Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 1, 2014

CLAIM NO. 201301045

RICHARD KEEN PETITIONER

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

LOUISVILLE GAS & ELECTRIC COMPANY
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING AND REMANDING
* * * * * *

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

STIVERS, Member. Richard Keen ("Keen") appeals from the February 6, 2014, Opinion and Order and the March 10, 2014, Order on Petition for Reconsideration of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). In the February 6, 2014, Opinion and Order, the ALJ dismissed Keen's claim for income and medical benefits after finding it to be non-compensable.

On appeal, Keen asserts the ALJ erred by not finding the work incident aroused pre-existing cervical and lumbar conditions into a disabling reality.

The Form 101 alleges on April 19, 2012, Keen sustained injuries to his neck and back when the bucket truck he was driving while working for Louisville Gas & Electric Company (“LG&E”) was rear-ended.

The December 3, 2013, Benefit Review Conference ("BRC") order indicates the following stipulation: "Plaintiff sustained a work-related injury or injuries on April 19, 2012." The BRC order also indicates a stipulation under "TTD benefits" that Keen did not miss work due to the injury. Finally, the BRC order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; unpaid or contested medical expenses; injury as defined by the ACT; and exclusion for pre-existing disability/impairment. Handwritten under "other" is as follows: "2x; subro credit for 3rd party recovery; med dispute: reasonable & necessity of radio frequency ablation."

In the February 6, 2014, Opinion and Order, the ALJ set forth, in relevant part, the following summary of Dr. Thomas Loeb’s opinions:

At the request of the Defendant Employer Dr. Loeb conducted an independent medical evaluation (IME) on October 15, 2013, by taking a brief history from the Plaintiff, reviewing medical records and conducting a physical examination. Plaintiff's chief complaint was neck pain and low back pain; he gave a brief history of his work as a lineman for LG&E and of the April 19, 2012 work injury and subsequent treatment. He had former neck problems in 2008 but none within the past year of his current injury. He denied prior low back problems. Epidural steroid injections have not helped. He has sharp, stabbing pain, throbbing at times, which can be as high as 9/10 on the pain scale.

Dr. Loeb found longstanding cervical spine and low back multilevel degenerative disc disease, only mildly aggravated on a transient basis from his motor vehicle accident. He had a transient strain of the cervical spine, markedly delayed in onset, and transient strain of his lumbar spine. The two-week delay in onset of cervical spine symptoms would not be considered to be any type of an acute injury or have any relationship to the motor vehicle accident in Dr. Loeb opinion.

Dr. Loeb does think Plaintiff experienced a strain to the lumbar spine, with absolutely no acute injury pattern present as diagnosed by the x-rays at Jewish Hospital. With regards to his cervical spine, pursuant to the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*, Dr. Loeb assessed 0% impairment to the whole person. Regarding the lumbar spine he would be rated with no verifiable radicular complaints, 5% to the whole person, 100% of apportionment

> would be due to pre-existing disease process and 0% to the work injury of April 19, 2012.
>
> Dr. Loeb found no need for further treatment to the cervical spine, lumbar spine, or right wrist, either due to the original work injury of April 19, 2012, or in relationship to his active, pre-existing conditions, particularly regarding the cervical and lumbar spine.
>
> Plaintiff's subjective complaints are consistent with Dr. Loeb's objective medical findings. Basically his symptoms are mild and his physical findings are also minimal and uncomplicated. The work injury resulted in nothing more than a transient aggravation to the lumbar spine, which has long since resolved.
>
> Dr. Loeb specifically disagreed with the opinions of Dr. Barefoot and with Dr. Pratt's recommendation for radiofrequency ablation as he puts no stock in the treatment and finds no measurable results.
>
> Dr. Loeb testified by deposition on December 11, 2013 and did not change his opinion as stated in his report.

(emphasis added.)

The ALJ put forth the following findings of fact and conclusions of law:

> **A. Work-relatedness/Causation; Injury as Defined by the Act.**
>
> **1. <u>Principle of law</u>.**
>
> Under the Act, an injury is "any work-related traumatic event . . . 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). The term "objective medical findings" means clinical findings, observations, and other standardized testing performed as part of a physical examination as well as sophisticated diagnostic tests. *Gibbs v. Premier Scale Co. /Ind. Scale Co.*, 50 S.W.3d 754 (Ky. 2001). A diagnosis complies with the requirements of KRS 342.0011(1) and (33) if based upon symptoms of a harmful change confirmed by means of direct observation and/or testing applying objective or standardized methods. *Id.*

. . .

