

OPINION ENTERED: FEBRUARY 22, 2013

CLAIM NO. 201093949 & 200798912

TRANSERVICE LOGISTICS, INC.

PETITIONER/
CROSS-RESPONDENT

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

MICHAEL ZINK,
KROGER COMPANY,
and HON. CHRIS DAVIS
ADMINISTRATIVE LAW JUDGE

RESPONDENTS/
CROSS-PETITIONERS

RESPONDENT

OPINION
AFFIRMING

* * * * *

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

SMITH, Member. Transervice Logistics, Inc. ("Transervice") appeals from the April 6, 2012 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"), and from the May 11, 2012 order on reconsideration.¹ The ALJ found Michael Zink ("Zink")

¹ Kroger filed a notice of cross-appeal on June 25, 2012 but filed a "Notice of Withdrawing Cross Appeal" on July 23, 2012. Zink filed a

sustained work-related injuries on December 30, 2006 while employed by Kroger Company ("Kroger") and on July 6, 2009 and December 6, 2009 while employed by Transervice. Transervice argues the ALJ failed to make findings regarding the application of the direct and natural consequence rule and the holding in Calloway County Fiscal Court v. Winchester, 557 S.W.2d 216 (Ky. App. 1977). Transervice further argues the ALJ erred in finding the alleged events occurring in 2009 constituted injuries.

Zink filed a Form 101, Application for Resolution of Injury Claim, on April 10, 2009, alleging injuries to his right thumb, wrist, and low back on December 30, 2006, while employed by Kroger. He filed a second Form 101, Application for Resolution of Injury Claim, on April 13, 2011, alleging injuries to his right thumb on July 6, 2009 and to his right thumb, middle finger and shoulder on December 6, 2009 within the course of his employment with Transervice. The ALJ consolidated both claims by order dated June 13, 2011.

Zink testified by deposition on June 23, 2011 and at the formal hearing held February 22, 2012. Zink acknowledged he was involved in a motor vehicle accident ("MVA") in 1996 and was treated by Dr. George Raque, who

notice of cross-appeal on June 19, 2012 but indicated in his brief to the Board the cross-appeal was dependent upon whether the Board altered

provided epidural injections and performed surgery. Zink testified he sustained a torn bicep in September 2004 for which he had surgery. He was involved in another non-work-related MVA in July 2005. He injured his right wrist and thumb and had surgery performed in September 2005 by Dr. Waquar Aziz, which reduced, but did not eliminate his pain. He subsequently returned to work as a truck driver.

Zink testified he was tossing a pallet onto a stack on December 30, 2006 when his right thumb became lodged, causing him to be jerked and injuring his thumb, elbow and back while working at Kroger. Zink returned to Dr. Aziz, who performed fusion surgery in January 2007. Zink stated the surgery did not alleviate his pain, but he was able to return to work. After his return to work, he avoided opening trailer doors and requested assistance from co-workers for other duties.

Zink stated he began working for Transervice when it purchased the routes from Kroger in 2008. On July 6, 2009, Zink was entering the dispatch room to turn in paperwork when he caught his right thumb on the door, which was jammed into his wrist. Zink stated he experienced severe pain and reported the injury. He was seen at BaptistWorx and then returned to less strenuous work in the yard. When his pain

the ALJ's decision. Since we affirm, Zink's cross-appeal is moot.

did not improve, he requested medical treatment in November 2009, which was denied by the workers' compensation carrier.

Zink stated that on December 6, 2009, he was hooking up a trailer when the gearbox jammed causing injury to his right hand from his wrist to the top of his thumb. Zink sought treatment at Baptist East emergency room and followed up at BaptistWorx. He was later examined by Dr. Steven J. McCabe, Dr. Mark Barrett and Dr. Warren L. Bilkey. After undergoing a functional capacity examination, Zink returned to work for Transervice in 2010.

Zink testified his thumb was most affected by the December 2006 injury, worsened by the July 2009 accident. He indicated he cannot move his right thumb and has limited movement in his middle finger. He has trouble moving his wrist and buttoning his clothes. He also indicated he has pain in his elbow from the fusion surgery.

Dr. Aziz examined Zink on August 24, 2005, for the right thumb injury. An August 16, 2005 MRI of the right hand revealed mild osteoarthritis along the base first metacarpal bone and first metacarpal phalangeal ("MP") joint space and a small foreign body in the region of the proximal phalanx of the second finger. Dr. Aziz performed a metacarpophalangeal ("MCP") joint fusion surgery on September 13, 2005. On November 16, 2005, Dr. Aziz noted

the fusion might not be solid but Zink was fairly comfortable.

