

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 15, 2013

CLAIM NO. 201082673

PERRY COUNTY AMBULANCE AUTHORITY

PETITIONER

VS.

APPEAL FROM HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

JOHN PAUL NEACE, JR.;
UK INTERVENTIONAL PAIN;
KENTUCKY MEDICAL SERVICES;
AMREICAN ESOTERIC LABORATORIES;
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Perry County Ambulance Authority ("Perry County") appeals from the opinion, order and award rendered July 1, 2013 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") awarding John Paul Neace, Jr. ("Neace") permanent total disability ("PTD") benefits and medical

benefits for a work-related low back injury sustained on July 19, 2010. Perry County also appeals from the order entered August 9, 2013, denying in large part its petition for reconsideration.

On appeal, Perry County argues the ALJ made incorrect and insufficient findings of fact and conclusions of law in determining Neace is permanently totally disabled. Perry County also argues the ALJ erred in relating the December 13, 2010 incident when Neace fell at home to the July 19, 2010 lifting injury. Perry County next argues the ALJ's finding timely and appropriate medical care was denied was erroneous. Finally, Perry County argues the ALJ mischaracterized the opinion of Dr. Ralph Crystal, "the only vocational expert whose opinions were presented for consideration." Because we determine the ALJ's determinations are supported by substantial evidence, we affirm.

Neace filed a Form 101 on April 21, 2011 alleging he sustained a low back injury on July 19, 2010 while lifting a patient. Neace testified by deposition on July 27, 2011 and again on April 25, 2013. He also testified at the hearing held May 2, 2013. Neace is a high school graduate, and completed a paramedic course of study at the Hazard Community College. He was born on July 3, 1981 and

resides in Lost Creek, Breathitt County, Kentucky. Neace began working as a paramedic in February 2000, and has not worked since the July 19, 2010 accident. Neace testified he missed two days of work a few years prior to his work injury, but he had no medical treatment for his back prior to the accident date despite periodic aches and pains. He began working for Perry County in October 2003. He stated his job required lifting, pushing, pulling in awkward positions, and carrying seventy-five pounds of gear.

On July 19, 2010, Neace and a co-worker responded to a physician's office in Hazard, Kentucky, where a patient had collapsed. The patient was placed on a stretcher, and when they lifted her, he experienced immediate low back and left leg pain. Neace assisted with taking the patient to the hospital, where he was also treated. An accident report was completed, and he indicated he had low back and left leg pain. After the accident, he followed up with treatment at the Primary Care Center, and was eventually referred to Dr. Phillip Tibbs, a neurosurgeon in Lexington, Kentucky.

Neace continued to experience low back pain and left leg pain and numbness. On December 13, 2010, he was sitting in a recliner at home. When his wife came home, he attempted to stand and immediately experienced low back pain, and his left leg gave way causing him to fall. He was

placed in a back brace for two to three months afterward. He currently takes several medications for his back and leg, but no surgery has been recommended. Although recommended, he has had no epidural injections. Neace estimated he can walk approximately a quarter of a mile at a time, and can sit for no more than thirty minutes. He stated he has difficulty climbing stairs, and must lie down at certain times of day. Prior to the accident Neace had lost a large amount of weight, but has gained much of it back due to an inability to exercise.

Neace filed numerous office notes and reports from Dr. Tibbs, and his physician's assistant, Mr. Randall Kindler. Neace also deposed Dr. Tibbs on October 6, 2011. Neace first saw Dr. Tibbs on October 8, 2010, and he testified he saw both Mr. Kindler and Dr. Tibbs on each office visit. On October 8, 2010, Dr. Tibbs prescribed medication for treatment of Neace's work injury. On November 12, 2010, Dr. Tibbs recommended epidural steroid injections for treatment of ongoing symptoms related to the July 19, 2010 work injury. On January 14, 2011, it was noted Neace fell and sustained a compression fracture before he could undergo the injections. The February 11, 2011 office note indicates in December, Neace's legs gave way causing him to fall. It was noted, "We do believe Mr.

