

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: September 4, 2020

CLAIM NO. 201901004

BRUCE FLEMING

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE

B. BROCK ENTERPRISES, LLC AND  
HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**BORDERS, Member.** Bruce Fleming (“Fleming”) appeals from the March 10, 2020 Opinion and Order Dismissing his claim for workers’ compensation benefits rendered by Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”). The ALJ found Fleming failed to prove he sustained a work-related cumulative trauma injury resulting from his employment. On appeal, Fleming argues the ALJ erred in

finding he failed to meet his burden of proof as to causation and in finding the claim is precluded on procedural grounds. Because the ALJ's determination is supported by substantial evidence, and we additionally find the ALJ acted within the scope of her discretion, we affirm.

Fleming filed a Form 101 on August 16, 2019, alleging his employment with B. Brock Enterprises, LLC ("Brock") caused a cumulative trauma injury to his neck manifesting on April 23, 2019. Fleming previously filed claim number 2017-02093 alleging he sustained acute injuries to multiple body parts on August 9, 2016, and claim number 2016-58549 alleging a low back injury on December 16, 2015, all of which occurred while working for Brock. In an Opinion rendered on November 6, 2018, Hon. Christina D. Hajjar, Administrative Law Judge awarded permanent partial disability benefits based upon a 10% impairment for a low back condition due to the December 16, 2015 log truck rollover incident. She dismissed the mid back and cervical claims. On December 10, 2018, the parties entered into a settlement agreement settling all of Fleming's claims against Brock for \$30,000.00. The agreement reflects a diagnosis of lumbar strain, L5-S1 herniated disc. The agreement specified \$6,000.00 represents a waiver of all claims for reopening. The agreement specifically provided:

For resolution of Plaintiff's remaining claims for benefits under K.R.S. Chapter 342, Defendant-Employer shall pay to Plaintiff \$24,000.00 in a lump sum upon approval of the Administrative Law Judge. The settlement funds are in complete satisfaction of Defendant-Employer's liability to the Plaintiff for any and all claims for benefits under the Act. It is expressly agreed that this lump sum figure includes consideration for waiver of past medical expenses, non-Medicare covered future medical expenses, a waiver of reopening, waiver of vocational

rehabilitation, and waiver of any remaining indemnity or income benefits. Plaintiff will be bearing the burden of satisfying any past medical bills or liens. No further income or medical benefits of any sort shall ever be paid by Defendant-Employer.

Fleming testified by deposition on November 11, 2019 and at the hearing held January 29, 2020. Fleming was last employed with Brock as a log truck driver and mechanic. He drove a Western Star truck which “beat him to death” off-road. As a mechanic, he frequently lifted and used his hands and arms to push, pull, and use tools. He testified he was injured when the log truck that he was driving overturned on December 16, 2015. He has experienced neck pain since the rollover accident. He testified that he was injured again on August 8, 2016, when he was at a tire dealership and had to assist in removing the brakes from the truck. Before December 16, 2015, he had experienced neck and middle back pain. He had treatment beginning in approximately December of 2014 at Mountain Comprehensive Care Center in Whitesburg. This included x-rays of the cervical spine and thoracic spine before December 16, 2015, as well as a bone scan. He stated Dr. Jonathan Hatton was the first doctor to diagnose a work-related cumulative trauma injury, but he could not recall when he was advised of that diagnosis. Fleming last worked on August 9, 2016, when he worked for a few hours but was unable to continue. He has not looked for work, nor has he applied for work since. In his deposition, he indicated his neck condition is not any worse now than it was at the time of the previous claims; however, at the hearing he stated his neck pain continues to increase even though he has not worked in more than four years.

Dr. John W. Gilbert evaluated Fleming on April 23, 2018. Dr. Gilbert diagnosed disc ruptures at C4-C5, C5-C6, C6-C7, T11-T12, and L5-S1. He also diagnosed cervical and lumbar radiculopathies, pain, numbness and weakness in the appropriate dermatomes and myotomes, chronic pain syndrome, and some chronic cervical and lumbar nerve root injury syndrome. He noted Fleming has mobility issues, problems with steps and inclines, chronic pain interfering with his ability to concentrate, and occupational disability. Dr. Gilbert assigned a combined 35% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”), consisting of 17% for the cervical spine, 7% for the thoracic spine, 10% for the lumbar spine, and 7% for gait and station. Dr. Gilbert stated Fleming did not have an active impairment prior to the injury. He stated Fleming reached maximum medical improvement on April 23, 2018. Dr. Gilbert stated Fleming did not retain the physical capacity to return to the type of work performed at the time of injury, noting his pain and ruptured discs in his neck, mid back and low back, and numbness and weakness, interfere with his ability to concentrate and perform heavy manual labor or operate machinery. Dr. Gilbert opined Fleming’s condition resulted from his work related injuries, but does not state it was caused by cumulative trauma.