Zink returned on January 18, 2006, reporting pain and swelling. X-rays revealed fractures in the carpometacarpal ("CMC") joint and the interphalangeal ("IP") joint that might explain Zink's pain. On October 25, 2006, Dr. Aziz noted the MCP joint fusion screw seemed to be dislodged due to performing heavy lifting. He opined Zink would require screw removal and fusion of the MCP joint. Dr. Aziz performed screw removal, re-debridement of the MCP joint, placement of three screws, and a bone graft on January 9, 2007.

In a February 16, 2007 letter to the workers' compensation insurer, Dr. Aziz indicated Zink related his injury to stacking pallets. On April 23, 2007, Dr. Aziz noted Zink had a completely consolidated fusion with full range of motion and strength in the thumb, was released to return to regular duty work.

Zink returned on June 22, 2007 with complaints of dorsal radial pain. Dr. Aziz administered an injection which helped his pain for six to eight weeks. Zink was diagnosed with deQuervain's stenosing tenosynovitis on September 14, 2007. Dr. Aziz performed a right first dorsal compartment decompression and tenosynovectomy on February 5,

2008 due to deQuervain's tenosynovitis of the right wrist. Zink was allowed to return to work on March 3, 2008. Dr. Aziz completed several questionnaires stating Zink had a significant change in his condition between October 25, 2006 and January 5, 2007. Dr. Aziz indicated he would defer to Dr. Bilkey regarding an impairment rating.

Dr. Warren L. Bilkey examined Zink on August 20, 2007. He diagnosed a right thumb traumatic injury status post open reduction and internal fixation ("ORIF") surgical repair with ankylosis of the thumb MP joint; right wrist pain; tendinitis, post-traumatic; and right elbow pain with hypersensitivity at the graft site. Dr. Bilkey indicated Zink was at maximum medical improvement ("MMI") for the thumb injury, but not for the wrist injury. He stated Zink sustained thumb tendon injuries and recommended surgery which he related to the December 2006 work injury.

Dr. Bilkey re-evaluated Zink on March 25, 2008, noting February 3, 2008 surgery. Dr. Bilkey determined Zink was not at MMI and referred him for occupational therapy to improve his range of motion.

Dr. Bilkey examined Zink again on April 30, 2008. He diagnosed a work-related right thumb injury treated by ORIF surgery with ankylosis of the right thumb MP joint; right wrist pain; tendinitis, posttraumatic; and right elbow pain

with hypersensitivity at the graft site. Dr. Bilkey assigned a 10% impairment rating for the wrist and elbow complaints, a 7% impairment rating due to limited motion of the thumb, and a 20% impairment rating for loss of pinch strength for a combined 20% whole body impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Zink returned to Dr. Bilkey on August 3, 2009, after sustaining an additional work-related right thumb injury. Dr. Bilkey diagnosed a hyperextension injury to the right thumb and recommended an evaluation by an orthopedic hand surgeon. He stated Zink was not at MMI.

Dr. Bilkey examined Zink on September 29, 2011 for complaints of right wrist, thumb, and finger pain. Zink reported a contusion injury to his right hand on December 6, 2009. Zink had a positive Tinel's sign over the right carpal tunnel; decreased sensation over the entire thumb; hypersensitivity over the dorsum of the thumb, palm and wrist; tenderness to palpation over the dorsal and volar lateral wrist and CMC joint region; and third digit MCP joint tenderness. Dr. Bilkey assigned a 12% impairment rating to the December 2006 injury, a 4% impairment rating to the July 2009 injury, and an 8% impairment rating to the

December 2009 injury resulting in a combined impairment rating of 32% pursuant to the AMA Guides.

Dr. Thomas Gabriel evaluated Zink on July 30, 2008 and on June 17, 2009. He also testified by deposition on July 21, 2009. During the 2008 examination, Zink reported a right thumb injury while moving pallets. Dr. Gabriel obtained x-rays which revealed a solid fusion. He reviewed medical records and found Zink sustained a fracture to the MCP joint in an MVA in June 2005. He underwent a fusion surgery by Dr. Aziz, but the fusion failed. Dr. Gabriel noted Zink underwent another fusion surgery in January 2007 and developed symptoms between April 2, 2007 and January 2008. Dr. Gabriel diagnosed right thumb CMC osteoarthritis; status post right MCP arthrodesis, solid fusion; status post release of the right wrist, and residual radial sensory neuralgia/neuritis. Dr. Gabriel assigned a 5% impairment rating pursuant to the AMA Guides.