Neace's fall was related to pain from his original work injury."

In a February 24, 2012 letter, Dr. Tibbs stated the MRI dated February 9, 2011 revealed an anterior wedge fracture at L2, and significant disc protrusions at L2/3; L3/4 and L4/5. He stated epidural steroid injections were necessary, surgery was not recommended, and Neace had not reached maximum medical improvement ("MMI"). He stated Neace had a work-related injury super-imposed upon dormant degenerative changes. He opined Neace should avoid repetitive twisting, bending at the waist, or lifting over ten pounds repetitively. He also advised avoidance of sitting or standing more than twenty minutes at a time and to work no more than four hours per day. He assessed a 12% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

At his October 16, 2011 deposition, Dr. Tibbs reiterated his assessment of impairment and restrictions. He also stated the December 2010 incident was related to the original injury. He stated although Neace had not reached MMI, his impairment would be 12% if he received no additional treatment. He stated Neace is unable to work, and needs additional testing and injections. He stated,

based upon the history provided, Neace had pre-existing dormant degenerative conditions before the July 2010 lifting incident which were not ratable prior to the accident.

Perry County submitted reports from Dr. Henry Tutt, a neurosurgeon, dated March 15, 2011; March 3, 2012; and January 30, 2013. Dr. Tutt also testified by deposition on April 9, 2012. In his first report, Dr. Tutt noted Neace's complaints of the immediate onset of low back pain with burning and numbness in the left leg as he and a co-worker were lifting a patient on July 19, 2010. He also noted the December 13, 2010 fall at home which resulted in a compression fracture at the L-2 level. He diagnosed Neace as morbidly obese and having multilevel degenerative disk disease without evidence of recent structural alteration, disk herniation, lumbar spinal stenosis, or anything associated with nerve root compression. He stated the July 2010 event was a "transient myofascial injury" which he termed was a "strain or sprain on a background of previously symptomatic multilevel mild lumbar degenerative disk and joint disease." He opined Neace achieved MMI five months after the incident, for which permanent restrictions were not anticipated. He stated the compression fracture was unrelated to the July 2010 injury.

In supplemental reports dated January 30, 2012 and March 13, 2012, Dr. Tutt stated his previous opinions remain unaltered after reviewing additional records from Mr. Kindler and the December 18, 2012 myelogram.

Dr. Tutt testified by deposition on April 9, 2012. He stated Neace has no radiculopathy. He stated the subsequent intervening event of December 13, 2010 was more serious than the original injury. He noted Neace had longstanding, mild pre-existing spondylosis, and the compression fracture at L-2 had nothing to do with the July injury. He stated Neace reached MMI six to ten weeks after the accident, and did not qualify for an impairment rating pursuant to the AMA Guides.

Dr. Joseph Zerga, a neurologist, evaluated Neace on July 27, 2011. He noted Neace has not worked since July 19, 2010. He stated Neace had occasional back problems prior to July 2010, but never sought medical treatment. Dr. Zerga noted both the July 2010 lifting incident, and the December 2010 fall. He diagnosed non-specific low back pain and left leg pain. He also noted the small compression fracture at L-2. Dr. Zerga opined surgery and a proposed myelogram were unnecessary. He administered EMG/NCV testing which yielded normal results. Dr. Zerga assessed a 5%

impairment rating pursuant to the AMA Guides, with no restrictions.

In a report dated February 29, 2012, Dr. Zerga stated he had reviewed a note from Dr. Tibbs/Mr. Kindler dated December 19, 2011. He stated his opinions from July 2011 remain unchanged. In a report dated March 19, 2012, Dr. Zerga stated the disagreed with Dr. Tibbs. He stated the July 19, 2010 injury was insufficient to cause any degree of permanent symptoms. He stated Neace has a 6% impairment rating pursuant to the AMA Guides, with no restrictions attributable to the work injury. In a report dated February 6, 2013, Dr. Zerga stated he had reviewed the December 18, 2012 myelogram and post-myelogram CT scan. He stated Neace reached MMI on April 10, 2011, and the myelogram does not show any new findings suggesting to the contrary.

