

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 25, 2014

CLAIM NO. 201201071

RAYMOND WOODS

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

MISA FABRICATING COMPANY
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

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

STIVERS, Member. Raymond Woods ("Woods") appeals from the August 15, 2013, Opinion and Order dismissing his claim and the October 1, 2013, Order overruling his petition for reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ dismissed Woods' claim for failure to prove he sustained an injury under the

Act. On appeal, Woods asserts the evidence compels a finding of a cumulative trauma injury.

The Form 101 alleges on May 23, 2012, Woods sustained an injury to his middle and lower back due to "repetitive lifting" while in the employ of Misa Fabricating Company ("MISA"). The work history, Form 104, attached to Woods' Form 101 indicates Woods has worked in metal manufacturing since 1996. His job with MISA spanned January 3, 2012, through May 23, 2012.

The May 9, 2013, Benefit Review Conference order lists the following contested issues: benefits per KRS 342.730 [handwritten: "and multipliers"], work-relatedness/causation, notice, unpaid or contested medical expenses, injury as defined by the Act, and TTD.

Concerning whether Woods had proven a work-related injury, the ALJ made the following findings of fact and conclusions of law:

12. Injury is defined as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." KRS 342.0011(1).

13. The Plaintiff was seen in the emergency room on May 5, 2012 complaining of back pain. He also

reported to the emergency room on May 23, 2012 and reported no trauma or specific back injury but reported back pain of one month in duration.

14. The ALJ finds that the Plaintiff's testimony as well as the medical history that he has provided for the purposes of medical treatment and examination lack credibility.

15. The ALJ further finds that the medical opinion of Dr. Zerga is the most credible in this matter. Dr. Zerga found that the Plaintiff did not, within a reasonable medical probability, incur a specific injury on May 23, 2012.

16. Based upon the foregoing, the ALJ finds that the Plaintiff did not suffer an injury as that term is defined in the Act.

Woods filed a petition for reconsideration asserting Dr. Zerga's opinions regarding a "specific" injury are not dispositive as Woods' claim is for a cumulative trauma injury. Woods requested a specific finding "as to whether the Plaintiff sustained a cumulative or gradual injury to his low back on/about May 23, 2012."

In the October 1, 2013, order ruling on the petition for reconsideration, the ALJ provided the following additional findings of fact:

1. The ALJ finds in accordance with the deposition testimony of Dr. Zerga that the Plaintiff suffered degenerative changes as noted in the MRI report of

January 30, 2013 and that he demonstrated no evidence of anatomical change related to a work injury.

2. The ALJ therefore reiterates the finding that the Plaintiff did not suffer an injury as that term is defined by the Act.

On appeal, Woods asserts the evidence compels a finding of cumulative trauma. Woods argues the deposition testimony of Dr. Jerry Morris is supportive of his cumulative trauma injury claim. Additionally, he argues because Dr. Zerga's opinions pertain to the existence of an acute trauma injury they are not relevant, and the ALJ erred by relying on them.

We take issue with Woods' assertion he "pled, and established, a *repetitive* injury, not a *specific* injury." (emphasis in original). The record is inconsistent with an allegation of that type of injury. A review of the Form 101 reveals no clear indication Woods alleged a cumulative trauma injury claim. The Form 101 merely indicates Woods was injured "due to repetitive lifting." During his October 29, 2012, deposition, Woods described the events of May 23, 2012, as follows:

Four hours into my shift, or a half day into my shift, around 10:00, or somewhere around there- I can't remember exactly whether I was putting the parts in the machine or taking the

parts out of the machine- all of a sudden, I felt sharp pains in my back, and I couldn't move and I couldn't bend and I couldn't pull myself up because I'm kind of tall, about 6'1" or 6'2".

At the June 20, 2013, hearing, Woods confirmed that his deposition testimony regarding the events of May 23, 2012, was accurate. Finally, in his subsequent brief to the ALJ, Woods asserted as follows: "It is the Plaintiff Woods' argument that his injury sustained to his back occurred as a result of the repetitive bending and reaching that was required of his job on May 23, 2012."

