

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 17, 2015

CLAIM NO. 201364777

ROBERT REYNA

PETITIONER

VS.

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

PETER KIEWIT SONS INC.
D/B/A THE INDUSTRIAL CO INC.
HO. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION AND ORDER
VACATING AND REMANDING**

* * * * *

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

RECHTER, Member. Robert Reyna ("Reyna") appeals from the February 4, 2015 Opinion and Order and the March 11, 2015 order overruling his petition for reconsideration rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"). The ALJ dismissed Reyna's claim in its entirety, indicating

he was not persuaded Reyna met his burden of proving he suffered an injury as defined by the Workers' Compensation Act or that his current spine condition is causally related to a September 11, 2013 work-related incident. Reyna argues the ALJ erred in assessing the proof and in failing to explain his reasoning in rejecting uncontradicted evidence of a work-related traumatic event. For the reasons set forth herein, we vacate and remand for further findings of fact.

Reyna filed his claim on May 1, 2014 alleging he sustained a back injury on September 11, 2013 while working as a pipefitter for Peter Kiewit Sons, Inc. d/b/a The Industrial Company, Inc. ("Kiewit"). Reyna was walking between two pipes when he lost his footing and fell backwards, hitting his back on a pipe.

Reyna testified by deposition on July 16, 2014. He worked for Precipitator Services from January through October 2005. He indicated he quit working following a lifting injury in 2005. While lifting a heavy pipe, he felt a pop in his low back and experienced pain radiating into his legs. He sought treatment at the Carrollton Hospital emergency room and was referred to a physician at a clinic in Carrollton. He treated with a different doctor for three months before moving back to his home state of Texas.

Reyna initially stated he was off work for a year or a year and a half following the 2005 injury. Later, he confirmed he was off from work from October 2005 through December 2007. Reyna was incarcerated from January 2008 until February 2009 as a result of trafficking in cocaine. He had no additional injuries during his incarceration and received no medical treatment. Reyna testified his back and leg pain following the September 11, 2013 injury was more severe than what he experienced following the 2005 injury, and was lower in his back.

At the hearing held December 5, 2014, Reyna testified he hurt his low back while lifting in 2005. He acknowledged he received workers' compensation benefits until he was incarcerated in 2008. Surgery was discussed. It was his understanding surgery would be necessary if his condition did not improve. However, his condition was improving prior to his incarceration and completely resolved while he was imprisoned. Reyna never filed a claim for the 2005 injury. After his release, he was not receiving medical treatment. He denied any back pain at the time of his release.

Following his release, Reyna resumed work as a pipefitter, working as much as fifty-eight hours per week, and did not miss any work. He received no medical treatment

for his back until the 2013 injury. Since the 2013 injury, Reyna has experienced back pain every day. He had pain in his left leg following the 2005 injury. Now, he has pain in both legs that is worse than what he experienced in 2005. Reyna estimated he can sit for approximately forty minutes and can stand with the ability to walk for approximately forty-five minutes. He cannot twist and has pain if he bends his back.

Reyna submitted records from Commonwealth Orthopedics. He was seen for consultation by Dr. Richard M. Hoblitzell on October 15, 2013 and for a second opinion on October 18, 2013 by Dr. Raj V. Kakarlapudi. Both doctors recorded a history of the 2013 work injury. Dr. Hoblitzell diagnosed a central disc herniation at L5-S1. Dr. Kakarlapudi's impression was severe central canal stenosis L5-S1 and to a lesser extent L4-5, with a large disc herniation L5-S1 causing severe stenosis and bilateral inside of the thigh numbness with progressive worsening of symptoms. Dr. Kakarlapudi ultimately performed microlumbar discectomy bilaterally at L5-S1 and open central decompression at L4-5 and L5-S1 on November 18, 2013. He noted there was a large disc herniation causing impingement of the nerve root bilaterally at L5-S1.

Reyna filed records from Carroll County Hospital documenting treatment from September 13, 2013 through October 7, 2013. An MRI revealed a large central extrusion at the L5-S1 level resulting in severe thecal sac compression and sacral nerve root effacement.

Kiewit submitted an October 13, 2005 record from Carroll County Hospital indicating Reyna was seen in the emergency room on that date. The record is largely illegible.

In addition, Kiewit submitted significant evidence regarding Reyna's treatment following the 2005 lifting incident. Reyna was seen on November 1, 2005 at King's Daughters Medical Center for complaints of low back pain radiating to his left leg. He was diagnosed with left radiculopathy with low back pain. A November 22, 2005 note indicates Reyna had a worsening of symptoms after physical therapy. An MRI was obtained that revealed a minimal disc bulge at L4-5 and a 5mm disc bulge at L5-S1 which moderately attenuates the ventral epidural space and is associated with mild effacement of the underlying dural margin.