Fleming filed records from Dr. Hatton of Mountain Comprehensive Health Corporation documenting treatment from December 17, 2014 through December 18, 2019. Dr. Hatton treated Fleming primarily for back pain and hypertension. Although Dr. Hatton lists cervicalgia and neck complaints in a number of notes, each indicates Fleming had a normal cervical examination. In an

October 7, 2019 “To Whom it May Concern” letter, Dr. Hatton stated, “Mr. Fleming is a patient of mine here at the Whitesburg Medical Clinic. His pain is the result of cumulative trauma and wear and tear related to his employment as a truck driver and mechanic.”

Dr. Daniel D. Primm, Jr. evaluated Fleming on May 18, 2018. Dr. Primm reviewed numerous medical records including Dr. Gilbert’s report. He diagnosed lumbar strains with no evidence of radiculopathy, a history of neck strain with no objective evidence of radiculopathy, and significant symptom exaggeration versus malingering. Dr. Primm opined the December 16, 2015 work accident did not cause a permanent injury to the lumbar spine, rather Fleming sustained a lumbar strain. Dr. Primm stated there was no objective evidence of a permanent injury to the neck or low back arising from the August 9, 2016 work accident. Fleming may have sustained another low back strain, but there are no objective findings of a cervical injury. The notes of Fleming’s primary care physician indicate a normal cervical examination. Dr. Primm’s cervical examination was also normal. He noted Fleming had no evidence of gait derangement and assigned a 0% impairment rating pursuant to the AMA Guides.

Dr. Russell Travis evaluated Fleming on November 22, 2019. Dr. Travis found no objective abnormalities of the cervical spine. Dr. Travis felt Fleming exhibited significant flagrant symptom magnification with examination of the cervical spine. Fleming limited his cervical spine range of motion significantly. When distracted, Fleming’s range of motion was normal and his lateral rotation and flexion were within normal range. A February 26, 2018 cervical MRI showed

degenerative changes that would be found in the majority of asymptomatic males of Fleming's age. Dr. Travis placed Fleming in DRE cervical category I with a 0% impairment rating based upon the neurological examination that showed symptom magnification, no clear-cut objective findings of radiculopathy, and a cervical MRI that showed only pre-existing degenerative changes with no evidence of disc herniation or neural compromise at any level. He noted Fleming has only mild degenerative changes of an osteophyte complex at C6-7 and minimal degenerative changes, primarily anterior osteophytes at C6-7, which are found in the asymptomatic population of his age range. Dr. Travis stated Dr. Gilbert's diagnosis of C4, C5, C7 disc ruptures is inconsistent and without credibility. His physical findings did not support a diagnosis of disc herniation at C4-5, C5-6 and C6-7, and they did not correlate with the examination and the medical records. Dr. Travis noted that Dr. Gilbert assessed an impairment rating for gait and station, but the AMA Guides clearly put gait and station under the Central Nervous System Chapter. A rating for gait and station is only applicable if there is corticospinal tract involvement, which he stated Fleming does not have. Dr. Travis stated Fleming did not sustain a cumulative trauma injury to the cervical spine. He found no objective reason to restrict Fleming from returning to his previous work or similar work.

After reviewing additional medical records and Dr. Travis' report, Dr. Primm prepared a supplemental report on January 20, 2020. Dr. Primm again opined Fleming has no impairment rating for the cervical spine and noted cervical films were interpreted as normal. They show only very mild degenerative changes at one level, commonly seen in individuals of Fleming's age, regardless of occupation.

Dr. Primm agreed with Dr. Travis's impressions and impairment ratings. Dr. Primm stated Fleming did not have a cumulative trauma injury. Fleming's radiographic and MRI findings are not unusual, nor are they advanced for a man in his age group, and are not due to a cumulative trauma from any activity, including his work activity.