Dr. Zerga testified by deposition on October 25, 2011. He noted Neace had experienced some back problems prior to July 2010. He also noted the December 13, 2010 incident. He stated Neace's physical examination was within normal limits. He stated Neace is morbidly obese which places him at a greater risk of developing back pain. He stated Neace was temporarily totally disabled from July 19,

2010 until April 10, 2011, when he reached MMI. He stated no additional diagnostic testing is necessary.

Perry County submitted a records review report prepared by Dr. Peter Kirsch, an orthopedic surgeon, dated January 19, 2011. He stated the compression fracture is unrelated to the July 19, 2010 accident.

Perry County also submitted a report from Dr. James Patrick Murphy, an anesthesiologist/pain management specialist. He reviewed Neace's records and stated current lumbar complaints/exam findings are unrelated to the July 19, 2010 accident. He stated the proposed epidural steroid injections at L2-3 are not medically necessary and appropriate for treatment of the July 19, 2010 work injury.

Perry County next submitted the report of the December 18, 2012 myelogram from the University of Kentucky Healthcare. The report states small disk bulges were noted at multiple levels, without evidence of high grade stenosis.

Finally, Perry County submitted the vocational report of Dr. Ralph Crystal dated April 18, 2013. Dr. Crystal stated if Neace could return to his past work, he would have no loss of employability or earning capacity. If he can perform sedentary work, he is still not precluded from all work. Dr. Crystal stated additional training would be beneficial.

A Benefit Review Conference ("BRC") was held on May 2, 2013. The issues preserved in the BRC order and memorandum include benefits per KRS 342.370; work-relatedness/causation; unpaid/contested medical expenses; TTD; vocational rehabilitation; work-relatedness of the December 2010 event and all related medical expenses; and failure to follow reasonable medical advice.

On July 1, 2013, the ALJ issued an opinion finding Neace sustained a work-related injury on July 29, 2010 while lifting a patient. He then found as follows:

The Claimant sustained a fall on December 13, 2010, resulting in a compression fracture at L2. The question is whether or not there is a causal relationship between the original work injury and the subsequent fall. Based on the testimonies of Plaintiff and Dr. Phillip Tibbs, the ALJ finds a causal connection and does find that the fall and compression fracture in December of 2010 to be the consequence and result of the injury of July 19, 2010. The Plaintiff had suffered from similar symptoms from the date of his injury on July 19, 2010, until the date on which he fell at home. According to Plaintiff's testimony, which the ALJ finds to be credible, the Plaintiff's leg was numb when he attempted to stand and walk on it, which caused him to fall to the floor and suffer the compression fracture. But for the symptoms that still existed from the July 19, 2010, incident, it is unlikely that the Plaintiff would have fallen as he did in December of 2010. In any event, the

testimonies of Plaintiff and Dr. Tibbs are logical and sequential in nature and provide a basis for a finding of a cause and effect relationship. In the opinion of the ALJ, the fall and the compression fracture resulting from the fall were substantially caused by the injuries received by Plaintiff on July 19, 2010.

The ALJ then found as follows:

4. Based on the evidence from Dr. Tibbs, the treating neurosurgeon, the Plaintiff has a 12% permanent impairment to the body as a whole, based on the AMA Guides, 5th Edition. All of this impairment is attributable to the direct effects of the work-related injury of July 19, 2010. Any symptoms that the Claimant had prior to July 19, 2010, were not impairment ratable and were not of such significance as to interfere with the Plaintiff's performance of his regular job and work activities. Claimant was suffering from a pre-existing dormant degenerative condition in his low back, as described by Dr. Tibbs and other physicians herein, and it is the finding of this ALJ that said condition was dormant prior to July 19, 2010. The lifting incident at work on that date aggravated the dormant pre-existing degenerative changes in Claimant's low back and aroused the dormant condition into a disabling reality. These symptoms continued from July 19, 2010, through the date of Claimant's fall at home and beyond. The Defendant-Employer is responsible for any consequences that naturally flow from the work injury. Beech Creek Coal Company v. Cox, 237 S.W.2d 56 (Ky., 1951).

