

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 14, 2019

CLAIM NO. 201586551

CASSENS TRANSPORT CO.

PETITIONER

VS. APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

TIMOTHY MARIANO; and
HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Cassens Transport Company (“Cassens”) appeals from the January 15, 2019 Opinion and Order rendered by Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”), granting Timothy Mariano’s (“Mariano”) motion to reopen and awarding him additional temporary total disability (“TTD”) stemming from a March 20, 2015 work injury. Cassens also appeals the February 5, 2019 Order denying its petition for reconsideration. On appeal, Cassens argues the

ALJ's determination is unsupported by substantial evidence. We disagree and affirm.

Mariano filed a Form 101 on May 25, 2017. He alleged he sustained a cumulative trauma injury to his low back due to heavy repetitive work, manifesting on March 20, 2015. At all relevant times, Mariano worked as a truck driver hauling cars for Cassens. Mariano filed a first report of injury and records from Dr. Jung Kim in support of his claim. The first report of injury, prepared by Kevin Nelson, notes Mariano was standing in snow as he reached up to unlock a safety pin from a trailer on March 20, 2015. Mariano reported he sank in the snow, injuring his back and also had symptoms in his left hip, leg, foot and shoulder. Mr. Nelson also completed an investigative report reflecting the same date and mechanism of injury.

Subsequent to a hearing held February 28, 2018, the parties entered into a settlement agreement approved by the ALJ on April 19, 2018. The agreement reflects March 20, 2015 as the injury date. It notes that although Mariano alleged a cumulative trauma injury in the Form 101, he testified he suffered a specific, acute trauma to his low back on March 20, 2015. The agreement reflects Cassens paid TTD benefits from March 25, 2015 to July 12, 2015, and medical expenses in 2015, but not in 2017. The parties settled for a lump sum for permanent partial disability benefits based upon a compromised impairment rating and additional TTD benefits for periods Mariano was off work in 2017. Mariano retained his right to reopen and entitlement to past/future medical benefits.

Nearly two months later on June 14, 2018, Mariano filed a motion to reopen for additional TTD benefits, which was sustained by the ALJ on July 25,

2018. A benefit review conference was held on October 16, 2018. The parties identified the contested issues as entitlement to additional TTD benefits from June 14, 2018 to August 7, 2018, and whether Mariano sustained a new injury barred by the settlement agreement.

Mariano testified by deposition on July 26, 2017, and at hearings held February 28, 2018 and December 12, 2018. Mariano resides in Youngstown, Ohio. Mariano has worked as a car hauler for Cassens since March 2011. He typically drives a dedicated route, picking up vehicles at Ford in Louisville, Kentucky and hauling them to various dealerships in New York. Mariano is responsible for loading and unloading the cars from the trailer. Mariano is paid by the mile and drives an average of two thousand miles per week.

Mariano testified he was standing in a pile of snow approximately three feet high on the side of the road in New York on March 20, 2015. As he was pulling a pin from the trailer, the snow gave way causing him to fall and injure his low back. His pain was located in his left low back and hip, and radiated down his left leg. He reported the incident to his supervisor. Mariano completed his delivery and drove back to Youngstown, Ohio. He then sought treatment with a company physician at Mercy Health Occupation Medicine (“Mercy Health”) who recommended physical therapy. Mariano was off work for approximately four months, and then returned to his regular job at Cassens with no restrictions in June 2015. Cassens voluntarily paid his medical expenses and TTD benefits in 2015. Mariano continued to work his regular job and sought no additional treatment until March 2017.

In March 2017, Mariano experienced gradual pain down his left side. He testified it was “the same pain I had from the original injury” and agreed the pain was located in the same general area as before in March 2015. Mariano reported his symptoms to his supervisor and returned to a different company physician at Mercy Health. Dr. Kim recommended physical therapy, which Mariano did not undergo since all treatment in 2017 was denied by the workers’ compensation insurance carrier. Mariano was off work from March 1, 2017 to June 15, 2017, but did not receive TTD benefits. He returned to his regular job with Cassens on June 15, 2017 without restrictions earning the same or greater wages as he did in March 2015.

