Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 27, 2015

CLAIM NO. 201169189

TAMEIRA SMITH BRIM PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

TOYOTA MOTOR MANUFACTURING KENTUCKY, INC.
DR. TRAVIS HUNT
DR. ROBERT E. CULBERTSON
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Tameira Smith Brim ("Brim") appeals from the Opinion and Order rendered October 27, 2014 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"), overruling her motion to reopen for a worsening of her condition, and sustaining Toyota Motor Manufacturing's

("Toyota") motion to reopen challenging a cervical fusion surgery recommended by Dr. Travis Hunt. Brim also seeks review of the December 1, 2014 order denying her petition for reconsideration.

On appeal, Brim argues the ALJ erred in finding her current cervical condition unrelated to the original February 24, 2011 work injury. Because substantial evidence supports the ALJ's determination, and no contrary result is compelled, we affirm.

Brim sustained a work-related injury on February 24, 2011, while working as a team member for Toyota. The parties settled the claim. The Form 110 settlement agreement, approved by an Administrative Law Judge on November 22, 2011, was based upon a 5% impairment rating for a diagnosis of "neck strain." The agreement noted Dr. James Owen assessed a 5% impairment rating. Toyota did not pay temporary total disability benefits since Brim missed no work. Brim did not waive her right to future medical benefits or her right to reopen.

On March 29, 2013, Brim filed a motion to reopen alleging a worsening of condition, and an increase in her disability. Brim attached an affidavit to her motion stating her condition had deteriorated since the claim was settled, and her treating physician now recommended fusion

surgery for a C5-C6 disc herniation. She also attached the February 21, 2013 medical note of Dr. Hunt, who stated Brim had a work-related injury two years prior, and has experienced neck and left arm pain off and on since that time. He noted Brim complained of neck and left arm pain extending into her thumb, index and middle fingers. Dr. Hunt reviewed a cervical MRI and diagnosed a C5-6 disc herniation, and recommended an anterior cervical discectomy and fusion at that level. On May 30, 2013, Dr. Hunt confirmed the need for fusion surgery after noting Brim continued to have symptoms radiating into her fingers.

Toyota filed a motion to reopen and medical dispute on May 13, 2013 challenging the cervical fusion surgery recommended by Dr. Hunt as neither reasonable nor necessary. In support of it motion, Toyota attached the physician review report of Dr. Carl Lauryssen and report of Dr. Robert Sexton. Dr. Hunt was subsequently added as a party by order dated August 26, 2013.

On May 30, 2013, the Chief Administrative Law Judge found both parties had set forth a *prima facie* case for reopening, and sustained the motions to the extent the claim was assigned to an ALJ for further adjudication. The contested surgery was performed on September 4, 2013. The claim was placed in abeyance pending attainment of maximum

medical improvement ("MMI"). The claim was later removed from abeyance by order on March 20, 2014.

Brim testified by deposition on July 31, 2013 and at the hearing held August 27, 2014. On February 24, 2011, Brim experienced neck and left arm pain as she was shooting roof brackets into a car while working for Toyota as a team member on the assembly line. Brim treated at Toyota's in-house medical facility, and received physical therapy. Brim testified she continued to work for Toyota during her course of treatment performing light duty tasks. She testified following her injury, she returned to work but to a different part of the assembly process which required less overhead work. At some point, Brim was released to regular duty with no restrictions. Brim confirmed her claim was settled in November 2011. She continued to work at Toyota, but was never pain free, and took Ibuprofen.

In approximately July 2012, Brim applied for and became a team leader on the door line. Because the robots frequently broke down, Brim was required to lift and carry heavy car doors. Brim stated her pain intensified after she became a team leader on the door line. She eventually returned to the in-house medical facility, which referred her to Dr. Hunt. He in turn recommended surgery, which was performed on September 4, 2013. The surgery was denied by

workers' compensation. Brim testified she returned to work to the same position after her surgery in June 2014. Brim indicated her co-workers usually lift doors for her. Brim stated the surgery was beneficial, but did not completely resolve her pain.

Toyota filed three cervical MRI reports. The first was done on April 8, 2011, shortly after the original February 24, 2011 injury. The MRI demonstrated spondyloarthotic changes at C6-7 with a mild broad based disc bulge causing mild narrowing of the spinal canal and neural foramina bilaterally, as well as Chiari I malformation. The C2-3, C3-4, C4-5, C5-6 and C7-T1 levels were normal.