Following his June 17, 2009 evaluation, Dr. Gabriel stated there was no change in Zink's wrist or thumb symptoms. Dr. Gabriel stated the December 2006 injury did not cause a harmful change to the human organism and did not aggravate or hasten the need for additional surgery. Dr. Gabriel felt the fusion surgery and arthritic changes were

due to the June 2005 MVA and the aging process. He disagreed with Dr. Bilkey's assessment of impairment rating.

Zink submitted treatment records from BaptistWorx where he presented on July 6, 2009 with complaints of right thumb pain after his thumb was struck by a door the previous day, and was diagnosed with a thumb sprain. He returned on December 7, 2009, with complaints of pain in his right hand and from his thumb through his arm. Zink was restricted to no lifting over two to three pounds with his right hand due to a right hand contusion.

Dr. Mark Barrett examined Zink on December 28, 2009 for complaints of right hand and shoulder pain due to a December 6, 2009 work injury. Dr. Barrett noted Zink sustained a hyperextension injury in July 2009, which had resolved. Dr. Barrett diagnosed right hand and shoulder pain with a possible rotator cuff injury. Zink was restricted from working. On January 18, 2010, Dr. Barrett released Zink to his regular work duties.

Dr. Barrett stated the December 2006 injury caused a temporary exacerbation of Zink's pre-existing right wrist and/or hand problem. He opined Zink returned to his pre-December 2006 baseline after the January 7, 2007 surgery. Dr. Barrett did not believe the July 2009 or December 2009 injuries caused a harmful change to the human organism. He

concluded Zink was not at MMI as of January 18, 2010. In response to a questionnaire on September 20, 2011, Dr. Barrett stated a treating physician would be in a better position to determine the effects of the work injury. He stated he would defer to Dr. Aziz regarding the effects of the 2006 and 2009 work injuries.

Dr. Richard H. DuBou examined Zink on March 2, 2010, September 18, 2011, and December 15, 2011. In the March 2, 2012 evaluation, Dr. DuBou noted Zink sustained multiple injuries to his right upper extremity and fusion was performed in 2006. Dr. DuBou opined Zink had blunt trauma to the MCP joint of the thumb, secondary to chronic radial collateral ligament injury, with unstable MP joint and degenerative changes of the MP joint from repetitive trauma. He did not believe Zink sustained any additional permanent partial impairment from his recent injury and his impairment was secondary to the previous injury that resulted in the fusion.

In the September 18, 2011 evaluation, Dr. DuBou noted Zink had decreased range of motion in the shoulder and inconsistent grip strength testing with signs of symptom magnification. Dr. DuBou opined Zink's additional injuries caused a temporary exacerbation of his condition. He noted the original thumb fusion was due to the July 2005 MVA and

its failure to fuse dictated the second surgery. Dr. DuBou stated the work injuries caused no permanent change and any impairment rating assigned for the fusion surgery was related to the MVA. He did not believe deQuervain's tenosynovitis was related to the work-related thumb injury.

In his December 15, 2011 evaluation, Dr. DuBou stated the repeat fusion and ongoing problems were not related to the December 2006 work injury. Dr. DuBou assigned a 6% impairment rating, unrelated to the work injury. Dr. DuBou indicated he reviewed reports from Dr. Bilkey and Dr. Gabriel. Dr. DuBou disagreed with Dr. Bilkey's impairment rating and agreed with Dr. Gabriel's opinion the December 6, 2006 work injury did not change Zink's thumb condition or result in the re-fusion surgery.

In the Opinion, Order and Award rendered April 6, 2012, the ALJ made the following findings relevant to this appeal:

This Plaintiff undoubtedly, prior to December 30, 2006 had sustained a right thumb injury significant enough that it required a fusion. As recently as October, 2006, approximately two months prior to the first date of injury herein, he continued to seek medical treatment for that injury and it was noted, among other things, that the screw used in the fusion had become dislodged.

However, it must also be remembered, as is relevant to any discussion of causation and pre-existing

active conditions, that the plaintiff had returned to work, without any work-restrictions or impairment rating.

I also reject the notion that because the incidents of December 30, 2006, July 6, 2009 and December 6, 2009 were unwitnessed they either did not happen or had no or minimal impact on plaintiff's right thumb condition. In fact, I believe the Plaintiff's testimony that the events occurred and that after these occurrences he experienced a spike in pain and limitations.