The parties settled the claim for the March 20, 2015 injury in April 2018. At the subsequent final hearing on December 12, 2018, Mariano testified he returned to Dr. Kim in May 2018 for piercing pain down his left side, which caused his left leg to occasionally give way. His symptoms were aggravated when he drove his truck. Dr. Kim placed him on restrictive duty from May 2018 until August 2018, and he was released to regular duty on August 8, 2018. At that time, Mariano returned to his regular job with Cassens. Mariano received no TTD benefits during the time he was off work in 2018. On cross-examination, Mariano replied “yes” to the following question: “So, the first injury in 2015 was to your left hip area and then when you started experiencing pain the second time, and I guess you had returned to work at this point, you started having pain in your right hip. Does that sound right?”

Mariano filed the treatment records of Dr. Kim, which reflect examinations on four occasions in 2017. On each date, the treatment records reflect

the identical description of injury: “Injury from 3/28/15 I had a flare up from this injury started about 3 weeks ago.” Mariano first sought treatment on March 1, 2017. Dr. Kim noted Mariano previously treated for a lumbar strain with physical therapy from April to June 2015, which was helpful. Dr. Kim noted that Mariano had experienced low back pain, left shin, and left shoulder pain, as well as left leg buckling for three weeks. Dr. Kim diagnosed strain of muscle, fascia and tendon of the low back, recommended physical therapy, and placed Mariano on restrictive duty. He also stated Mariano’s current condition is a new claim since his work requires repetitive use of his left ankle. However, in a work ability form completed the same day, Dr. Kim identified the date of injury at March 28, 2015, and placed Mariano on restrictive duty preventing him from returning to his full job duties. Mariano returned to Dr. Kim on April 12, 2017 and May 24, 2017 with the same complaints to his low back and left leg with no improvement. Dr. Kim noted his recommended treatment had been denied and he kept Mariano on restrictive duty. On June 14, 2017, Mariano reported his low back and left leg had improved and he was willing to return to work. Dr. Kim noted his initial diagnosis and returned Mariano to regular duty on June 15, 2017.

After the April 2018 settlement agreement, Mariano returned to Dr. Kim on several occasions in May, June, and November 2018. As with the 2017 records, the 2018 records document the identical description of accident: “injury from 3/28/15 I had flare up from this injury started about three weeks ago.” On May 16, 2018, Dr. Kim noted Mariano was last seen in June 2017, and has been working with pain on left lower back radiating into his left thigh. Mariano reported

his left low back and leg pain at a level 10. Dr. Kim noted the initial diagnoses of muscle strain, fascia and tendon of the low back and recommended physical therapy. Mariano returned on May 30, 2018, reporting worsening left back and leg pain. Dr. Kim placed Mariano on restrictive duty, and noted a lumbar MRI may be required. Mariano reported no improvement to his low back and left sided symptoms on June 27, 2018. Dr. Kim advised Mariano to perform home exercises while awaiting approval for physical therapy and a lumbar MRI. Dr. Kim placed Mariano on restricted duty until August 8, 2018. Dr. Kim prescribed a high back seat support on September 25, 2018.

On November 7, 2018, Dr. Kim noted Mariano's problem began on March 28, 2015, and that he continues to have low back pain and numbness, although they are improved. Dr. Kim recommended home exercises and noted Mariano had returned to work. A work ability document was completed by Dr. Kim on each treatment date, with each reflecting the March 28, 2015 date of injury, with correlating restrictions. On each form, Dr. Kim indicated Mariano had not attained maximum medical improvement ("MMI").

Mariano also submitted the November 28, 2017 report by Dr. Jules Barefoot. He noted the March 2015 work accident resulted in low back and left leg pain, as well as the development of low back pain radiating into his left buttock and leg in March 2017. He noted Mariano returned to work in June 2017. Mariano continued to complain of low back pain radiating into left buttock, thigh and shin. Dr. Barefoot reviewed records from 2015 and 2017, and performed an examination. Dr. Barefoot diagnosed lumbar degenerative disc disease with ongoing nonverifiable

radicular complaints warranting a 7% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. He noted Mariano has a clinical history and examination findings compatible with a specific injury, and continues to be symptomatic. He recommended a lumbar MRI and consultation with a spine surgeon. He found Mariano had attained MMI and assigned restrictions that would not prevent him from returning to his regular job.