The second MRI was done on July 2, 2012. At the C5-6 level, it found broad based posterior disc osteophyte complex causing mild spinal canal narrowing which has progressed since April 2011. At C6-7, it showed a broad based posterior disc osteophyte complex causing mild bilateral neuroforaminal and spinal canal narrowing which is stable since April 2011. The overall impression was "1) mild spondyloarthrotic changes at the C5-C7 levels causing mild spinal canal narrowing at the C5 through C7 levels and mild bilateral neuroforaminal narrowing at the C6-C7 level. The spinal canal narrowing at the C5-C6 level has progressed

since April 2011" and 2) mild Chiari I malformation. The third MRI, done February 8, 2013, showed spondylosis, not significantly changed from the prior study, Chiari I malformation, and posterior extradural defect of low T1 and T2 signal at T3.

Brim filed the August 12, 2013 certification recommendation with physician review by Irene Slater, RN, BSN, CCM, Nurse Reviewer. After reviewing the medical records, Ms. Slater found a clear clinical indication for the proposed surgery, and recommended certification for the procedure.

Brim also filed Dr. Owen's May 12, 2014 report which summarized the February 2011 work injury and subsequent treatment. He noted Brim began experiencing severe neck pain in 2012 after starting on the door line, which required heavy lifting. Dr. Owen diagnosed status post C5-6 fusion with fairly good outcome, but some persistent non-verifiable radicular symptomology. Dr. Owen left blank the question "Within reasonable probability, was plaintiff's injury the cause of her complaints." Under the question, "If the employee sustained more than one injury, which is the cause of her complaints," Dr. Owen wrote:

> Within a reasonable medical probability, the patient's injury was the cause of her complaint.

> Any part due to natural aging: No.
>
> Any part preexisting, dormant, nondisabling: Yes. She had degenerative changes shown on MRI

Under explanation of causal relationship, Dr. Owen stated, "by repetitive excessive torsion and torque to her cervical spine." Dr. Owen assessed a 26% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides"). Dr. Owen stated Brim has attained MMI. He opined she does not retain the physical capacity to return to her former job on the door line and assigned restrictions.

Attached to its motion to reopen, Toyota filed the May 7, 2013 physician review report of Dr. Lauryssen. He opined the proposed fusion surgery was not medically necessary since no radicular findings were documented on examination in the medical records he reviewed.

Toyota also filed Dr. Sexton's April 16, 2013 report. He diagnosed Brim with cervical spondylosis at C5-6 and C6-7 and Chiari I malformation. Dr. Sexton opined Brim's current neck, arm and hand complaints are unrelated to the claimed work injury of 2/24/11 because 1) she had a cervical spine MRI in April 2011 showing a mild wear-and-tear degeneration at C6-7; 2) a subsequent cervical spine

MRI revealed the degenerative changes had progressed to involve the C5-6 level; 3) all of the degenerative changes are mild in nature; and 4) her MRIs reveal "a disc protrusion; (degeneration). They do not reveal a disc herniation (trauma)."

Dr. Sexton opined the proximate cause of Brim's cervical spondylosis is age-appropriate wear and tear. He also noted the Chiari I malformation was caused by an embryological problem prior to birth. Dr. Sexton opined Brim's current complaints could most certainly be caused by the malformation, and noted on examination she had no indication of cervical radiculopathy. Dr. Sexton recommended NSAIDS, and a home exercise program. Dr. Sexton disagreed with the proposed surgery since fusion is not recommended treatment for cervical spondylosis, there is no evidence of radiculopathy or cervical instability, Brim is working full time without difficulty, and she is a smoker.

Dr. Sexton also testified by deposition on September 19, 2013. He opined the April 8, 2011 MRI, taken after the original February 2011 injury, showed mild spondylosis at C6-7, which is normal for Brim's age, as well as mild Chiari I malformation. He testified the July 2, 2012 MRI showed a tiny bulge at C4-5 and a "broad based disc osteophyte complex" at C5-6 and C6-7. Dr. Sexton explained

a disc osteophyte complex is a bone spur and protrusion of the disc. Dr. Sexton opined the bone spur was not caused by the injury, and agreed it was not even present on the April 8, 2011 MRI. Dr. Sexton opined the proposed anterior cervical fusion at C5-6 is to correct morphological abnormalities at that level, and was not caused by her work injury.

Dr. Sexton diagnosed Brim with cervical spondylosis with some disc degeneration at C5-6 and C6-7 and Chiari I malformation. Dr. Sexton stated the malformation is unrelated to Brim's current symptoms. Dr. Sexton emphasized the surgery proposed by Dr. Hunt is neither reasonable nor necessary because her morphological changes are related to disc degeneration and spondylosis, conditions for which fusion is excessive and unnecessary; and Brim has no clinical evidence of radiculopathy, cord dysfunction or myelopathy. Dr. Sexton also noted in smokers, there is a 10-40% "enhanced chance" of non-fusion and Brim reported she is working full time without great difficulty.

