Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 10, 2014

CLAIM NO. 201174810

REM COMPANY INC.
d/b/a ARTICLEAN PETITIONER

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

ROBERT CUMMINS
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. REM Company, Inc. ("REM") appeals from the July 5, 2012 Interlocutory Opinion, the July 26, 2012 Order denying Reconsideration, the April 24, 2014 Opinion, and the June 9, 2014 Order denying Reconsideration rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ").

The ALJ determined Robert Cummins suffered a work-related injury during the course of his employment with REM, and was awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, medical benefits, and vocational rehabilitation benefits. On appeal, REM challenges the ALJ's determination Cummins suffered a new and distinct injury, as opposed to a re-injury of a prior low back condition. It also challenges the award of vocational rehabilitation benefits as unsupported by the evidence. For the reasons set forth herein, we affirm.

Cummins began working for REM in 2008, a company which builds and installs ozone units. At the plant, he would perform plumbing work on the units. At other times, he would travel to different parts of the country, installing the units and necessary plumbing at the customer's site. Prior to REM, Cummins worked maintenance and construction jobs.

In 2004, Cummins was hit in the back and developed a bone spur. Dr. Timothy Kriss performed a two-level, left-sided, unilateral L4/L5 and L5/S1 discectomy surgery. He was eventually released back to work with no restrictions, and suffered no ongoing symptoms.

In 2009, Cummins suffered a work-related injury while lifting. He was diagnosed with a right-sided L4/L5 disc herniation. Dr. James Bean performed a right L4/L5 lumbar discectomy in February 2010. Cummins returned to work two months later with no ongoing restrictions, medications, or symptoms. Regarding the 2009 injury, Cummins entered into a settlement agreement with REM which included a waiver of his right to future medical benefits.

At a deposition taken February 1, 2012, Cummins testified he was on a month-long work trip in June of 2011 when he began to experience symptoms in his back. The trip involved a convention in Las Vegas, followed by the delivery and installation of several units in California. Cummins stated he and another co-worker were driving to Las Vegas when the load in their trailer shifted. He pulled one of the ozone units and felt low back pain. From that point on, his condition worsened, particularly because he was driving approximately 12 to 13 hours a day. Later, when they reached California, the condition in his back had worsened significantly.

When he returned to Kentucky, Cummins sought medical treatment. He worked off and on through July 2011, though with pain. Eventually, he was seen by Dr. Bean in

August 2011 who diagnosed a recurrent disc herniation. Dr. Bean took Cummins off work and recommended surgery.

Cummins initiated this claim and sought pre-approval for the surgery recommended by Dr. Bean. REM conceded Cummins suffered a recurrent disc herniation requiring surgery, but argued it is not causally related to any work incident. The ALJ bifurcated the claim to first determine whether Cummins had suffered an injury as defined by the Workers' Compensation Act, causation, and compensability of the proposed surgery.

At a hearing held May 7, 2012, Cummins was cross-examined regarding the onset of his symptoms. He again stated he began to experience back pain while on the June, 2011 trip to Las Vegas and California. When asked if he remembered some "specific happening" or "direct trauma", he answered no. He then explained, "I did put a unit on the wall and felt a good twitch and a burning that I feel like was the turning point. But, I mean, it was, I still at that time I did continue working."

REM submitted the peer review report of Dr. Daniel Agnew, who opined there was no real mechanism suggesting a new injury in June 2011. Rather, Dr. Agnew believed Cummins' condition was related to his 2009 injury. Dr. Kriss also evaluated Cummins on May 7, 2012. He received a

history from Cummins of holding a 250-pound ozone unit against a wall for installation when he felt a burning sensation in his low back. Thereafter, he sat in a vehicle for extended periods of time. After discussing the difficultly in identifying causation in a patient with a history of lumbar surgeries, Dr. Kriss concluded Cummins' condition is work-related *if* the history he received is accurate.

Dr. Bean's report was submitted by Cummins. In concluding Cummins' condition is not related to his 2009 injury but the result of a new injury, Dr. Bean noted several factors of consideration. First, the 2011 injury is on Cummins' left side. His 2009 injury was on the right side. While the 2004 surgery was on the left side, Cummins was symptom free prior to 2011. Also, he relied on a history of Cummins handling and lifting ozone units to conclude the current herniation is work-related.

