# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: April 5, 2019**

CLAIM NOS. 201800511, 201800510, 201800506,
201764748 & 201678248

BLUEGRASS OAKWOOD, INC. PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE**

ROBIN STUBBS
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION
AFFIRMING IN PART & REMANDING**

* * * * * *

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

**STIVERS, Member.** Bluegrass Oakwood, Inc. ("Oakwood") appeals from the November 16, 2018, Opinion, Award, and Order and the December 17, 2018, Order on both parties' Petitions for Reconsideration of Hon. Grant Roark, Administrative Law Judge ("ALJ") resolving Robin Stubbs' ("Stubbs") consolidated claims. In the November 16, 2018, Opinion, Award, and Order, the ALJ awarded Stubbs permanent

partial disability benefits and medical benefits for work-related injuries to her neck and left shoulder occurring on June 15, 2016.

On appeal, Oakwood set forth four arguments. First, it argues the ALJ misinterpreted Finley v. DBM, 217 S.W.3d 261 (Ky. App. 2007) by holding it responsible for proving a pre-existing condition is both symptomatic and impairment ratable. Second, it argues that, even if the ALJ did not misinterpret Finley, supra, the question of whether a condition is symptomatic prior to an alleged injury is a question for the medical experts. Next, Oakwood argues the Independent Medical Examination ("IME") reports submitted by Stubbs do not constitute substantial evidence. Finally, Oakwood argues the ALJ's finding Stubbs' condition was asymptomatic prior to the alleged injury based on the fact that she was working is arbitrary and capricious.

The Form 101 for Claim No. 201678148, filed on March 26, 2018, alleges Stubbs sustained work-related injuries to multiple body parts on June 15, 2016, in the following manner: "Hit, pinched, scratched, head butted and hair pulled by client, injuring neck, left arm, left shoulder and back."

The Form 101 for Claim No. 201800511, filed on March 27, 2018, alleges work-related injuries to her face on October 13, 2016, after being struck in the face by a resident.

The Form 101 for Claim No. 201800506, filed on March 26, 2018, alleges Stubbs sustained work-related injuries to multiple body parts on May 2, 2017, in the following manner: "She and other staff were changing individual and she struck her in the left shoulder and left arm."

The Form 101 for Claim No. 201800510, filed on March 27, 2018, alleges Stubbs sustained work-related injuries to multiple body parts on July 11, 2017, in the following manner: "When transporting an individual home she fell off the sidewalk and pull [sic] the Plaintiff off with her injuring left shoulder, arm and elbow.

The Form 101 for Claim No. 201764748, filed on March 27, 2018, alleges Stubbs sustained work-related injuries to multiple body parts on September 18, 2017, in the following manner: "While lifting client onto bicycle felt left shoulder pull and felt a pop in back." By order dated April 30, 2018, the ALJ consolidated all five claims under Claim No. 201800511.

Stubbs was deposed on June 1, 2018. She began working for Oakwood as a rehabilitation instructor in 2006. She described her job as follows:

> A: Okay. On grounds as a rehab instructor, you had a little classroom, and you had, maybe, four or five clients. And you would work with them on whatever your classroom was supposed to work with them on. For example, once I had a math money classroom. I would work with individuals on how to tell the difference and the different money. And that's basically what a rehab instructor is, you have a classroom.

Stubbs' pupils were "handicapped and intellectually developmentally delayed" adult residents of the home. In 2009, Stubbs stopped working in the classroom and started working in the store which was stocked with items made by the residents of Oakwood. In 2014, Stubbs was moved back to the classroom teaching and assisting residents in their homes.

In 2012, Stubbs was involved in a motor vehicle accident in which her car was sideswiped by a tractor-trailer, and she sustained bulging discs at C5-6 and C6-7. She did not undergo surgery after the accident. She explained:

A: No. The doctors agreed not to do it until, you know, I actually needed it. And they didn't believe that I needed it then.