I will state, affirmatively and with conviction, that I have great respect for Dr. DuBou and Dr. Gabriel. I could certainly conclude on their opinions that the entirety of the right thumb and right wrist conditions were pre-existing and active and not work-related. There is sufficient medical evidence from the treating physicians' medical records to make this conclusion. Dr. Aziz performed a fusion surgery in 2005 and as late as October, 2006 noted the fusion screw had come loose. He later said the wrist problems are related to the thumb problems. Dr. Barrett, first, said there is no permanent work related condition.

However, the above analysis is counter-balanced by the fact that Dr. Barrett, later, said he would defer to the primary treating physician, Dr. Aziz, in determining the effects of the work-related injury. Dr. Aziz has, affirmatively and unambiguously, related the 2007 and 2008 surgeries, one to the right thumb and the other to the right wrist, to the work injury of December 30, 2006.

As noted by the Plaintiff only Dr. Aziz, of all the physicians providing opinions has had an opportunity to examine the Plaintiff and follow him pre and post December 30, 2006. Dr. Aziz has explained how the incident with the pallet has caused a new, permanent, injury to the right thumb. He has explained how the injury to the right thumb has eventually led to the DeQuervain's syndrome.

The opinions of Dr. Aziz are, of course, supported by the Plaintiff, who has reported an increase in symptoms and a decrease in functioning since December 30, 2006.

Not only has Dr. Barrett deferred to Dr. Aziz, whose diagnoses and assignment of causation are supported by substantial evidence, but they are confirmed by Dr. Bilkey. Dr. Bilkey generated a complete and detailed set of records, as summarized above. Among other things he assigns an impairment rating of 12% to the December 30, 2006 incident, 4% to the July 6, 2009 incident and 8% to the December 6, 2009 incident. However, on February 15, 2012, Dr. Bilkey stated that prior to December 30, 2006 plaintiff had a 1% impairment rating and after that date he has a 19% impairment rating.

It is this last question, that of what impairment ratings and restrictions to apportioned [sic] to each condition and date of injury which is the only truly confusing part of this claim. Dr. Gabriel has assessed no impairment rating and that opinion is rejected. Dr. DuBou has assessed no work related impairment rating and that opinion is rejected. Dr. Bilkey has taken two opportunities to assess impairment ratings and the two are inconsistent and

the second time he does not even address apportionment between the multiple dates of injury or the impairment rating of the wrist.

In this claim, and with acknowledgment that the February 15, 2012 [rating] from Dr. Bilkey is more recent, I find that the ratings he assigned on September 29, 2011 more accurately reflect the plaintiff's actual impairment ratings for the work-related injuries. This results in a 12% impairment rating for the December 30, 2006 date of injury; a 4% impairment rating for the July 6, 2009 date of injury and an 8% impairment rating for the December 6, 2009 date of injury. The combined values of these impairment ratings is not relevant herein.

I also find that inasmuch as Dr. Bilkey was clearly aware of the pre-existing injury to the right thumb and inasmuch as he specifically assign [sic] an impairment rating to each date of injury that the assigned impairment ratings are those compensable portions which have effectively excluded any non-work-related and/or pre-existing active component.

. . . .

As far as medical expenses the undersigned is aware that it is possible to assign responsibility for future medical expenses to an earlier date of injury and even, if so convinced, to apportion medical expenses between multiple dates of injury. However, in this claim the undersigned is convinced that the appropriate course of action is to assign future medical expenses for the right wrist and right thumb to the most recent date of injury, December 6, 2009.

All parties filed petitions for reconsideration. Transervice argued the evidence established Zink only had a temporary aggravation of his thumb and wrist injuries resulting from the 2009 incidents. Transervice also argued the direct and natural consequence rule applies and bars any claim against it since Zink's problems stem from either the 2002 MVA or from injuries sustained while employed at Kroger. By order issued May 11, 2012, the ALJ denied Transervice's petition as a re-argument of the merits of the claim.