2. <u>Findings of fact and conclusions of law</u>.

Plaintiff has failed to meet his burden of proving a work related injury/harmful change to a human organism.

3. <u>Evidentiary basis and analysis</u>.

Several factors play a part in this decision. The long list of prior injuries and complaints of pain is significant in spite of Plaintiff's claim he was pain free in the neck and back from 2008 until the work related motor vehicle accident. Another factor is the credible evidence of record strongly supporting the finding Plaintiff's current complaints are the result of nothing but pre-existing degenerative changes. While Plaintiff insists his pain has only been present since the work injury, the past complaints are too many in number to be

counted as insignificant, even though the most prominent documented neck complaints were as far back as 2008. The pain prior to the injury was always related to degenerative changes and the medical evidence strongly supports the finding there is nothing new to cause the current complaints.

Furthermore, the opinions relating Plaintiff's complaints to the work injury are strongly based – if not entirely based - on his subjective complaints. While it is possible Keen suffered a strain on the day of his motor vehicle accident, there is no convincing evidence his condition required treatment of any kind.

Keen's determination to continue working is admirable. Even so, this is added evidence, not only of his very active lifestyle which includes long mule riding trips but also of the many other factors that could lead to his subjective complaints much more believable than the minor event of the motor vehicle accident. It is simply not convincing that this minor event – and not all the other strenuous activities – is the reason for his pain.

Relied upon herein is the opinion of Dr. Loeb which is found to be most consistent as it incorporates the past medical history more thoroughly than the other medical testimony and opinions. While Dr. Barefoot's report has been thoroughly reviewed, his opinion of the pain being due to the work injury is not believable and appears to be based on the history as provided by Plaintiff. It does not account for the significant and ongoing complaints of the same types of the pain though the years.

> The report of Dr. Reiss from 2008 is an example of pain with no specific incident which is most likely what is occurring with Plaintiff at this time.
>
> As the claim is found non-compensable, all other issues are **MOOT.**

Both parties filed petitions for reconsideration. In his petition for reconsideration, Keen asserted the ALJ misinterpreted the medical and lay evidence. Keen also asserted the medical evidence compels a finding he sustained an injury as defined by the Act. Keen requested additional findings of fact as to whether his lumbar condition was a pre-existing active condition or pre-existing dormant condition and whether the motor vehicle accident aroused or aggravated the condition. Should the ALJ find he had a pre-existing active condition, Keen requested “additional information.” Keen also requested the ALJ to "catalogue" the past complaints referenced in reaching her conclusion and whether those complaints related to his lumbar or cervical spine. Finally, Keen submitted the ALJ committed patent error by failing to award indemnification and medical benefits.

In the March 10, 2014, Order on Petition for Reconsideration, the ALJ provided the following:

Defendant Employer's February 13, 2014 petition requests more specific findings specifically:

1. The accident of April 19, 2012 did not cause an "injury" as defined by the ACT.

2. The accident did not cause an arousal of a pre-existing, dormant condition, resulting in a work-related injury.

Page 15 of the Opinion state [sic]:

2. <u>Findings of fact and conclusions of law</u>.

Plaintiff has failed to meet his burden of proving a work related injury/harmful change to a human organism.

With respect to the first point, "a work related injury/harmful change in a human organism" should address the issue of whether Plaintiff's accident resulted in an "injury as defined by the ACT." As it is found there was no work related injury, likewise there is no "injury as defined by the ACT."

Regarding the second point, there is no finding of an arousal of a pre-existing, dormant condition as there is a clearly stated finding of no work related injury/harmful change to a human organism.

Defendant Employer's proposed Order requests specific findings which are set out below and, although worded differently, are actually in line with the findings and conclusions in the Opinion:

1. The first basis for the Defendant-Employer's Petition for Reconsideration is SUSTAINED. This Administrative Law Judge hereby makes a specific finding of fact that the accident of April 19, 2012 did not cause and [sic] "injury" to any body part pursuant to KRS 342.0011(1). This finding of fact is based upon the records of Occupational Physician Services of treatment after the accident, Plaintiff's activities after the accident, including a mule-riding trip, the fact that Plaintiff never lost time form [sic] work after the accident, the records and testimony regarding Plaintiff's pre-existing and active neck and low back conditions, and the testimony and opinions of Dr. Loeb.