Q: Do you remember – did they tell you what type of surgery they were thinking about?

A: Dr. [Magdy] El-Kalliny specifically?

Q: Sure.

A: He said when I got old – that I was too young to have it, they would probably go in and replace the discs or something.

Q: Does a fusion sound familiar or discectomy, anything like that?

A: Fusion was mentioned.

Stubbs began experiencing neck pain after the June 2016 incident. She testified as follows:

Q: … So, now, your neck, as I understand it, is a component of your claim. Take all the time to answer this that you need, but when did – any of these five incidents, did – did – as best you remember, did your neck hurt with specificity – did you injure your neck on [sic] any of these incidents that we just discussed?

A: The June incidents [sic]?

Q: June the – June of 2016?

A: Yes.

Q: Okay. Was that something that you felt immediately? Did – do you remember – did Dr. [Jeffrey] Golden treat your neck specifically around that time that you remember?

A: All I can remember is he gave me anti-inflammatories and pain medication and sent me to physical therapy.

Stubbs used to enjoy kayaking, which ceased after the first injury in June 2016.

Stubbs also testified at the September 17, 2018, hearing. The worst pain she was experiencing at the time of the hearing was on the left side of her neck down to her shoulder, her elbow, and her hand. She testified she could not return to her job at Oakwood.

Stubbs introduced the April 25, 2018, Form 107 Medical Report of Dr. Stephen Autry. After performing a medical records review and physical examination of Stubbs, Dr. Autry set forth the following diagnoses: "1. Aggravation of cervical spondylosis with radiculopathy. 2. Aggravation of lumbar spondylosis. 3. Rotator cuff tendinosis and impingement, left shoulder." On causation, Dr. Autry opined as follows: "The plaintiff's history and job description correlate with the specific diagnoses. The plaintiff has had multiple documented injuries occurring cumulatively to the neck, left shoulder and lower back areas as a consequence of her work activities." Dr. Autry opined Stubbs had reached maximum medical improvement ("MMI") and assessed a 15% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") apportioned in the following manner:

- Aggravation of cervical spondylosis with radiculopathy – 8%
- Aggravation of lumbar spondylosis with significant pain – 3%
- Rotator cuff tendinosis and impingement, left shoulder – 4%

He opined Stubbs' symptoms were "asymptomatic, dormant, and non-disabling but have been aroused into a disabling condition" by her employment at Oakwood, and she had no active impairment prior to the injury.

Oakwood introduced the August 9, 2018, IME report of Dr. John Vaughan. After performing a medical records review and an examination, Dr. Vaughan diagnosed Stubbs with pre-existing active C5-6 and C6-7 disc disease with mild spinal stenosis. He believed Stubbs had reached MMI and assessed a 5% Cervical DRE Category II impairment rating for this condition which was present and active prior to her work injuries of 2016 and 2017. He assigned no impairment to Stubbs' alleged lower back or shoulder conditions.[1]

The August 29, 2018, Benefit Review Conference Order and Memorandum listed the following contested issues: benefits per KRS 342.730, work-relatedness/causation, notice [handwritten: "10/13/16; 7/1/17"], average weekly wage, unpaid or contested medical expenses, injury as defined by the ACT, exclusion for pre-existing disability/impairment, and TTD.

In the November 16, 2018, Opinion, Award, and Order, the ALJ set forth the following findings of fact and conclusions of law:

**Causation/Work-Relatedness/Injury Under the Act**

> As threshold issues, the defendant maintains that, despite her multiple alleged dates of injury, late [sic] if [sic] is [sic] not severed [sic] any new, permanent injuries to her neck, back, or left shoulder beyond those problems which were pre-existing and active prior to any of the injuries alleged herein. It therefore argues plaintiff has no compensable permanent injuries and is not entitled to

[1] Dr. Vaughan's September 8, 2018, supplemental IME report does not alter his original impairment ratings or opinions regarding a pre-existing active condition.

permanent income benefits or payment of medical expenses. In support of this position, it relies on opinions from its experts, Dr. Ballard, Dr. Vaughan, and Dr. Best, each of them concluded plaintiff's cervical problems were pre-existing prior to her alleged work injuries and that none of the work incidents caused any structural change. They also concluded plaintiff suffered no lumbar injury. For her part, plaintiff relies on her expert, Dr. Autry, who acknowledged plaintiff's prior cervical treatment from a 2012 motor vehicle accident, but concluded she had neck, back, and left shoulder injuries due to the work injuries she described.