In an Interlocutory Opinion and Order dated July 5, 2012, the ALJ determined Cummins suffered a work-related injury to his lumbar spine. He relied on Dr. Bean's report, as well as Cummins' testimony, to conclude the injury occurred while lifting and moving ozone units. The ALJ ordered REM to pre-certify the surgery, and reserved all

remaining issues for later adjudication. Dr. Bean performed the surgery on September 28, 2012.

REM petitioned for reconsideration of the July 5, 2012 Opinion, which was denied. Nonetheless, it submitted the deposition testimony of three REM employees regarding Cummins' activities around the time of his alleged work-related injury. Genie Collins testified she attended a convention in Las Vegas with Cummins, and he never stated his back was injured. She observed him at numerous social events in Las Vegas. Dale Standfield drove to the Las Vegas convention, though not in the same vehicle as Cummins. He did not witness Cummins reposition an ozone unit while on the drive, nor did Cummins mention to him that his back was injured. Mark Moore testified he was present in Las Vegas, and Cummins did not inform him of his back condition. He observed Cummins bowling and riding go carts during the trip. The ALJ admitted this proof over Cummins' objection.

REM also submitted a subsequent report from Dr. Kriss, dated July 24, 2013. Dr. Kriss agreed Dr. Bean's surgery for a recurrent disc herniation was reasonable and necessary, but changed his position regarding whether the injury was work-related. Dr. Kriss stated Cummins told him, at his first evaluation in 2012 that the injury occurred while lifting an ozone unit in Las Vegas. At his 2013

evaluation, Cummins told Dr. Kriss the injury occurred while lifting a unit in California. Prior to the 2013 evaluation, Dr. Kriss was also presented with the deposition testimony of Ms. Collins, Mr. Standfield, and Mr. Moore. In reviewing their testimony, as well as Cummins' "inconsistent" testimony, Dr. Kriss now concluded Cummins' injury is degenerative, and not work-related.

Dr. Bean was deposed prior to the final hearing, on September 12, 2013, and was asked to revisit his prior report. He again opined Cummins' injury was caused by his work-related activities on the trip to Las Vegas, and represented a new injury distinct from his 2009 injury. Responding to the allegation Cummins had engaged in physical activities during the trip, Dr. Bean explained a herniated disc does not always cause immediate symptoms, but may begin as a low-grade, nagging pain. Further, Dr. Bean acknowledged that a person who suffers one disc herniation is at a greater chance of having a recurrent disc herniation at the same level. He also identified degenerative changes as a possible contributing factor to Cummins' new injury. Referencing the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Bean attributed 25% of Cummins' new injury to the 2004 surgery, 25% to the 2009 surgery, and 50% to the

new incident that precipitated the current condition. Accordingly, he assessed a 10% pre-existing, active impairment immediately preceding the 2011 injury.

A final hearing was held on February 25, 2014. Cummins testified he first noticed a “twitch” in his back when the load shifted during the drive to Las Vegas. He stated he was able to rest somewhat in Las Vegas, because local union members unloaded the equipment, and he recovered somewhat. However, his condition worsened after the first installation job in California. It progressively deteriorated during the drive back to Kentucky. He acknowledged riding a go cart in Las Vegas, but explained he could tolerate this six-minute long activity. He explained his back condition prevented him from participating in a zip-line activity, which the other employees undertook. Finally, Cummins disputed the history of lifting an ozone unit received by Dr. Kriss.

In an Opinion and Award dated April 24, 2014, the ALJ summarized and considered the testimony of Ms. Collins, Mr. Standfield, and Mr. Moore, in addition to Dr. Kriss’ revised opinion. However, the ALJ concluded the evidence did not change his prior opinion as to causation, and declined to readdress the issue. He awarded TTD benefits, medical benefits, and vocational rehabilitation.

Additionally, he awarded PPD benefits based on a 21% functional impairment rating, which reflected a reduction by the 10% pre-injury, active functional impairment rating assessed by Dr. Bean.

REM petitioned for reconsideration. As it relates to this appeal, REM requested the ALJ address the "direct and natural consequence" rule. It also requested further findings of fact regarding the award of vocational rehabilitation benefits. In an Order dated June 9, 2014, the ALJ addressed REM's argument regarding the "direct and natural consequence" rule, stating,

> [I have] received Dr. Bean's testimony once again and believe that his testimony was sufficient to enable [Cummins] to meet his burden of proving that he suffered an injury as defined by the Act sufficient enough to entitle him to permanent partial disability benefits. Dr. Bean clearly believes that the incident at work necessitated the need for his most recent surgeries and resulted in his current disability. While Dr. Bean acknowledged that [Cummins] had some prior active back problems he did not attribute his current condition to that pre-existing active condition.