Regarding the award of PTD benefits, the ALJ found as follows:

The next question to be considered is whether the Plaintiff is capable of any work as defined by the Statute. KRS 342.0011(34) defines "work" as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011(11)c defines "permanent total disability" as "the condition of an employee who, due to an injury, has a permanent disability rating and a complete and permanent inability to perform any type of work as a result of an injury." The restrictions imposed by Dr. Tibbs include the avoidance of repetitive twisting or bending at the waist and the avoidance of lifting more than ten pounds repetitively. Further, the Claimant would be required to change positions frequently and he should neither stand nor sit for more than twenty minutes at a time. The Claimant would be unable to work more than four hours per day, even with the restrictions and frequent breaks that he would have to take. Considering these restrictions imposed by Dr. Tibbs, together with a consideration of the many factors enunciated in KRS 342.730; Osborne v. Johnson, 432 S.W. 2d 800 (Ky. 1968); Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000); and McNutt Construction/First General Services v. Clifford F. Scott, et al., 40 S.W.3d 854 (Ky. 2001), the ALJ finds the Claimant to be permanently totally disabled.

Perry County filed a petition for reconsideration on July 15, 2013, alleging numerous errors by the ALJ, stating his findings were inconsistent, or in the alternative, failed to support his conclusions. In an order entered August 9, 2013, the ALJ stated he incorrectly indicated the date Neace first saw Dr. Tibbs, and entered a correction. In all other respects, the petition for reconsideration was denied.

The crux of this appeal concerns whether the ALJ's determination of relatedness of the December 13, 2010 incident and whether the award of permanent total disability are supported by substantial evidence. Since Neace, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

The ALJ, as fact-finder, has sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). 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 (Ky. 1977); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). It is not enough to merely show some evidence supports a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006).

After reviewing the evidence of record, we conclude the ALJ's determination Neace is permanently totally disabled was in accordance with the Kentucky Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Dr. Tibbs assessed restrictions which the ALJ could and did clearly consider in arriving at his determination. While Perry County pointed to a great deal of evidence supporting its position, including the report of Dr. Crystal, the ALJ was not constrained to rely upon it.

Because the ALJ's determination is supported by substantial evidence, we are without authority to disturb his decision on appeal. See KRS 342.285; Special Fund v. Francis, supra. For that reason, we cannot say the ALJ's determinations finding the December 13, 2010 fall was causally related to the July 19, 2010 work injury, and the award of PTD benefits is so unreasonable in light of the evidence the decision must be reversed.

We next address Perry County's argument concerning the ALJ's comments regarding a delay in medical treatment. The ALJ was certainly free to comment on the timetable of when medical treatment/testing was performed or authorized. This is especially true in light of the fact the myelogram was not performed until December 2012, only after an order requiring authorization for such testing was entered by the ALJ. We therefore find this argument without merit.

Finally, Perry County argues, citing to Cepero v. Fabricated Metal Corporation, 132 S.W.3d 839 (Ky. 2004), the ALJ erred in concluding Neace's December 13, 2010 fall at home, and ensuing compression fracture at L2 is causally related to the July 19, 2010 injury. Perry County argues Dr. Tibbs opinion regarding the relatedness of the December

2010 incident was inaccurate or incomplete, and therefore his opinions cannot be relied upon.

After an examination of the record, we conclude Cepero, supra, is inapplicable in the case sub judice. Cepero, supra, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. In this instance, Perry County has failed to demonstrate the information provided to Dr. Tibbs was incorrect so as to render his opinion meritless.

Accordingly, the decision rendered July 1, 2013 by Hon. Edward D. Hays, Administrative Law Judge, and the order on reconsideration issued August 9, 2013, are hereby **AFFIRMED.**

ALL CONCUR.

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