Kiewit also submitted the December 12, 2005 report of Dr. Dante Morassutti who saw Reyna for a consultation. Dr. Morassutti noted Reyna had back pain and left leg pain. Dr. Morassutti diagnosed an L5-S1 disc herniation with left

S1 monoradiculopathy. On January 30, 2006, Reyna reported bilateral leg pain in a combination of an L5 and S1 distribution. Dr. Morassutti added a diagnosis of right displacement of lumbar L4-5 disc without myelopathy. In a September 25, 2006 note, Dr. Morassutti indicated all conservative treatment options had been exhausted without significant benefit. A left L5-S1 lumbar microdiscectomy was suggested.

Dr. Fernando Avila saw Reyna for a consultation on April 18, 2006. Dr. Avila recommended lumbar epidural injections and obtained a lumbar myelogram that revealed a ventral defect with effacement of the left nerve root sleeve at L5-S1.

Kiewit submitted the December 20, 2006 report of Dr. Richard Mortara. Dr. Mortara reviewed extensive medical records and diagnostic studies. He diagnosed a herniated L5-S1 disc and recommended a discectomy.

Kiewit submitted the March 6, 2007 report of Dr. Wayne Villanueva who noted surgery had been approved following an independent medical evaluation ("IME"). Dr. Villaneuva dismissed Reyna as a patient on January 3, 2008.

Kiewit filed medical records of King's Daughters Medical Center. On September 12, 2013, Reyna was seen for

complaints of back pain and gave a history of the September 11, 2013 incident.

Kiewit filed reports from Dr. Ronald J. Fadel who performed an IME on July 24, 2014. Reyna complained of back pain with radiation into both legs and tingling in the lateral three digits of his left foot. Dr. Fadel recorded a history of the 2013 incident and subsequent treatment. He also noted a past history of a 2005 back injury after lifting a support while employed by a different company. Reyna reported that, after his incarceration, he felt he was better and returned to work without problems until the 2013 incident. Dr. Fadel diagnosed status post lumbar laminectomy/discectomy with residual left S-1 radiculopathy; degenerative disc disease and spondylosis aggravated by morbid obesity and deconditioning. Dr. Fadel opined the condition was proximately caused by the 2013 work incident. He stated:

The temporal feature in this case establishes after the fall the examinee experienced acute onset of low back pain, followed thereafter by objective imaging verification of a severely displaced disc at the L4-5 and L5-S1 levels associated with examination findings of the corresponding neuropathy. This, superimposed upon a pre-existing congenitally narrowed spinal canal and perhaps pre-existing degenerative disc disease arising from his previous back injury.

Dr. Fadel opined Reyna had sustained a harmful change to the human organism proximately caused by an acute trauma at work and assigned a 10% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition.

In a September 8, 2014 supplemental report, Dr. Fadel indicated he reviewed records concerning treatment from 2005 through 2007 with the Carroll County Memorial Hospital, King's Daughters Medical Group, Louisville Neuroscience Center/Dr. Villaneuava, and Drs. Kelly, Mortara, Avila and Morassutti as well as 2014 treatment record from Dr. Tayeb. Dr. Fadel opined Reyna's low back and left lower extremity condition was not proximately caused by the 2013 work incident. He observed Reyna sustained an exacerbation of his pre-existing disc disease, but the subject work injury was not the cause of his problem. Dr. Fadel opined the pathology is the result of the 2005 work injury superimposed upon a congenitally small spinal canal and pre-existing spondylosis. He reconfirmed his prior 10% impairment rating but stated none of the rating would be assigned to the 2013 injury.

Records from the Department of Workers' Claims indicate temporary total disability benefits were paid for

the 2005 injury from October 21, 2005 through December 30, 2007.

At the final hearing, Reyna was cross-examined about the 2005 lifting incident. Specifically, he was questioned regarding Dr. Morassuti's records and indicated he did not remember Dr. Morassutti recommending surgery. Reyna acknowledged Dr. Mortara recommended discectomy surgery but denied that anyone told him surgery was approved prior to his incarceration. He confirmed a term of his probation was that he not take narcotic drugs. Reyna indicated he told Dr. Kakarlapudi about a small injury in the past, but did not report he had been off work for two years as a result of that injury. At the time of the hearing, Reyna was taking Percocet and Gabapentin.