The ALJ's findings relevant to this appeal are set out *verbatim* below:

## **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Work relatedness/causation; Injury as defined by the ACT.**

Pursuant to the Act, an injury is "any work-related traumatic event . . . arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." KRS 342.0011(1). The term "objective medical findings" means clinical findings, observations, and other standardized testing performed as part of a physical examination as well as sophisticated diagnostic tests. *Gibbs v. Premier Scale Co. /Ind. Scale Co.*, 50 S.W.3d 754 (Ky. 2001). A diagnosis complies with the requirements of KRS 342.0011(1) and (33) if based upon symptoms of a harmful change confirmed by means of direct observation and/or testing applying objective or standardized methods. *Id.*

Medical causation must be proved to a reasonable medical probability with expert medical testimony . . . [however], [i]t is the quality and substance of a physician's testimony, not the use of particular "magic words," that determines whether it rises to the level of reasonable medical probability, *i.e.*, to the level necessary to prove a particular medical fact." *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004). The claimant bears the burden of proving causation.

After careful consideration of the evidence of record, it is found that Plaintiff has not met his burden of proving a work related harmful change as a result of his work. Dr. Gilbert's report does not diagnose cumulative

trauma but, rather, finds a specific injury. Plaintiff's medical evidence that he suffers cumulative trauma consists of only the short statement from Dr. Hatton:

Mr. Fleming is a patient of mine here at the Whitesburg Medical Clinic. His pain is the result of cumulative trauma and wear and tear related to his employment as a truck driver and mechanic.

This statement not only fails to provide a specific diagnosis, it fails to state even which body part causes pain. There are no specifics as to what activities were problematic and what symptoms developed. Dr. Hatton failed to provide any objective medical findings of a harmful change to some part of the human organism. He mentions no job duties nor does he explain how they caused cumulative trauma injuries.

On the other hand, Dr. Travis and Dr. Primm provide persuasive opinions that there is nothing out of the ordinary that would lead to a finding of work related cumulative trauma to the neck. Dr. Primm and Dr. Travis each concluded Plaintiff had no excessive spine degenerative changes and no cumulative trauma injuries. Dr. Primm reviewed Plaintiff's records and diagnostic studies and performed his own examination. He noted that his examination showed no objective cervical abnormality. Dr. Travis also pointed out that the only imaging studies acquired of the thoracic spine are those of August 3, 2015 which are normal. As to the cervical spine, Dr. Travis found nothing in the imaging studies to indicate that Fleming has any cervical, thoracic, or spinal degenerative conditions that would be greater than or in excess of what would be expected for a male of his age or a departure from the normal state of health.

**B. Joinder, *res judicata* and collateral estoppel.**

Of the many procedural issues raised, these three present the most problematic for Plaintiff going forward with this claim. Without going into great detail and analysis of these procedural issues – because Plaintiff has failed to meet his burden of proving work related cumulative trauma to the neck - the one glimmer of

hope for Plaintiff is the argument that he did not know of his cumulative trauma claim until a doctor told him he suffered work related cumulative trauma, that when he signed the full and final settlement, he was not aware of a claim for cumulative trauma.

The policy underlying KRS 342.270(1), the joinder statute, is one of administrative economy. *KI USA Corp. v. Hall*, 3 S.W.3d 355 (Ky. 1999). The provision has been held to represent the General Assembly's attempt to expedite the processing of workers compensation claims and is intended to eliminate piecemeal litigation, which has long been highly disfavored under Kentucky law. *Jeep Trucking, Inc. v. Howard*, 891 S.W.2d 78 (Ky. 1995). The rationale behind discouraging piecemeal litigation is the avoidance of added costs to employers incumbent in such practices and the added burden such practices impose on our judicial system in general, thereby guaranteeing a proper resolution of issues such as offset, credit, excess disability and overlapping disability.

Collateral estoppel is a form of issue preclusion. *Gregory v. Commonwealth*, Ky., 610 S.W.2d 598, 600 (1980); and *Rosenbalm v. Commercial Bank of Middlesboro*, Ky. App., 838 S.W.2d 423, 429 (1992). Res judicata concerns the preclusive effects of a former adjudication. *Carroll v. Owens-Corning Fiberglas Corp.*, Ky., 37 S.W.3d 699, 702 (2000). Pursuant to the doctrine of collateral estoppel, however, such an adjudication precludes re-litigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action or involved the same parties as the second suit. *Napier v. Jones By & Through Reynolds*, Ky. App., 925 S.W.2d 193, 195-96 (1996). The doctrine applies so long as the party against whom it is invoked was given a full and fair opportunity to litigate the issue in the prior action. *Sedley v. City of West Buechel*, Ky., 461 S.W.2d 556, 559 (1970). See also *Moore v. Commonwealth*, Ky., 954 S.W.2d 317, 318-19 (1997).

