar MRI performed on May 24, 2011 revealed degenerative disc disease at L4-L5 and L5-S1 with a small left paracentral focal protrusion or herniation at the L4-L5 disc interspace.

Diagnostic studies performed on August 25, 2011 at Wellmont Health Systems revealed mid thoracic spine spondylosis, mild multi-level lumbar spine spondylosis without significant central canal stenosis, small right paramedian T8-T9 and left paramedian T7-T8 disc protrusions obliterating the thecal sac causing mild central stenosis, and hemicord deformity. Smith had mild central canal stenosis and severe bilateral neural foraminal narrowing at L5-S1 secondary to a disc osteophyte complex with foraminal extension, degenerative disc narrowing, facet joint arthropathy and ligamentum flavum hypertrophy. An August 5, 2011 whole body bone scan was grossly unremarkable but revealed a mild increased uptake at the L5-S1 level that was degenerative in nature and minimal levoscoliosis of the thoracolumbar junction. A September 7, 2011 cervical myelogram revealed probable degenerative disc bulging in the cervical region.

Dr. Daniel D. Primm, Jr. performed an IME on September 10, 2014. Dr. Primm diagnosed cervical sprain by history, occurring at the time of his 2011 work-related

event; chronic low-back pain following a 1993 low-back strain injury; and Huntington's chorea. Dr. Primm found no evidence Smith had any significant degenerative disc disease or degenerative arthritis in his neck or lower back in excess of what is expected for his age. Dr. Primm did not believe Smith has an impairment rating for the cervical or lumbar spine pursuant to the AMA Guides. Were it not for his history of Huntington's disease, Smith would have the physical capacity to return to his past work for Nally & Hamilton.

Dr. Russel L. Travis conducted a medical records review on November 28, 2014. Dr. Travis opined there is no evidence that Smith sustained any work-related cumulative trauma injury arising from his employment with Nally & Hamilton. Any degenerative changes are the result of the natural aging process. Dr. Travis disagreed with Dr. Hughes' findings and impairment rating because he concluded Dr. Hughes had ignored facts and his own objective findings. Dr. Travis instead placed great emphasis on the fact Smith returned to work without restrictions in September 2011, and continued to work without problems until he was laid off in February 2014.

The ALJ's findings relevant to this appeal are as follows:

> As for the injury claim I understand that the Plaintiff did not have any traumatic injury but is alleging a cumulative trauma injury. The Plaintiff worked for several years in the coal mining industry. His work was very physical[ly] demanding. It required constant unnatural positioning of his body. Dr. Hughes thinks he has a work-related impairment. The Plaintiff is very credible.
>
> In reliance on Dr. Hughes I find the Plaintiff has permanent work-related cervical and lumbar injuries resulting in a 5% impairment rating each and without any portion being pre-existing, active. In reliance on Dr. Hughes there is no pre-existing, active condition.
>
> In making these findings I am aware of the reports and conclusions of Drs. Primm and Travis. They do constitute substantive evidence. I believe however that given the Plaintiff's relatively young age, fifty-five, the advanced condition of his spine, and the lack of any other substantive explanation, all when combined with the report of Dr. Hughes, that the finding made is correct and supported.

The ALJ further determined there is no evidence upon which to apportion the disability.

Nally & Hamilton filed a petition for reconsideration arguing the 2011 injury is the cause of Smith’s complaints. It requested additional findings regarding the causal relationship between the 2011 injury and the current condition of Smith’s spine, and what expert medical evidence would support a finding of advanced

abnormalities. Alternatively, Nally & Hamilton requested a correction of the amount of the permanent partial disability ("PPD") benefit. The ALJ's April 20, 2015 order amended the PPD rate to $49.03, but otherwise denied Nally & Hamilton's petition without making additional findings.

On appeal, Nally & Hamilton argues the ALJ erred in finding Smith sustained a cumulative trauma injury to his neck and back. It contends the evidence establishes a specific trauma injury on March 30, 2011 which caused the neck and low back conditions. This incident led to the diagnostic imaging and medical evidence establishing the conditions the ALJ erroneously concluded were due to cumulative trauma.