Having reviewed the evidence of record, the Administrative Law Judge is plainly aware of the fact that plaintiff had prior cervical and lumbar complaints, and even some left shoulder complaints, prior to any of the work injuries alleged herein. But the question is whether any portion of her current cervical, left shoulder, or lumbar issues are new and caused by any of the work injuries alleged. Ultimately, the ALJ is persuaded plaintiff has suffered some new cervical and left shoulder injuries as a result of the June 15, 2016 work injury. Despite prior treatment and even a 2012 motor vehicle accident, plaintiff was always able to return to work and perform the full duties associated with her position. After June 15, 2016 her neck and left arm/shoulder conditions never significantly abated. All physicians agree plaintiff has significant cervical degenerative disc disease but the ALJ is persuaded by Dr. Autry's opinion that plaintiff's work injury caused a permanent aggravation of her cervical spondylosis and accompanying radiculopathy. His opinion is simply found more persuasive and more in keeping with plaintiff's ability to continue working and performing the full range of her duties before she was struck by a resident at work on June 15, 2016. It is therefore determined plaintiff's cervical condition is work-related and compensable.

Similarly, the ALJ is persuaded by Dr. Autry's opinion that plaintiff has rotator cuff tendinosis and impingement as a result of her work injury. In reaching this conclusion, it is noted that Dr. Huff, to whom plaintiff was referred by the insurance carrier, indicated plaintiff's diagnostic testing and examination indicated cervical impingement after her work injury with

persistent weakness in the left upper extremity hyperreflexia. His findings seem to support Dr. Autry. Conversely, the defendant's experts offer contradictory conclusions which undermine their collective credibility. For example, Dr. Vaughan indicated plaintiff had genuine pain into her left upper extremity, he believed it was referred pain from her cervical condition and not due to any shoulder injury. However, Dr. Best indicated plaintiff's shoulder complaints were due to a left rotator cuff tear diagnosed in 2012 after motor vehicle accident and that plaintiff suffered only shoulder and neck contusions in the work incidents, which resolved without any permanency. In addition, Dr. Ballard's initial report indicates she never even examined plaintiff's neck, yet she still concluded in a subsequent report, after reviewing additional records, that plaintiff only had pre-existing cervical and bilateral shoulder problems. Based on Dr. Autry's more persuasive opinion in this instance, it is determined plaintiff also suffered a compensable shoulder injury.

However, with respect to plaintiff's alleged lumbar condition, the ALJ is persuaded by Dr. Vaughan's opinion that plaintiff never even mentioned lumbar complaints and she therefore had no condition which warranted any permanent impairment rating. His opinion in this regard is corroborated by plaintiff's testimony, in which she indicated her current, ongoing symptoms involve her neck and left upper extremity. Based on Dr. Vaughan's opinion, it is determined plaintiff suffered no permanent lumbar injury.

**Benefits Per KRS 342.730/Prior Active Condition**

The next issue is the extent of plaintiff's impairment/disability. Plaintiff maintains the combined effects of her work injuries render him [sic] permanently and totally disabled from returning to any gainful employment on a regular and sustained basis. However, the ALJ is not persuaded late [sic] if's [sic] neck and shoulder injuries preclude her from returning to all employment. Several factors to [sic] support this decision. First, the only physician to assign restrictions was plaintiff's expert, Dr. Autry, and even he did not indicate plaintiff could not return to any form of employment. In addition, plaintiff applied for, and is receiving, Social Security disability, but she testified her claim was based

on psychological conditions including panic attacks. The ALJ infers from this that even plaintiff did not believe her neck and shoulder conditions were so severe as to preclude her from all employment. Finally, as also noted that plaintiff has not had any surgery for her shoulder or neck and is not taking any significant medication for these conditions. Based on the totality of these factors, the ALJ is simply not persuaded plaintiff has carried her burden of proving she is not capable of returning to gainful employment on a regular and sustained basis in a competitive economy. As such, it is determined she is not permanently and totally disabled.