The ALJ's relevant findings are as follows:

The Plaintiff argues that he has met his burden of proving that he suffered an injury as defined by the Act on September 11, 2013, which caused his current lumbar spine condition and the need for surgical repair and medical treatment. The Plaintiff has submitted medical proof from Dr. Kakarlapudi which indicates that this doctor feels that the Plaintiff's current lumbar spine condition and the need for the surgery that he performed was caused by the September 11, 2013, work-related accident. However, it does not appear that the Plaintiff's treating physicians were given the history of the Plaintiff suffering work-related injury to his

lumbar spine in 2005, for which surgery was recommended, nor did any of his physicians have the opportunity to review the Plaintiff's medical records regarding the treatment he received from 2005 to 2008.

The Defendant Employer has argued that the Plaintiff has been deceptive throughout this claim and has purposely attempted to conceal any evidence regarding his 2005 injury. They argue that this is indicated by a close look at his Form 101 and 104 which were filed by him to initiate this claim neither of which contained any documentation setting forth that the Plaintiff had a prior back injury.

In fact, the Plaintiff denied any prior back injuries to his doctors as indicated by their medical records indicat[ing] no prior injuries and the Plaintiff initially denied any prior back injuries in his deposition. It was not until the final hearing in this matter when the Plaintiff was confronted with the medical records regarding his prior injuries and medical treatment that he admitted to it yet attempted to play it down by stating the condition had completely resolved by the time he was incarcerated in 2008. The Plaintiff testified that his condition spontaneously resolved after he was incarcerated in 2008 and when he got out of prison he returned to work as a pipe fitter without restrictions. The Plaintiff argues that this is clearly evidence that his prior back condition had completely resolved and is no longer symptomatic.

The Defendant Employer had the Plaintiff evaluated by Dr. Ronald Fadel. Dr. Fadel initially saw Plaintiff in July of 2014. Based upon his

examination of the Plaintiff and review of limited medical records, which did not include any records regarding the Plaintiff 2005 work-related back injury and subsequent treatment, opined that the Plaintiff did suffer a work-related injury on September 11, 2013, as alleged by him.

Thereafter Dr. Fadel was supplied the medical records from Dr. Mortara, Dr. Villaneuva, Dr. Morassuti, and [Dr.] Kelly reflecting the treatment the Plaintiff received as a result of the 2005 injury which indicated that he suffered a herniated disc at L5-S1 and for which surgery was recommended, and as a result amended his findings to set forth a diagnosis of status post exacerbation of pre-existing L5-S1 discopathy with displacement of the neural root compression and left lower limb radiculopathy. Dr. Fadel opined that while the Plaintiff did sustain an exacerbation of his pre-existing disc disease, the subject work injury is not the proximate cause of his current problems. The records reviewed at this time clearly and indisputably establish this to be the case. Dr. Fadel was adamant in his opinion that Mr. Reyna's pathology is a result of his October 10, 2005, work injury superimposed upon the congenitally small spinal cord and pre-existing spondylitis and is not the result of the September 11, 2014, [sic] work-related incident.

In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge is simply not persuaded that the Plaintiff has met his burden of proving that he suffered an injury as defined by the Act and that his current lumbar spine condition is causally related to the September 11, 2013, work-related

incident. The Plaintiff's story has been inconsistent and the fact that he, in the undersigned Administrative Law Judge's opinion, purposely tried to conceal any evidence of the 2005 work-related incident makes the Plaintiff's testimony in this claim less than credible.

In so finding, the Administrative Law Judge is persuaded by and relies upon the opinion of Dr. Fadel, who opined after having the opportunity to review all of the Plaintiff's medical records regarding his treatment both before and after the occurrence of the September 11, 2013, work-related incident, that the Plaintiff suffered post exacerbation of pre-existing L5-S1 discopathy with displacement of the neural root with compression and left lower limb radiculopathy. The Administrative Law Judge specifically does not find the opinion of Dr. Kakarlapudi, Dr. Devarajan, or Dr. Tayeb's [sic] persuasive as none of these physicians were supplied any history or medical records regarding the Plaintiff's treatment as a result of his 2005 work-related low back injury to be considered when rendering their opinions.

Therefore, having failed to meet, to the satisfaction of the trier of fact, their burden of proving that the Plaintiff suffered a work-related injury and that his current lumbar spine condition is causally related to the events of September 11, 2013, the Plaintiff's claim for Workers' Compensation benefits shall be dismissed in its entirety.

Reyna filed a petition for reconsideration raising the same arguments he makes on appeal. By order dated March

11, 2015, the ALJ overruled the petition for reconsideration as a re-argument of the merits of the claim.