Dr. Barefoot stated, “I would apportion 100% of this 7% whole person impairment to his workplace injury that occurred on March 20, 2015.” He noted that although his initial condition improved somewhat after receiving treatment in 2015, Mariano continues to have ongoing significant problems with low back pain radiating into his left leg.

Cassens filed the December 4, 2017 report prepared by Dr. Michael Best. He noted the March 2015 injury. Mariano reported a gradual progression of low back pain, and on occasion into the right hip without injury. Dr. Best summarized the 2017 records of Dr. Kim. After performing an examination, Dr. Best diagnosed, “lumbosacral soft tissue sprain/strain-resolved” for the March 20, 2015 work event and “Non-work-related soft tissue lumbosacral sprain/strain March, 2017-resolved.”

Dr. Best opined the March 20, 2015 work event resulted in soft tissue sprain/strain/contusion that resolved without a permanent harmful change. He noted Mariano freely admitted there was no work-related cause to his progressive low back pain in March 2017, and there was clearly no work injury. Regardless, Dr.

Best noted this condition had resolved, and Mariano returned to full, unrestricted work on June 18, 2017. Therefore, Dr. Best opined there had been no injury or harmful change to the human organism. Dr. Best assessed a 0% impairment rating. He opined Mariano had reached MMI and he assigned no restrictions. Dr. Best also opined, “there is no cause and effect relationship established between the 2015 soft tissue lumbosacral sprain/strain and the 2017 low back complaint.”

The ALJ rendered an opinion on January 15, 2019. She determined Mariano is entitled to TTD benefits from June 14, 2018 through August 8, 2018.

The ALJ stated as follows:

There appears to be no dispute that Mariano was having left-sided low back pain from May 2018 through August 8, 2018, for which Dr. Kim restricted him from working. The real issue is whether the pain he was experiencing was due to the injury he sustained on March 20, 2015, and for which he settled his claim for benefits. Importantly, Mariano retained all future rights as part of the settlement.

Defendant argues that Mariano’s injury resolved within several months after physical therapy in 2015. Defendant further argues that Dr. Barefoot did not address the question as to whether Mariano suffered a second injury or event in 2017, because he did not receive a history of Mariano of the new right-sided pain. However, other than that[sic] Mariano admitting to having some right-sided pain in 2017 during questioning at the hearing, this ALJ is unaware of any treatment records for a new right-sided low back injury in 2017. This ALJ reviewed Dr. Best’s report in which he describes Dr. Kim’s records from the early part of March 2017. Dr. Best characterized the records as stating that Mariano had pain in the right hip that ran down to the right shin that was accompanied by pain in the low back. However, the records on March 1, 2017, and the records thereafter from Dr. Kim clearly document left leg symptoms, not right.

This ALJ also recognizes that Mariano responded “yes” when asked, “So, the first injury in 2016 was to your left hip area, and then when you started experiencing pain the second time, and I guess you had returned to work at this point, you started having pain in your right hip. Does this sound right?” This question had multiple statements to which Mariano responded “yes”, and this ALJ believes Mariano may have simply been confused, as he repeatedly described similar left-sided symptoms in all of his treatment records in 2015, 2017, and 2018. The treatment records indicate that he had a gradual recurrence of his left-sided low back complaints. Dr. Kim’s records also indicate that the March 2015 injury was the cause. Dr. Barefoot also noted that on November 28, 2017, Mariano was still symptomatic and that he sustained a permanent injury.