Instead, the ALJ is persuaded by Dr. Autry's opinions that plaintiff has an 8% cervical impairment rating and a 4% left shoulder impairment, for a combined 12% whole person impairment. For the same reasons the ALJ already found Dr. Autry's opinions more persuasive on causation, his opinion on the applicable impairment ratings is also most persuasive. In addition, the ALJ is persuaded by Dr. Autry's opinion that plaintiff does not retain the physical ability to return to the rehabilitation instructor position she held at the time of her injury. Quite simply, plaintiff's testimony and the fact that she continued to suffer significant exacerbations and repeated attacks by residents after her initial injury, and that she did not return after September 18, 2017, supports this conclusion. Plaintiff is therefore entitled to application of the 3x multiplier and KRS 342.730(1)(c)(1). Even though plaintiff returned to work following the June, 2016 work injury and the parties stipulated sheer [sic] in [sic] the same wage thereafter, the ALJ believes the 3x multiplier in (c)(1) is more appropriate than the 2x multiplier in (c)(2) because there is no evidence plaintiff can continue to earn the same wage for the indefinite future. The fact that she stopped working after her last exacerbation and has not returned further supports this. Based on plaintiff's age at the time of injury, her award of benefits is therefore calculated as follows:

$582.50 x 2/3 = $194.17 x .12 x 1 x 3.2 = $74.56 per week

The defendant maintains at least 5% of plaintiff's cervical impairment rating should be carved out his pre-existing and active based on the opinions of its experts and plaintiff's treatment records. However, although plaintiff previously receive [sic] significant treatment for

> cervical complaints, the ALJ is not persuaded her condition was significantly symptomatic and disabling immediately prior to June, 2016. The fact that she was able to perform the full range of duties of her job supports this conclusion. As such, the ALJ is persuaded by Dr. Autry's opinion that no portion of plaintiff's cervical impairment rating was pre-existing and active.
>
> **TTD Benefits**
>
> Plaintiff also claims entitlement to TTD benefits. However, on this issue, the ALJ is persuaded by Dr. Vaughan's opinion that plaintiff reached maximum medical improvement as of August 9, 2016. Plaintiff did not stop working until September, 2017. As such, she was not unable to work and not at maximum medical improvement at the same time and, as such, is not entitled to temporary, total disability benefits.

Both parties filed petitions for reconsideration, and the ALJ, in the December 17, 2018, Order, determined as follows:

> This matter comes before the administrative law judge pursuant to the parties' petitions for reconsideration of the Opinion, Order & Award rendered in this matter on November 16, 2018. In her petition, plaintiff points out there was [sic] an error in calculating her award of permanent, partial disability benefits. In its petition, the defendant requests a finding [sic] is entitled to a credit for TTD benefits paid.
>
> Having reviewed the parties' petitions, and being otherwise sufficiently advised, the ALJ is first persuaded plaintiff correctly points out her award of permanent, partial disability benefits was incorrectly calculated. Accordingly, her weekly award of benefits is amended to be $158.44 per week.
>
> As to the defendant employer' [sic] as [sic] petition requesting a specific credit for TTD benefits paid, such language was not automatically included in the opinion because the defendant never provided information specifying what TTD benefits have been paid. However, to the extent the defendant employer actually paid any TTD benefits, it is entitled to a credit against its liability

> for past-due permanent, partial disability benefits for amounts paid in TTD.
>
> In all other respects, the November 16, 2018 Opinion, Order & Award remains unchanged.