Toyota filed Dr. Michael Best's July 15, 2014 report. He also testified by deposition on August 11, 2014. In his report, Dr. Best noted he had reviewed the medical records and treatment history since the original injury in February 2011. Dr. Best noted his examination showed no

evidence of cervical radiculopathy or myelopathy. He reviewed the medical records, including the MRIs, and concluded:

> [T]herefore, clearly the MRI of the cervical spine demonstrates progressive degenerative changes (arthritis) in the neck, but no evidence of acute process such as disc herniation from a work injury. There was no episode of a specific trauma event to the cervical spine.

Dr. Best opined Brim had attained MMI from the September 2013 fusion surgery. He assessed a 25% impairment rating pursuant to the AMA Guides, of which he apportioned 5% to the prior February 2011 injury and resulting November 2011 settlement. He recommended no additional treatment, and as to causation, Dr. Best stated as follows:

> The question remains as to whether this is a work-related condition. Clearly, there was no specific trauma event that resulted in an acute abnormality such as disc herniation, nerve root impingement, radiculopathy, or myelopathy. The patient demonstrates progression of degenerative arthritis by her serial MRI scans. Degenerative disc disease is not a work-related condition (when there has been no specific traumatic event/injury) . . . . Therefore, the spine degenerative changes are considered hereditary and without specific trauma, not work related.

Dr. Best's deposition testimony was consistent with his report. He testified Brim underwent fusion surgery

on September 4, 2013 due to a cervical disk osteophyte complex at C5-6, which was producing weakness in the wrist extension consistent with a C6-7 disk herniation. He explained a disk osteophyte complex is most commonly seen with the natural aging process of degenerative arthritis and degeneration of the disc, and is basically the formation of bone spurs as a disc collapses.

Dr. Best testified an osteophyte complex can be caused by an injury if there was, for instance, a fracture due to injury. In Brim's case, Dr. Best testified there was nothing in the injury description of February 24, 2011 to indicate a specific trauma resulting in a fracture of the cervical spine which would have created an osteophyte or spur. Like Dr. Sexton, Dr. Best also opined the Chiari I malformation is not related to her current symptoms, and does not cause disk herniation or arthritis. However, the formation could explain her neck pain.

Dr. Best opined Brim recovered well following the February 2011 work injury. He noted a June 14, 2011 medical note reporting Brim had no pain and was back to full duty. Approximately a year later, on July 2, 2012, a cervical MRI showed a progression of the disk osteophyte complex since the April 2011 MRI at the C5-6 level. He testified as follows:

> A: Yeah. There was--now what we're looking at is there was a very significant spur formation that was present that was again occupying space in an area where there's not a whole lot of extra space.
>
> Q: Okay. And was this finding in any related or aggravated or aroused or caused by her 2011 injury?
>
> A: No. It is unrelated to the February 24, 2011, complaint or injury

The August 5, 2014 benefit review conference order identified the issues as benefits per KRS 342.730, "work-relatedness/causation of M Dispute," and temporary total disability. Under "other," the ALJ noted, "1) MD included in claim + 2) a re-opening on increased impairment 3) parties stipulated 5% WPI as result of initial injury.

In the October 27, 2014 opinion, the ALJ noted the main issue is causation. He reviewed the three MRIs, as well as the reports and testimony of Drs. Sexton and Best. He also reviewed the report of Dr. Owen, and found several defects in his report, stating as follows:

> There are problems with Dr. Owen's input. In Section H., titled "CAUSATION" Dr. Owen was asked to indicate "Yes" or "No" to the question, "Within reasonable medical probability, was Plaintiff's injury the cause of her complaints?" Dr. Owen did not answer this question. The next question asked, "If the employee sustained more than one injury, which is the cause of her complaints?" Though Plaintiff did not

> sustain more than one injury, Dr. Owen's response was, "within reasonable medical probability, the patient's injury was the cause of her complaint."
>
> When the Form 107 asked for an explanation of his opinion regarding the causal relationship, Dr. Owen wrote, "by repetitive excessive torsion to her cervical spine." Plaintiff did not claim a repetitive type injury, Plaintiff described her February 24, 2011 incident, "I was shooting a bolt into the roof of the car, and I had to back it out. And when I put it back in I had to look at and I felt a pain shooting through my neck - - up my arms and up through my neck." (Depo., p. 7) Plaintiff's injury, according to her own description, was a single acute event, not the result of "repetitive excessive torsion to her cervical spine." Dr. Owen's explanation of the causal relationship describes a cumulative trauma type injury involving repetitive excessive torsion and torque. Dr. Owen and Plaintiff seem to be addressing two entirely different types of injury.
>
> As indicated, There [sic] are significant and serious defects with Dr. Owen's input regarding the causal relationship linking Plaintiff's symptoms to her February 24, 2011 acute injury. Due to the above noted deficiencies, Dr. Owen's input is given little weight.