In contrast, Woods strongly asserted in his petition for reconsideration that he was alleging a cumulative trauma injury claim. Additionally, questions posed by Woods' counsel to witnesses, particularly in the April 22, 2013, deposition of Dr. Zerga, are consistent with an allegation of a cumulative trauma injury.

That said, in his April 22, 2013, deposition, Dr. Zerga specifically addresses the alleged cumulative trauma injury. Dr. Zerga's testimony, in relevant part, is as follows:

Q: So that's part of it, but also, Doctor, there's two types of preexisting conditions that can be brought in- well, there may be more than two, but the two I'm concerned about right now are the type where you

have a preexisting dormant condition and you have one specific isolated identifiable incident, where you bend over to pick up something or move something, feel a pop and that's when you notice the onset of pain, and I think you would probably agree that doesn't appear to be our case here; correct?

A: Yes.

Q: The other incident is where the nature of the person's work is such that the preexisting condition- the change was they believe sooner than would have been the case had the person had a lighter job, okay, that wasn't as strenuous. In that sense, there maybe isn't the scenario of a specific incident, but it's a gradual trauma that occurs over a period of months, years, weeks, whatever it may be in terms of the type of work they're doing, okay, would this appear to fall- more closely fall into that category, and does that help explain maybe some of the lack of a definite, you know, specific injury report, that sort of problem?

A: Well, you know, you're kind of asking me a legal question. You know, I guess I've always been a bit befuddled by the cumulative trauma argument in Workman's Comp, especially when it comes to things like the back. I think it's a more- conceptually I can understand it better in terms of things like carpal tunnel. But the only thing I can say is that the patient states he didn't have a specific injury. He indicated symptoms going back one month, which means they might have been going back even more than that. The findings on his MRI scan are degenerative, and that we have no

medical records prior to May 23rd, 2012. You know, they might speak in your favor. They might speak to the fact he never had back pain before, but the other side of that argument is it might indicate a long history of back pain. We just don't have records one way or the other, and that, you know, as far as a cumulative trauma argument, given the findings on the MRI scan- I just saw a gentleman from Harlan who had- who's worked in the coal mines for 33 years and as far as any cumulative trauma argument for his back, I certainly might say that there is an argument in that case, somebody who's been crawling around in the mines for 33 years, but this gentleman only worked for M-- is it M-I-S, I'm sorry?

Mr. Jones: yes, M-I-S-A.

A: He only worked for M-I-S-A for five months, so I would be- and the findings that he has on his MRI scan are degenerative and take years and years to occur, so as far as pursuing that argument and saying that it was due to his work at M-I-S-A, I would say that within reasonable medical probability I could not say that was true.

Q: I appreciate that, Doctor, and I think that's probably a fair point. However, I think this gentleman has done- even though he only worked at M-I-S-A for a short period of time, I think his testimony was that he had done this same type of work for most of his occupational life. I mean, if that were the case and he didn't just start doing this kind of work five months ago, and again, we'll leave it to the judge to hash out whether five months in one place is enough time to, you know, catch liability, I think the law says it is, but that's not what I'm

asking you about, I guess the question is, if it's not just five months of work, but it's a period of years, ten years plus, would that be significant enough to change your prior answer?

A: I'm really not really sure what you're asking me. It's really- it's a hypothetical, and I know if your defense you can only ask a hypothetical because you don't have the medical records, but without the medical records there's so many if's ands or buts. I don't know if I can give you an accurate opinion regarding that.

Q: Really the question I was asking right there was, you seemed to- you know, you pointed out that he only worked there five months and you doubted whether that would be enough time to, I guess, aggravate a preexisting condition to the extent that it would become disabling. I guess my question was, you know, let's not limit it to MISA, but let's talk about his entire occupational history of performing that same type of work, you know, the machinist, would that- if you don't limit it to that five months but look at his entire occupational history of that type of work, does that make it more palatable for you to draw that connection?