In response to Oakwood's first argument on appeal, we reject its assertion the ALJ misinterpreted the requirements of Finley, supra, by requiring it to prove a pre-existing condition was both impairment ratable *and* symptomatic before it can be deemed "active." It claims the ALJ focused exclusively on whether Stubbs' cervical spine condition was symptomatic in resolving this issue. [2]

The burden of proving the existence of a pre-existing active condition is on the employer. Finley v. DBM Technologies, supra. In Finley v. DBM Technologies, supra, the Court of Appeals instructed that in order for a pre-existing condition to be characterized as "active" at the time of an alleged work injury, it must be both impairment ratable pursuant to the AMA Guides *and* symptomatic immediately prior to the occurrence of the injury. Therefore, the ALJ did not err in considering whether Stubbs' cervical spine condition was symptomatic at the time of the June 15, 2016, injury in resolving the issue of whether she was suffering from a pre-existing active cervical spine condition.

We further disagree the ALJ focused exclusively on whether Stubbs' cervical spine condition was symptomatic at the time of the June 15, 2016, injury in resolving the issue of a pre-existing active condition. The ALJ relied upon the opinions of Dr. Autry in resolving this issue, and in his April 25, 2018, Form 107, Dr. Autry opined Stubbs' symptoms were "asymptomatic, dormant, and non-disabling" and

[2] At no point does Oakwood argue Stubbs was also suffering from a pre-existing active left shoulder condition.

were "aroused into a disabling condition" by her injuries at Oakwood. He did not assess an impairment rating for *any* pre-existing active condition. There is no indication in either the November 16, 2018, Opinion, Award, and Order or the December 17, 2018, Order that the ALJ focused exclusively on whether Stubbs' cervical spine condition was symptomatic at the time of the June 15, 2016, injury in resolving the issue of whether Stubbs was suffering from a pre-existing active cervical spine condition. Therefore, we affirm on this issue.

We are unpersuaded by Oakwood's second argument that, even if the ALJ did not misinterpret Finley, the question of whether a condition is symptomatic prior to an alleged injury is a medical question. Oakwood claims that "all medical testimony" coming from physicians with "actual knowledge" of the extent of Stubbs' cervical spine condition before June 15, 2016, supports the conclusion Stubbs' cervical spine condition was symptomatic. Oakwood asserts that, even if a medical opinion is not required as to the presence of a pre-existing symptomatic condition, Stubbs offered no testimony indicating she was not experiencing symptoms before her alleged injuries.

As noted, in his November 16, 2018, decision the ALJ relied upon Dr. Autry's opinions in determining Stubbs was not suffering from a pre-existing active cervical spine condition. Despite Oakwood's erroneous claim that "all medical testimony" coming from physicians with "actual knowledge" of Stubbs' pre-injury cervical spine condition supports the conclusion she was suffering from a pre-existing active cervical spine condition, it is abundantly clear Dr. Autry was aware of Stubbs' pre-injury cervical spine issues. In the "history" section of the April 25, 2018, Form

107, Dr. Autry noted as follows: "She does admit that she had a previous neck injury secondary to a motor vehicle accident in 2012. However, she states that up until the date of the industrial injuries, she had no radicular pain." Knowing this, Dr. Autry opined Stubbs' symptoms were "asymptomatic, dormant, and non-disabling" and were "aroused into a disabling condition" by her injuries at Oakwood. Dr. Autry's opinions, standing alone, support the ALJ's conclusion Stubbs was not suffering from a *symptomatic* cervical spine condition prior to her alleged work injuries. Any contrary medical opinions in the record merely represent conflicting evidence supporting an outcome favorable to Oakwood on this issue which the ALJ may reject. If "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

Further, because the burden of proof on the issue of a pre-existing active condition is on the employer, Oakwood is incorrect when it insinuates Stubbs was required to testify she was *not* suffering from any cervical spine symptoms prior to June 15, 2016, before the ALJ could resolve this issue in her favor.