In spite of the prior dismissal of the neck claim and the full and final and final settlement of all claims 5 weeks later, may Plaintiff now raise a claim for cumulative trauma arguing he did not know of the cumulative trauma until after the opinion and settlement agreement? One obvious problem is that he based his

claim on a report that was already in the record at the time of the prior litigation and was the basis of Plaintiff's prior proof. Additionally, Dr. Gilbert found a specific injury - his report does not support a claim for cumulative trauma. Not only did medical evidence on cumulative trauma not exist until October 7, 2019, months after the claim was filed, the vague, general statement of cumulative trauma falls far short of establishing a claim. If Plaintiff's claim was supported by Dr. Gilbert's opinion (as it was filed), then he is precluded on these various procedural grounds, including joinder, because the report existed in the prior claim. If he does not rely on Dr. Gilbert's opinion, he still fails to support his claim of cumulative trauma as there was no evidence in the record for cumulative trauma when he filed his claim.

Whatever the cause, Plaintiff had already litigated a claim for neck pain. To now say his same neck pain is from another source is, essentially, a second bite at the apple.

It is hard to imagine that any Plaintiff could sign an agreement for a full and final settlement and then raise a new claim on an already existing cause of action a few months later.

Fleming did not file a petition for reconsideration. On appeal, Fleming argues the ALJ erred in concluding that he failed to meet his burden of proving causation. Fleming asserts Dr. Gilbert's report does not diagnose cumulative trauma because he did not review Fleming's prior records. However, Dr. Gilbert diagnosed a harmful change in the human organism related to work. His opinions are based upon observations, clinical findings and other standardized testing performed as part his examination, and review of multiple sophisticated diagnostic tests. Likewise, Dr. Hatton's opinion that Fleming's pain resulted cumulative trauma related to his employment as a truck driver and mechanic was

based on his examination, clinical findings, and review of multiple diagnostic tests. When the opinions of Drs. Gilbert and Hatton are considered together, along with Fleming's testimony, there is sufficient evidence of causation to meet his burden of proof.

Fleming argues the ALJ erred in concluding the claim is precluded on procedural grounds. Fleming notes that in cumulative trauma cases, a claimant is not required to self-diagnose the cause of the pain that contributed to his inability to work. Fleming further notes the discovery date is the date a physician advises the claimant that he has a gradual injury caused by the claimant's work. Fleming concedes he knew he had problems with his neck and mid-back at the time of his prior claims. He assumed these were caused by the incidents that gave rise to those claims. However, no physician had informed him that his neck and mid-back problems were the result of cumulative trauma caused by his work. Consequently, he argues his claim is not barred by the doctrines of collateral estoppel, res judicata, or the prior ALJ's opinion and settlement agreement. Fleming contends his claim for cumulative trauma is not barred by the settlement in the prior claim because the settlement only applied to a lumbar strain and L5-S1 herniated disc, which resulted from the December 16, 2015 accident. Because he did not know his neck and mid-back problems resulted from cumulative trauma related to his work, those claims could not have been released in that agreement. Fleming contends his claim is not barred by joinder pursuant to KRS 342.270 because the claim had not yet accrued. During the pendency of those claims, no physician had informed him that those problems were the result of a gradual injury caused by his work.

As the claimant in a workers' compensation proceeding, Fleming had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

Fleming's failure to file a petition for reconsideration further restricts our review. Pursuant to KRS 342.285, in the absence of a petition for reconsideration, concerning questions of fact, the Board is limited to a determination of whether there is substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is any evidence of substance in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Here, the ALJ specifically rejected Fleming's claim that he sustained a cumulative trauma injury. The ALJ's decision was reasonable in light of the evidence from Dr. Primm and Dr. Travis, whose opinions constitute substantial evidence supporting the ALJ's finding. Dr. Travis found no objective abnormalities

of the cervical spine and noted a cervical MRI showed degenerative changes that would be found in the majority of asymptomatic males of Fleming's age. Dr. Travis clearly stated Fleming does not have a cumulative trauma injury to the cervical spine. Similarly, Dr. Primm found no objective findings of a cervical injury and his cervical examination was also normal. Dr. Primm noted Fleming had only very mild degenerative changes at one level, commonly seen in individuals of Fleming's age, regardless of occupation. He agreed with Dr. Travis's impressions and impairment ratings. Dr. Primm concluded Fleming did not have a cumulative trauma injury. Finally, each of the primary care physician's notes indicates a normal cervical examination. The ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Because Fleming was unsuccessful on the threshold issue of proving he sustained a cumulative trauma injury to his neck caused by his employment, the remainder of his arguments are rendered moot.

Accordingly, the March 10, 2020 Opinion and Order Dismissing rendered by Hon. Jane Rice Williams, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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