With respect to the award of vocational rehabilitation benefits, the ALJ further explained, "It was readily apparent from review of the evidence that [Cummins], while not totally disabled, is limited to light and/or sedentary

work and clearly has no experience or training to perform work in this capacity."

On appeal, REM again argues Cummins' 2011 back injury is the "direct and natural consequence" of his 2004 and 2009 low back injuries at the same spinal level. REM maintains such a determination would warrant dismissal of Cummins' claim, because he settled his 2009 injury claim and waived his right to future benefits.

The "direct and natural consequence" rule is that a later injury, "whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of the compensable primary injury." Addington Resources, Inc. v. Perkins, 947 S.W.2d 421, 423 (Ky. App. 1997) quoting Larson, Workmen's Compensation Law §13.11 (1996). In Addington, the claimant suffered a back injury in 1990. He later injured his back again while not in the course of employment, though at a different level of the spine. The ALJ was persuaded by the medical testimony that the original, work-related injury weakened the claimant's spine, leaving him susceptible to future injury. The Court of Appeals found the second injury compensable, reasoning: "[E]ven though the subsequent injury was to a different part of the back and followed a non-work-related incident, the medical expenses arising therefrom are

compensable since the work-related injury caused the part of the back that was subsequently injured to be more susceptible to injury." Id.

Dr. Bean clearly expressed the opinion that a new injury occurred. This is substantial evidence upon which the ALJ was free to rely in finding Cummins suffered an injury as defined by the Act. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). While Dr. Kriss opined Cummins' current condition is a direct result of his 2009 surgery, that proof certainly did not compel a different result, given the conflicting nature of the medical evidence. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

To the extent REM argues the ALJ did not adequately address its argument based on the "direct and natural consequence rule", we disagree. In the June 9, 2014 Order on Reconsideration, the ALJ specifically acknowledged this argument and reiterated his belief that a new work injury had occurred, and his reliance on Dr. Bean's opinion for this finding. In determining a distinct injury occurred, the ALJ implicitly rejected the argument that Cummins' condition flowed directly from the 2009 injury. Upon review of the ALJ's interlocutory and final orders in this case, we are convinced he completely grasped REM's

theory of the case and rejected it. Furthermore, he sufficiently stated his reasoning and the evidence upon which he relied in reaching this conclusion. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991).

REM next argues the ALJ's award of vocational rehabilitation benefits was not supported by substantial evidence. KRS 342.710(1) entitles a claimant to vocational rehabilitation services when, "as the result of the injury, he is unable to perform work for which he has previous training or experience." As the claimant, Cummins bore the burden of establishing his entitlement to the benefit. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

Cummins' is currently restricted from bending, twisting, and lifting objects that weigh more than 30 pounds. Dr. Stephanie Barnes, a vocational expert, evaluated Cummins, and opined he could perform sedentary and light work. Cummins' work history includes his plumbing and installation work at REM, as well as construction and maintenance positions.

REM emphasizes the positions which Dr. Barnes believes Cummins could perform, such as store clerk, cashier, customer service representative, or small products assembler. It argues these positions are readily available, and require no particular vocational training. It also

highlights Cummins' prior position performing maintenance at Shadewell Farms which, REM argues, would fall within his current physical restrictions.

Upon review of the record, we believe these arguments were presented to the ALJ and rejected. Cummins was cross-examined about his ability to learn new trades or jobs, and his willingness to do so. He was also questioned about his position at Shadewell Farms. While acknowledging the position did not involve heavy lifting or working with horses, Cummins likewise emphasized that maintenance work involves climbing ladders, twisting while lifting, and other physical activities outside of his restrictions.

In short, we do not believe the ALJ abused his discretion in concluding Cummins "is unable to perform work for which he has previous training or experience." Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993) (the ALJ is the fact-finder, and has the sole authority to determine the weight of the evidence). The recommendations of Dr. Barnes, combined with Cummins' physical restrictions and his testimony concerning his prior work experience and current capabilities, constitute the requisite substantial evidence to support the ALJ's conclusions. Wolf Creek Collieries v. Crum, id. As such, this Board may not disturb the award of vocational rehabilitation benefits.

For the reasons set forth herein, the July 5, 2012 Interlocutory Opinion, the July 26, 2012 Order denying Reconsideration, the April 24, 2014 Opinion, and the June 9, 2014 Order denying Reconsideration of Hon. R. Scott Borders are hereby **AFFIRMED**.

ALL CONCUR.

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