On appeal, Transervice argues the ALJ erred by failing to make findings of fact and conclusions of law regarding the uncontradicted medical evidence establishing the direct and natural consequence rule and the holding in Callaway County Fiscal Court v. Winchester, 557 S.W.2d 216 (Ky. App. 1977) apply to this claim. Transervice again contends all of Zink's problems with his right arm and wrist stem from the prior injuries which resulted in surgeries. Transervice contends that, even if the subsequent events in 2009 could be considered injuries within the meaning of the Act, those events where the direct and natural consequence of the injuries Zink sustained with Kroger prior to his employment with Transervice. Transervice argues the ALJ erred in

finding the alleged events in 2009 constituted injuries, relying upon the opinion of Dr. DuBou. Again, Transervice contends Zink suffered only a mere aggravation of a pre-existing active condition which is not compensable. Transervice contends the ALJ did not specifically find Zink suffered an injury within the meaning of the Act. Transervice further notes Zink testified he had been unable to use his right hand for tasks of daily life, including writing and using the toilet, prior to the alleged injuries at Transervice. Transervice requests the Board reverse the ALJ's award of income and medical benefits and find the uncontradicted medical evidence establishes as a matter of law Zink did not suffer a compensable injury within the meaning of the Act. In the alternative, it asks the Board to direct the ALJ to make additional findings of fact and conclusions of law regarding the applicability of the direct and natural consequences rule.

Since Zink, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences

to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same parties' total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to show there was some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, ordinarily we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969). Reasonable inferences regarding causation are fundamental to an ALJ's role as fact-finder. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979).

The seminal case on the direct and natural consequence rule is Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. 1997). There the Supreme Court stated:

The applicable rule has been referred to as the direct and natural consequence rule and is explained in Larson, *Workmen's Compensation Law* § 13.11 (1996), as follows: 'The basic rule is that a subsequent 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 a compensable primary injury.' (citation omitted). Thus, even 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. Accordingly, the Board's decision is affirmed.

Here, the record contained conflicting evidence indicating Zink sustained either a temporary injury from which he recovered and returned to his pre-injury baseline or new injuries which resulted in a harmful change to the human organism. No physician opined the original non-work-related 2005 MVA caused a weakened condition resulting in or causing new injuries. The ALJ simply chose to believe the evidence that established Zink sustained additional trauma that produced separate compensable injuries. The ALJ identified substantial evidence he relied upon in reaching his conclusions and was not obligated to explain why he rejected other evidence or arguments.

Similarly, we find no error in the ALJ's failure to discuss Calloway since he determined Zink sustained new injuries. Since it was rendered, Calloway, supra, has consistently been interpreted by this Board and the courts as standing for the proposition that, where an employee has an initial injury which creates the ultimate weakened physiological condition such that subsequent accidents or activities create a more serious physiological condition than would have occurred absent that initial event, but the subsequent injuries do not rise to a level of appreciable proportions, it is the employer and carrier at the time of the initial injury that are solely liable for payment of indemnity and medical benefits. See Kelly & Wilmore, Inc. v. Payne, No. 2002-SC-0396-WC, 2003 WL 1217830, slip opinion at p. 4, (rendered February 20, 2003, and designated not to be published). Where the medical evidence indicates a subsequent aggravation of a pre-existing injury is of no consequence, the worker's disability may be found to be due solely to the previous injury. See Sights Denim Systems v. Debortali, No. 2003-SC-0239-WC. 2004 WL 868588, slip opinion at p. 5, (rendered April 22, 2004, and designated not to be published).

In the case *sub judice*, the ALJ did not find the subsequent injuries were mere aggravations of the prior

condition. Generally, the employer or insurer at the time of the last injury is liable for medical expenses from the date of that injury forward. The ALJ was aware, based on the particular facts of a claim, some apportionment of payment medical treatment may be possible. See Sears Roebuck & Company v. Dennis, 131 S.W. 3d 351 (Ky. App. 2004). In this instance, the ALJ did not feel apportionment was warranted. We cannot say the ALJ's decision awarding medical benefits for the thumb and wrist was clearly erroneous. The ALJ weighed the evidence and applied the proper legal standard.

The ALJ addressed the conflict in the evidence and chose to believe Dr. Aziz and Dr. Bilkey, as was his right to do so. This evidence constitutes substantial evidence of probative value upon which an award could be based. McCloud vs. Beth-Elkhorn Corp., 514 S.W. 2d 46 (Ky. 1974) and Smyzer vs. B. F. Goodrich Chemical Co., 474 S.W. 2d 367 (Ky. 1971).

There being substantial evidence of probative value to support the ALJ's conclusion, credible testimony of a work-related harmful change in the human organism and no indication the ALJ failed to fully appreciate and understand the evidence before him, his Opinion must be affirmed.

Accordingly, the April 6, 2012 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge, and the May 11, 2012 Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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