2. The second basis for the Defendant-Employer's Petition for Reconsideration is also SUSTAINED. **This Administrative Law Judge is of the opinion that Plaintiff's neck and low back conditions were of a pre-existing and active nature before his accident of April 19, 2012.** However, to the extent Plaintiff had any pre-existing dormant condition in his low back or neck, as he asserts, this Administrative Law Judge further finds that the accident did not cause an arousal or aggravation of any such pre-existing an [sic] dormant condition into a symptomatic or disabling state. This finding is based upon the testimony and opinions of Dr. Loeb and made in accordance with McNutt Const./First Gen. Services v. Scott, 40 S.W.3d 845 (Ky. 2001). (emphasis added).

While these statements in the proposed order do not change the outcome in any way, out of an abundance of caution and for purposes of clarity, they are adopted and made a part of the Opinion.

> Plaintiff contends the ALJ misinterpreted the medical and lay evidence and should have relied on Dr. Barefoot and on the testimony of Plaintiff to find a work-related injury (strain on pre-existing dormant condition). Plaintiff's Petition for Reconsideration amounts to an unauthorized re-argument of the merits of the case. Plaintiff's testimony as well as the opinion of Dr. Barefoot have both been carefully considered and are not relied upon as they are inconsistent with the overwhelming evidence which strongly supports a finding of ongoing pain prior to the injury and numerous causative factors for the prior pain.
>
> **WHEREFORE,** Defendant Employer's Petition for Reconsideration is **SUSTAINED** as set out in paragraphs 1 and 2 on page 2 (above) of this Order. Plaintiff's Petition for Reconsideration is **DENIED.**

On appeal, Keen asserts the evidence compels an award of permanent partial disability.

In the February 6, 2014, Opinion and Order and the March 10, 2014, Order on Petition for Reconsideration, the ALJ indicates that she relied upon the opinion of Dr. Thomas Loeb in concluding Keen was suffering from pre-existing active degenerative disc disease at the time of the April 19, 2012, motor vehicle accident.

In his October 15, 2013, medical report regarding his diagnosis, Dr. Loeb expressed the following opinions:

> First of all, he has a normal right wrist examination, and if he ever had any wrist injury, it was a mild transient strain. As far as his cervical spine and low back, he has longstanding multilevel degenerative disc disease, which was only mildly aggravated on a transient basis from his motor vehicle accident. He had a transient strain of the cervical spine, markedly delayed in onset, and a transient strain of his lumbar spine. As a matter of fact, the delay in onset of his cervical spine challenges the credibility of any injury whatsoever from the motor vehicle accident. A two-week delay in onset of cervical spine symptoms would not be considered to be any type of an acute injury or any relationship to the motor vehicle accident in my opinion. I think he did possibly have a strain to the lumbar spine, but there was absolutely no acute injury pattern present as diagnosed by the x-rays at Jewish Hospital. His MRI findings in June 2012 are consistent with his longstanding preexisting degenerative changes. His intermittent radiculopathy with numbness in the toes is also consistent with his longstanding preexisting condition that was neither caused nor aggravated on a long-term basis by his motor vehicle accident. The mechanism of injury of a rear-end collision vector force in a seat-belted individual would typically not cause any acute pathology to the lumbar spine that would be longstanding or even transient more than a short period of time.

Concerning causation, Dr. Loeb opined as follows:

> I do not think the right wrist has any relationship whatsoever to the motor vehicle accident in question and the

> same is for the cervical spine. He may have sustained a transient strain to the lumbar spine, but I believe symptoms from that injury date have long since resolved the soft tissues have healed. Ongoing symptoms would be due to his longstanding preexisting degenerative condition.

Concerning an impairment rating for the alleged injuries, Dr. Loeb opined as follows:

> Note that he does not have any right wrist symptoms whatsoever and has a normal wrist examination. Therefore, he has a 0% permanent partial impairment rating regarding his right wrist. With regards to his cervical spine, he only complains of pain but has no significant clinical findings, no muscular guarding, no documentable neurologic impairment, no significant loss of motion of segment integrity, and no other indication of impairment related to the injury or illness or the injury in questions [sic]. Therefore, using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 392, Table 15-5, he would fall in DRE Cervical Category I, 0% impairment to the whole person. With regards to the lumbar spine using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 384, Table 15-3, he would be rated with nonverifiable radicular complaints, DRE Lumbar Category II, 5% to the whole person. As far as apportionment, 100% of the apportionment would be due to the preexisting disease process and 0% to the work injury of April 19, 2012.

Later in his report, Dr. Loeb refers to Keen's condition as "*longstanding preexisting, active multilevel*

degenerative disc disease in the cervical and lumbar spine." (emphasis added).