Nally & Hamilton also attacks the ALJ's reliance on Dr. Hughes' report. It asserts that Dr. Hughes failed to address how Smith could have a cumulative injury when the diagnosis was based on imaging studies from the 2011 traumatic event. Nally & Hamilton further argues the report fails to provide a direct causal connection between the conditions and circumstances under which the work was performed and the injury. Nally & Hamilton takes issue with the ALJ's statements Smith "did not have any traumatic injury" and that Smith has an "advanced condition" of his spine.

Finally, Nally & Hamilton argues that if the finding of a cumulative trauma injury is affirmed, the ALJ must be directed to determine what percentage of any impairment rating is directly attributable to Smith's employment from 2007 to 2014 with Nally & Hamilton.

As the claimant in a workers' compensation proceeding, Smith had the burden of proving each of the essential elements of his cause of action, including the extent of his disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). However, Nally & Hamilton's argument is essentially that Smith's neck and low back conditions are pre-existing, active conditions. Because Nally & Hamilton is the party with the burden of proof on this issue and it was unsuccessful before the ALJ, the question is whether the evidence compels a different conclusion. *See* Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). To succeed in proving an active, pre-existing condition, Nally & Hamilton 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). In the case *sub judice*, the evidence does not compel such a result.

The ALJ could reasonably find Smith's employment produced ongoing cumulative trauma. Dr. Morgan identified job related microtraumas and physical jarring as aggravating conditions. Dr. Hughes was aware of the 2011 specific trauma injury, Smith's work history, and the physical requirements of his work. He opined that Smith sustained a worsening of his condition as a result of cumulative trauma and that Smith did not have an active impairment prior to this injury. Contrary to Nally & Hamilton's assertion, Dr. Hughes did not base his opinions exclusively on the 2011 diagnostic studies. He reviewed x-rays taken on October 25, 2013, treatment notes from Dr. Dahhan in 2014, and conducted his own examination.

While Smith sustained a non-work-related injury in 1993 and a specific trauma injury in 2011, he was not diagnosed with a cumulative trauma injury prior to 2014. No medical expert assigned a pre-existing impairment rating for Smith's condition. Smith freely acknowledged he had prior symptoms, but was able to return to work in 2011. Because the evidence does not compel a finding Smith's condition was both symptomatic *and* impairment ratable immediately prior to the manifestation of the cumulative trauma injury, the record does not compel a finding he had a pre-existing active impairment rating.

We believe Nally & Hamilton misreads the ALJ's statement at page ten of the opinion, as set forth above, that Smith "did not have any traumatic injury." We believe the reference is to the fact Smith was not alleging a specific trauma injury, but rather a cumulative trauma injury. The ALJ's recitation of Smith's testimony and the summaries of the medical evidence evince the ALJ's knowledge of the 2011 work-related injury. While Drs. Primm and Travis opined Smith's degenerative conditions were not greater than what would be expected for his age, the ALJ could reasonably conclude, based upon Dr. Hughes' opinion that the conditions were worsened by his work and thus his condition was "advanced." As fact-finder, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

The ALJ was not compelled to apportion Smith's impairment. Although Smith had a thirty-four year history of work in the mining industry, there is simply no evidence to require apportionment. Nothing in the record established a manifestation prior to Smith's employment with Nally & Hamilton, and no physician offered an opinion as to how trauma from prior employment might have contributed to Smith's current condition. Indeed, the employer's

physicians did not believe Smith sustained a cumulative trauma. Instead, they viewed the specific trauma injury at Nally & Hamilton in 2011 as the single cause of the conditions. Dr. Hughes specifically stated the trauma at the most recent employer was responsible for Smith's current condition. Thus, apportionment was neither supported nor required.

Accordingly, the March 20, 2015 Opinion, Award and Order and the April 20, 2015 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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