We find no merit in Oakwood's third argument in which it asserts the report of Dr. Autry submitted by Stubbs does not constitute substantial evidence pursuant to the standards set forth in Cepero v. Fabricated Metals Corporation, 132 S.W.3d 839 (Ky. 2004), as Dr. Autry failed to review the reports of Drs. Michael Best and Ellen Ballard and did not have Stubbs' pre-injury MRI films or reports before providing his findings. We affirm on this issue.

After a careful review of Dr. Autry's Form 107 and the holding in Cepero, this Board concludes Cepero is inapplicable. Cepero is an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous.

While it appears Dr. Autry did not review the reports of Drs. Best and Ballard and Stubbs' pre-injury MRI films before rendering his opinions in the Form 107, this fact goes to the weight the ALJ chooses to afford to Dr. Autry's opinions, not the admissibility of the opinions. KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993), and the ALJ determined Dr. Autry's opinions to be credible. Consequently, he was free to rely upon them.

Finally, in response to Oakwood's fourth argument, we are unpersuaded the ALJ erroneously determined Stubbs' cervical spine condition was not a pre-existing active condition based upon the fact that she was able to work prior to the alleged work injury. It contends "there is no precedent to support the contention that an employee's mere ability to work is, by itself, conclusive evidence that the

employee's impairment is not active and thus not excluded from an award." We affirm on this issue.

As previously noted, in determining whether Stubbs had a pre-existing active cervical spine condition, the ALJ relied upon Dr. Autry's opinions. Dr. Autry opined Stubbs' symptoms were "asymptomatic, dormant, and non-disabling but have been aroused into a disabling condition" by her employment at Oakwood, and she had no active impairment prior to the injury. Thus, there is no basis for Oakwood's argument the ALJ relied exclusively upon the fact Stubbs was able to perform all of her work duties at Oakwood at the time of the June 15, 2016, injury in resolving this issue. Moreover, the ALJ has the discretion to rely upon the fact that Stubbs was able to successfully perform her work duties at Oakwood at the time of the first injury, in conjunction with Dr. Autry's report, in determining she was not suffering from a pre-existing active condition. Dr. Autry's opinions, and the fact that Stubbs was able to successfully perform her work duties at Oakwood at the time of the June 15, 2016, injury, constitute substantial evidence in support of the ALJ's conclusion she was not suffering from a pre-existing active cervical spine condition.

We point out this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Consequently, we remand the claim to the ALJ for additional findings. In the November 16, 2018, Opinion, Award, and Order, the ALJ determined Stubbs' "compensable injuries were

caused by her June 15, 2016 injury."[3] However, Stubbs' claim is a consolidation of five different injury claims occurring on June 15, 2016, October 13, 2016, May 2, 2017, July 11, 2017, and September 18, 2017, and by determining Stubbs sustained all compensable injuries on June 15, 2016, the ALJ only properly disposed of the first injury claim. Therefore, on remand, the ALJ must dispose of the remaining four injury claims.

Accordingly, on all issues raised on appeal, the November 16, 2018, Opinion, Award, and Order and the December 17, 2018, Order are **AFFIRMED**. The claim is **REMANDED** to the ALJ to dispose of the remaining four injury claims.

ALL CONCUR.

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[3] We note the discrepancy between Stubbs' argument to the ALJ that, after the *last* injury date of September 18, 2017, she was incapable of returning to work and the ALJ's ultimate determination that Stubbs sustained her compensable injuries on the *first* injury date of June 15, 2016. Also, the ALJ relied upon the opinions of Dr. Autry who opined Stubbs had "multiple documented injuries occurring cumulatively to the neck, left shoulder and lower back areas as a consequence of her work activities" while simultaneously concluding Stubbs sustained an acute injury on June 15, 2016. However, as no party raised these discrepancies on appeal, we will not address them herein.