On appeal, Reyna argues the ALJ erred in assessing the evidence, leading to a gross injustice, by concluding he failed to disclose the 2005 back injury until he was confronted with evidence of the injury at the hearing. Reyna acknowledges his Form 101, filed May 1, 2014, and supporting work history did not disclose the 2005 injury. However, he filed revised medical and work histories and a notice of correction on June 26, 2014. Further, he was questioned at his July 16, 2014 deposition regarding prior injuries and acknowledged the 2005 injury, that he had an MRI, and that he was off work for two years as a result of the injury. Reyna notes he supplied all of the medical records concerning the 2005 injury filed by Kiewit.

Reyna further contends the ALJ erred in failing to explain his reasoning in rejecting uncontradicted evidence of a work-related traumatic event on September 11, 2013. Reyna notes Kiewit never disputed the occurrence of the fall on his back. While there was a prior injury in 2005, there are no medical records for the six year period between 2008 and 2013 to support a finding that he had active symptomatology immediately prior to the 2013 injury. The only evidence concerning his symptoms immediately prior to

the work injury is his own testimony that he was asymptomatic and had not treated for years prior to the injury. He was physically able to perform regular duty as a pipefitter, averaging fifty hours per week prior to the 2013 injury. Reyna believes the ALJ's rejection of this testimony was based upon the mistaken conclusion he lied about or concealed the occurrence of the 2005 injury in his deposition testimony.

The parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. See Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Co., 788 S.W.2d 269 (Ky. 1990). We are not fully convinced the ALJ properly understood the evidence concerning the disclosure of Reyna's 2005 injury and subsequent treatment. Out of an abundance of caution, particularly because the ALJ's decision largely turned on Reyna's credibility, we find it necessary to vacate and remand for additional fact-finding.

Contrary to the ALJ's ruling, Reyna disclosed the 2005 injury prior to his deposition through the filing of his corrected Forms 101, 104, and 105. Kiewit was aware of the injury even prior to that, as evidenced by reference to the injury in its motion for more definite medical and employment history filed May 30, 2014. Kiewit questioned Reyna at the deposition and he answered questions regarding the 2005 injury. He acknowledged the 2005 injury kept him off work for two years. Reyna's testimony at the hearing was consistent with his deposition testimony. In this instance, it appears the ALJ based his determination that Reyna was not credible on an incorrect understanding of his deposition testimony, and to have discounted Reyna's testimony on all issues based upon that incorrect understanding.

The absence of any indication that Reyna received medical treatment for his back condition from 2008 until his injury and the fact he worked fulltime, and often overtime, performing the regular duties of a pipefitter from 2009 until the 2013 incident is certainly evidence that might convince some, perhaps even many, to conclude Reyna's back condition was not an active condition immediately prior to the work injury, or that the injury necessitated or hastened the need for the surgery that was performed. Thus, the ALJ

could conclude the 2013 incident caused some, if not all, of Reyna's impairment. Additionally, the fact that Reyna did not file a claim for the 2005 injury might be considered corroboration of the improvement of his prior condition.¹ This evidence could form the basis for rejection of Dr. Fadel's opinion in his supplemental report that the 2013 incident was not the proximate cause of Reyna's current condition.

On the other hand, while there may be evidence Reyna sustained an injury on September 11, 2013, we cannot say the evidence compels a finding the 2013 incident produced a permanent harmful change. Although Dr. Fadel stated in his final report that Reyna's current condition was not proximately caused by the 2013 injury, he did find Reyna sustained an exacerbation of his condition. The ALJ should have specifically addressed whether Reyna sustained a temporary injury for which temporary benefits may be due. See Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001).

In light of the conflicting evidence, we do not direct any particular finding on remand. Rather, because a correct understanding of the evidence and Reyna's testimony

¹ Reyna could have file a claim for the prior injury within two years of December 30, 2007 when TTD benefits were last paid.

is necessary, we vacate and remand for additional consideration or explanation.

As a final matter, Reyna's request for oral argument is **DENIED**.

Accordingly, the February 4, 2015 Opinion and Order and the March 11, 2015 order denying petition for reconsideration rendered by Hon. R. Scott Borders, Administrative Law Judge are **VACATED** and this matter is **REMANDED** for additional findings and a decision consistent with the views expressed herein.

STIVERS, MEMBER, CONCUR.

ALVEY, CHAIRMAN, CONCURS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I concur with the majority. This claim should be remanded for the Administrative Law Judge to make a determination of whether there was a temporary injury and if so, any appropriate period of temporary total disability benefits and/or medical benefits. I disagree with the majority regarding the remainder of the opinion in that the ALJ properly set forth the basis for his decision which is supported by the evidence.

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