In his December 11, 2013, deposition, regarding the nature of Keen's pre-existing degenerative disc disease, Dr. Loeb testified as follows:

> As far as I'm concerned, degenerative disk disease is an active condition. It's just like diabetes; you can keep it under control, it's always active, it's always there, it's not going away, you can't cure it, but it goes into remission.
>
> So, from a subjective standpoint, you could say it could have been dormant. From an objective standpoint, the condition itself, once you develop this disease process, which is typically congenital, inherited, you've got it.
>
> Obviously, everybody varies. Some people can go years and not have any complaints, and then out of the clear blue they've got an attack of pain. Usually it's caused by some mechanical event which brings it into, you know, at least transient subjective reality, but it varies. Everybody is different.
>
> Q: Do you have any medical evidence in your possession that would indicate his lumbar spine condition was symptomatic from June 10th of 2008 to April 19th of 2012?
>
> A: Not from a medical documentation standpoint, and the only way you would know that is to ask the man, and if he was honest, he would tell you if he had occasional pain, but certainly- as far as I know, nobody documented anything in the interim.

Later in his report, Dr. Loeb defined Keen's condition as "preexisting, active multilevel degenerative disc disease in the cervical and lumbar spine." While there is some inconsistency between Dr. Loeb's opinions as articulated in his report and in his deposition regarding the active nature of Keen's pre-existing condition, where the evidence is conflicting, the ALJ, as fact-finder, has the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Thus, Dr. Loeb's opinions, as set forth in his report, comprise substantial evidence in support of the ALJ's determination to dismiss Keen's claim for permanent income benefits for failure to prove a permanent injury to his lumbar and cervical spine as a result of the April 19, 2012, motor vehicle accident. "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

That said, based upon clear language in Dr. Loeb's report, which the ALJ included in her summary of Dr. Loeb's opinions, Keen sustained a "transient aggravation to the lumbar spine" on April 19, 2012. In KRS 342.0011(1),

an "injury" does not require a *permanent* "harmful change in the human organism." "Injury" is defined as follows:

> [A]ny 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)

The above definition does not require a *permanent* injury. Temporary disabling conditions, as defined in KRS 342.0011(11)(a), are still injuries pursuant to KRS 342.0011(1). In Robertson v. United Parcel Service, 64 S.W.3d 284, 286 (Ky. 2001), the Kentucky Supreme Court stated:

> In other words, the ALJ concluded that the claimant suffered a work-related injury but that its effect was only transient. It resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. Thus, the claimant was not entitled to income benefits for permanent, partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.

Since the rendition of Robertson, this Board has consistently held it is possible for an injured worker to establish a temporary injury for which only temporary total disability benefits and temporary medical benefits may be

awarded, but not meet his or her burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized. Further, pursuant to FEI Installation Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the ALJ may award future medical benefits despite the lack of a permanent impairment rating after providing sufficient reasons for the award.

Significantly, the December 3, 2013, BRC order reflects the parties stipulated a work-related injury occurred. The fact that "injury as defined by the ACT" was also made a contested issue does not negate the fact that this stipulation was entered into, and LG&E never sought relief from it pursuant to 803 KAR 25:010(16)(2). We also note that not only did the ALJ, in her summary of the evidence in the February 6, 2014, Opinion and Order, include Dr. Loeb's diagnosis of a transient strain of the lumbar spine, but by adopting LG&E's proposed language in the March 10, 2014, Order on Petition for Reconsideration, she reiterated her reliance on Dr. Loeb's opinions.

On remand, while the ALJ is not obligated to award Keen future medical benefits, the ALJ must analyze his entitlement to future medicals in a manner consistent with applicable case law. *See* Robertson v. United Parcel Service, supra; FEI Installation Inc. v. Williams, supra.

We affirm the ALJ’s dismissal of Keen's cervical injury claim. While Dr. Loeb's opinions on this issue are somewhat equivocal, he ultimately concluded that the two-week delayed onset of cervical symptoms "challenges the credibility of any injury whatsoever from the motor vehicle accident" and "would not be considered to be any type of an acute injury or [sic] any relationship to the motor vehicle accident."

Accordingly, those portions of the February 6, 2014, Opinion and Order and the March 10, 2014, Order dismissing Keen's cervical claim in its entirety and Keen’s claim for permanent income benefits for his lumbar injury claim are **AFFIRMED**. As it was stipulated at the BRC that Keen did not lose time following the April 19, 2012, incident, the ALJ does not need to determine Keen's entitlement to temporary total disability benefits. However, on **REMAND**, the ALJ must determine Keen sustained a work-related lumbar injury and the extent to which he is entitled to medical benefits including future medical benefits.

ALL CONCUR.

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