A: Well, it makes it very hard for me because I don't have the specifics of his entire occupational history. I don't have whether he reported symptoms in the past. I don't know what specific work activity he did-

Q: Assume that it's similar to the work that he reported to you that he did here at MISA?

A: Well, if I'm accurate about the work he did at MISA, he pretty much was working at level- at a level stance turning to the left and right moving parts from one table to the next, not doing a lot of below-the-waist bending, stooping, crawling or crouching, not doing lifting below the waist from the floor, I would think it's extremely unlikely that that type of activity would cause back problems.

Q: I mean, the twisting, repetitive twisting with weight wouldn't impact his spine at all?

A: No, sir. I mean, I have friends that play golf three and four times a week and they don't have any spine problems. In fact, it probably would help your spine, you know. I just can't really say that it's going to cause problems, no, sir. I'm trying to-

More importantly, the following testimony was given by Dr. Zerga regarding an MRI conducted on January 30, 2013:

Q: And, Doctor, prior to your deposition today, did you have an opportunity to review the MRI report dated January 30, 2013?

A: I have looked at it. Of course, to clarify, I did not have it at the time of my evaluation, but I have since looked at it, yes, sir.

Q: And as you review that report, Doctor, there are notations of degenerative changes being present at multiple levels, including L3, L4, L4 and L5 and L5 and S1; is that correct?

A: Yes, sir.

Q: And based on your experience and training, including the review and evaluation of the MRI's, do you have an opinion as to whether or not those degenerative changes and the related changes noted on the MRI preexisted the alleged injury on May 23rd, 2012?

A: Based upon my review of the report and the radiologist's impression- and let's read the impression of the radiologist. She states, 'Lumbar degenerative changes detailed above, most significant radiologically at L4-L5 and L5-S1.' ***So she's saying that there's [sic] degenerative changes. She's not indicating any specific injury pattern, and that would be my opinion as well.***

(emphasis added).

Dr. Zerga's deposition testimony, appropriately limited to the five months Woods worked for MISA, undeniably stands for the proposition that Woods did not sustain a cumulative trauma injury during the five months he worked at MISA. See Southern Kentucky Concrete Contractors, Inc. v. Campbell, 662 S.W.2d 221 (Ky. App. 1983). His testimony also stands for the proposition that it is "extremely unlikely" that Woods' previous work history in metal manufacturing could lead to any kind of a back injury. Dr. Zerga's testimony firmly establishes Woods did not sustain a cumulative trauma injury while working for MISA. More importantly, after reviewing an MRI

conducted on January 30, 2013, Dr. Zerga expressed the opinion Woods suffers from degenerative changes and not from an identifiable injury. Thus, Dr. Zerga's testimony constitutes substantial evidence in support of the ALJ's dismissal of Woods' claim for failure to prove an injury as defined by the Act.

Woods' arguments which are hyper-focused on certain language used by Dr. Zerga regarding the lack of a specific injury occurring on May 23, 2012, are without merit, as Woods ignores the aforementioned testimony in which Dr. Zerga, when questioned by Woods' counsel, directly addressed an alleged cumulative trauma injury.

That said, the ALJ was confused about the type of injury Woods pled. It is clear from the language in the August 15, 2013, Opinion and Order the ALJ believed Woods was pleading a specific injury occurring on May 23, 2012. In the October 1, 2013, order, the ALJ clarifies, that regardless of the type of injury Woods alleges, based on Dr. Zerga's testimony, he concluded Woods did not sustain an injury as defined by the Act.

Accordingly, the August 15, 2013, Opinion and Order dismissing Woods' claim and the October 1, 2013, Order overruling Woods' petition for reconsideration are **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON PHILLIPE W RICH
1437 STORY AVE SIDE
LOUISVILLE KY 40206

COUNSEL FOR RESPONDENT:

HON H DOUGLAS JONES
51 CAVALIER BLVD STE 260
FLORENCE KY 41022

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DR
LEXINGTON KY 40511