Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 17, 2020

CLAIM NO. 201877811

CENTIMARK CORP — PETITIONER

VS. **APPEAL FROM HON. JEFFREY V. LAYSON, III, ADMINISTRATIVE LAW JUDGE**

BILLY HUBBARD AND
HON. JEFFREY V. LAYSON, III,
ADMINISTRATIVE LAW JUDGE — RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Centimark Corporation ("Centimark") appeals from the Opinion, Award and Order rendered December 16, 2019 by Hon. Jeff V. Layson III, Administrative Law Judge ("ALJ"). The ALJ awarded Billy Hubbard ("Hubbard") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a low back injury he sustained on June 6, 2018.

Centimark also appeals from the January 16, 2020 Order overruling its petition for reconsideration.

On appeal, Centimark argues the ALJ erred in determining Hubbard did not fail to follow reasonable medical advice. Centimark also argues the ALJ erred in finding Hubbard did not have a pre-existing, active condition. In the alternative, Centimark argues the ALJ erred in finding Hubbard sustained a permanent injury due to the June 6, 2018 work accident. For the foregoing reasons, we affirm.

Hubbard filed a Form 101 alleging he injured his low back on June 6, 2018 when he slipped and fell while moving heavy plywood. Centimark denied Hubbard's claim and raised the affirmative defense of unreasonable failure to follow medical advice. It specifically noted Hubbard refused to undergo injection therapy and a lumbar myelogram recommended by Dr. James Bean, Dr. William Lester and Dr. Silvers (first name unknown).

Hubbard testified by deposition on April 12, 2019, and at the final hearing held October 22, 2019. Hubbard was born in January 1990, and resides in Manchester, Kentucky. He completed the ninth grade and has no additional vocational or specialized training. Hubbard began working for Centimark, a commercial roofing company, in February 2016. He initially worked there as a roofer and eventually became a foreman. In addition to his foreman responsibilities, Hubbard lifted plywood weighing approximately one hundred pounds, and manipulated large heavy rolls of rubber TPO.

Hubbard testified that on June 6, 2018 he was moving a stack of plywood by picking up one piece at a time and loading it into a wheeled cart. Hubbard testified his foot slipped as he lifted a piece of plywood, causing him to twist and fall onto his right side. Hubbard felt immediate pain in his low back radiating into his right leg. He sought treatment the following day with Dr. Silvers at Baptist Health. Dr. Silvers restricted Hubbard to sit down duty, ordered physical therapy and a lumbar MRI, and prescribed medication. Dr. Silvers recommended injections on at least two occasions, which Hubbard declined because "I didn't want nobody sticking a needle in my spine." However, Hubbard underwent trigger point injections in July 2018, which did not help his symptoms. Dr. Silvers referred him to Drs. Lester and Bean. He treated with Dr. Bean in August 2018, who recommended continuing physical therapy. Dr. Lester prescribed Norco and ordered EMG/NCS testing. In November 2018, Dr. Bean recommended a lumbar myelogram, which Hubbard declined. He stated as follows in explaining why he declined the myelogram:

> A: Because I talked to Dr. Lester about it. I told him I don't - - you know, what was it about. It was about like surgery. I guess he wanted to see about surgery. I told him, well, I don't want to do surgery. I said, I don't want to have surgery done on my back. But I don't know. I'm thinking about it. I'm thinking about having the surgery done because I'm just in excruciating pain all the time. I've got too much - - but the reason why I didn't do the myelogram is because I didn't want to have the surgery.
>
> Q: So you didn't do the myelogram.
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> A: And he said, well - - he said, if you ain't going to have surgery, there's no point in doing the myelogram, is what Dr. Lester said.

. . . .

A: Dr. Lester told me we was at the point that, you know, that's all we can do for you.

Q: He's done all he could do for you?

A: He said it's either surgery - - he said, you can do surgery, but he said, we're at the point, that's all we can do for you.

Q: So nobody knows right now that you're a surgical candidate, right because you've not had the myelogram.

A: Right.

Q: So, all right.

A: Because I didn't - - I don't want to have surgery.

Hubbard also stated he is reluctant to undergo surgery based upon conservations he has had with other individuals who have had poor results from back surgery. Dr. Lester told Hubbard surgery was his only option outside of medication. Hubbard acknowledged Dr. Lester placed him at maximum medical improvement ("MMI") and referred him for a functional capacity evaluation ("FCE") on January 3, 2019. Hubbard was unable to complete the FCE due to tightness in his chest. Hubbard continues to see Dr. Lester every two months for his prescriptions of Norco, Gabapentin, and a muscle relaxer. Dr. Lester has also recommended injections, which Hubbard declined.