The ALJ noted Ms. Slater's report and Dr. Hunt's records do not address the issue of causation for the fusion surgery. He then stated,

> There seems to be little dispute the ACDF surgery is likely appropriate for the condition of Plaintiff's neck, but it has not

> been shown the status of her cervical spine is due to her February 24, 2011 work incident.
>
> Several of the involved medical practitioners indicate ACDF surgery is appropriate, but none provide sufficient input, if any, the surgery is needed due to her work injury. Included within this group, in addition to Dr. Hunt, and PA – C Jones is Irene Slater, . . . and Dr. Carl Lauryssen, M.D."

The ALJ concluded Brim failed to present proof linking her alleged increased impairment, and requested cervical fusion surgery, to her work and/or to her work injury of February 24, 2011. The ALJ again noted "Dr. Owen's input is riddled with imperfection, so much so that little, if any, weight is given to his input."

> In contrast, Defendant's Drs. Best and Sexton's input is based on an accurate and complete understanding of the situation. These explanations why Plaintiff's work injury is not the cause of her increased impairment, if any, nor the cause of her need for the requested (and performed) surgery are well reasoned and set forth. In formulating their opinions they rely on the objective black-and-white of the successive MRI studies. It is hard to question what black and white diagnostic test results clearly show.

Therefore, the ALJ overruled Brim's motion to reopen, and sustained Toyota's motion to reopen contesting the reasonableness, necessity and work-relatedness of her

requested spine injury. The ALJ specifically stated Toyota is not obligated to provide medical benefits for the cervical spine surgery.

Brim filed a petition for reconsideration raising the same arguments it now makes on appeal. The petition for reconsideration was denied in an order issued on December 1, 2014.

On appeal, Brim argues she has met her burden in proving her current condition is causally related to the original work injury. Brim argues the series of cervical MRIs demonstrate a change in condition establishing an injury as defined by the Act, and the opinion of Dr. Owen establishes causation. Brim testified her continued employment with Toyota following her February 2011 injury and November 2011 settlement aggravated her condition. Brim also argues the ALJ misunderstood Dr. Owen's opinion, and erred in "failing to distinguish between the act that caused the original injury and repetitive acts that caused that condition to worsen."

Notwithstanding C & T Hazard v. Chantella Stallings, et al., 2012-SC-000834-WC, 2013 WL 5777077 (Ky. 2013), an unpublished case from the Kentucky Supreme Court, a long line of reported decisions establish in a post-award medical fee dispute, the employer bears both the burden of

going forward and the burden of proving entitlement to the relief sought, except that the claimant bears the burden of proving work-relatedness. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Since Brim was unsuccessful in proving her current cervical condition, including the contested surgery, are causally related to the original work injury, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Brim's appeal amounts to a request to the Board to re-weigh the evidence, and reach a result contrary to that of the ALJ. This we may not do. As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The ALJ outlined the facts, reviewed all medical and lay evidence, and provided the basis for his decision. The ALJ was presented with conflicting reports regarding causation, ultimately rejected the opinion of Dr. Owen, and provided his basis for doing so. The ALJ found the opinions of Drs. Best and Sexton most persuasive in their explanations of why Brim's work injury is not the cause of her increased impairment, if any, or her need for the contested surgery. These opinions constitute substantial evidence supporting the ALJ's determination. Although evidence exists supporting Brim's position, it merely presents a contrary viewpoint upon which the ALJ could have relied, but did not, and a different result is not compelled. Here, the ALJ's decision is well reasoned, and is supported by the evidence.

Accordingly, the October 27, 2014 Opinion and Order, and the December 1, 2014 order denying the petition for reconsideration by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON R JOHNSON POWELL
1795 ALYSHEBA WAY, STE 6101
LEXINGTON, KY 40509

COUNSEL FOR RESPONDENT:

HON KENNETH J DIETZ
1511 CAVALRY LN, STE 201
FLORENCE, KY 41042

OTHER RESPONDENTS:

DR TRAVIS HUNT
101 WINDSOR PATH
GEORGETOWN, KY 40324

DR ROBERT E CULBERTSON
1138 LEXINGTON ROAD, STE 209
GEORGETOWN, KY 40324

ADMINISTRATIVE LAW JUDGE:

HON OTTO DANIEL WOLFF, IV
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601