This ALJ found Mariano to be a credible witness, and he described that his recurrence of pain was to his left side, and that he had similar symptoms following the initial injury in 2015, 2017 and again in 2018, with no new injuries. The parties also agreed to a settlement based upon a 3.5% permanent impairment rating, and he did not waive his right to future medical or income benefits. This ALJ is convinced that Mariano had not reached maximum medical improvement and had not reached a level of improvement which would permit a return to employment during his flare up of his injury symptoms in May 2018 through August 2018. Accordingly, this ALJ finds that TTD benefits are due from June 14, 2018 through August 8, 2018.

Cassens filed a petition for reconsideration requesting additional findings addressing whether a physician had attributed Mariano’s complaints to the 2015 injury. The ALJ denied the petition as an impermissible re-argument of the merits of the claim.

On appeal, Cassens argues the ALJ’s decision is not based upon substantial evidence. Specifically, it argues Mariano did not file any medical evidence establishing his current problems are related to the initial 2015 injury.

Cassens asserts Dr. Kim made no determination regarding causation, and that Mariano is unqualified to address causation.

As the claimant in a workers' compensation proceeding, Mariano had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful in his burden regarding entitlement to additional TTD benefits, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). Where 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 may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Mere evidence contrary to the ALJ's decision is not adequate

to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

KRS 342.0011(11)(a) defines temporary total disability as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Kentucky Court of Appeals stated generally:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor

market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

As noted by the ALJ, the true issue before her was whether Mariano's 2018 low back pain is related to the March 20, 2015 work injury. Although the parties had settled this claim, Mariano retained his right to future medical benefits.

Our review of the record reveals substantial evidence supports the ALJ's determination that Mariano experienced a flare-up of symptoms in May 2018 to August 2018, from the March 20, 2015 injury. Additionally, the ALJ thoroughly considered and understood all the evidence before her in rendering her decision.

The medical records and report by Dr. Barefoot support the ALJ's determination that Mariano's 2018 symptoms are related to the March 20, 2015, work injury. Mariano sought treatment with Dr. Kim on May 16, 2018 for low back and left leg complaints. He documented the same description of injury as was noted in the 2017 records: "injury from 3/28/15 I had flareup from this injury started about 3 weeks ago." He noted Mariano was last seen in June 2017, had been working with low back and left leg pain, and "recently it has gotten worse with some difficulty walking." He noted the initial diagnosis of low back muscle strain and recommended physical therapy. Mariano returned on May 30, 2018 and June 27, 2018, again reporting worsening of symptoms. At the last visit of record on November 7, 2018, it is noted Mariano's low back pain and numbness began on March 28, 2015.

Dr. Kim additionally prepared work ability forms on each treatment visit. All forms document the date of injury as March 28, 2015, assign temporary restrictions on Mariano's work activities preventing him from returning to his full

duties, and indicate Mariano had not attained MMI from his work injury. The forms indicate Mariano was assigned restrictions until August 8, 2018.

Dr. Barefoot evaluated Mariano on November 28, 2017, prior to his 2018 symptoms. However, he noted Mariano's 2015 work accident and March 2017 symptoms. Dr. Barefoot diagnosed lumbar degenerative disc disease with ongoing nonverifiable radicular complaints warranting a 7% impairment rating. He apportioned the impairment rating to the March 20, 2015 work injury. He noted Mariano continues to be symptomatic and recommended additional treatment. He also noted that although Mariano's initial condition improved somewhat after receiving treatment in 2015, he continues to have ongoing significant problems with low back pain radiating into his left leg.

The above constitutes substantial evidence supporting the ALJ's determination Mariano's 2018 symptoms are related to the March 20, 2015 work injury. Although no individual physician provided a clear and concise causation opinion, we believe the ALJ could reasonably infer from the medical records and Dr. Barefoot's evaluation that Mariano's 2018 symptoms are related to the March 20, 2015 work accident. The finding Mariano had neither reached MMI nor a level of improvement permitting a return to employment during his flare up of his injury symptoms in May 2018 through August 2018 is supported by the work ability forms submitted by Dr. Kim and has not been appealed by either party.

Accordingly, the January 15, 2019 Opinion and Order, and the February 5, 2019 Order rendered by Hon. Christina D. Hajjar, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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