Hubbard testified he returned to light duty at Centimark for two or three months until Dr. Silvers restricted him completely. He then received TTD benefits until January 2019, when Dr. Lester placed him at MMI. Hubbard has not

returned to any work. He does not believe he can return to his former job with Centimark due to his ongoing low back and right leg symptoms.

Hubbard acknowledged he was involved in a motor vehicle accident in 2011, but could not recall his symptoms and complaints afterward, or with whom he treated. Hubbard testified that on December 9, 2014, he was cutting wood for his father-in-law when he experienced low back and right leg pain. He sought treatment the same day at the emergency room and had a lumbar MRI performed in January 2015. Hubbard testified his symptoms resolved, and he sought no additional treatment for his low back or right leg until the June 6, 2018 work injury.

The June 26, 2018 lumbar MRI demonstrated degenerative disc disease with multilevel neuroforaminal narrowing. Hubbard treated with Dr. Bean on August 13, 2018. He noted Hubbard injured his back on June 6, 2018 when he twisted while lifting plywood board. He noted Hubbard's complaints of low back pain radiating into his right leg, as well as right foot numbness. He noted Hubbard had undergone a couple of Toradol injections without much improvement, and participated in physical therapy. Dr. Bean diagnosed a lumbar sprain injury with degenerative disc at L5-S1. He noted there was no herniation or nerve root compression on the June 2018 MRI. He advised to continue with physical therapy, and did not recommend surgery.

On November 7, 2018, Dr. Patrick Leung performed an EMG/NCS study. The study demonstrated mild to moderate right L5 radiculopathy. Hubbard returned to Dr. Bean on November 26, 2018. Dr. Bean noted persistent pain despite the completion of 27 physical therapy sessions. He also noted the recent EMG/NCS

study. Dr. Bean assessed, "L5-S1 bright annular signal, lumbar sprain versus right HNP. Completion of all reasonable conservative management." Dr. Bean ordered a lumbar myelogram "to conclusively determine whether there is or is not any local nerve root compression at L5-S1 on the right."

Centimark also filed Dr. Lester's January 3, 2019 treatment record. He diagnosed a lumbar sprain and determined Hubbard had reached MMI. He prescribed Norco and ordered a FCE. The January 16, 2019 FCE report indicates the evaluation was not completed because Hubbard complained of chest pain with physical activity.

Centimark also filed the December 9, 2014 emergency department record from AdventHealth Manchester and the January 15, 2015 lumbar MRI report. On December 9, 2014, Hubbard went to the emergency room complaining of bilateral low back pain and right leg pain. A lumbar CT scan demonstrated multilevel degenerative changes, worse at L5-S1. Hubbard was diagnosed with low back pain, a lumbar sprain, and sciatica on the right. An injection was administered, and Hubbard was prescribed Flexeril and Toradol. The January 15, 2015 lumbar MRI demonstrated mild low T1 signal and mild to moderate degenerative changes.

Hubbard filed the January 4, 2017 physical therapy record from AdventHealth Manchester. Hubbard presented with neck pain radiating into his left arm due to a November 2016 work injury. Hubbard was diagnosed with left cervical radiculopathy. No low back or right leg complaints were recorded.

Dr. James Owen evaluated Hubbard on February 7, 2019, at his attorney's request. He noted Hubbard denied having any prior low back problems.

Dr. Owen assessed a 13% impairment rating for Hubbard's lumbar condition pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), attributable to the June 6, 2018 work accident. Dr. Owen opined Hubbard is at MMI since he refuses surgery. Dr. Owen opined Hubbard does not retain the physical capacity to return to work as a roofer. He restricted Hubbard from lifting over ten pounds and from repetitive bending, squatting, or stooping.

Dr. John Vaughan evaluated Hubbard on April 15, 2019 at Centimark's request. Hubbard denied any previous back injuries, pain or treatment. Dr. Vaughan diagnosed subjective complaints of low back and right leg pain, lumbar strain, and L5-S1 disc degeneration/disc bulge. He determined Hubbard's current low back and right leg symptoms are due to the June 6, 2018 work accident. Taking into consideration the EMG/NCS study, Dr. Vaughan assessed a 10% impairment rating pursuant to the AMA Guides. Dr. Vaughan restricted Hubbard from lifting over thirty pounds and opined he does not have the physical capacity to return to work as a roofer. Dr. Vaughan opined Hubbard is not a surgical candidate and believed injections are not medically necessary as they would not improve his pain. He determined Hubbard reached MMI three months after the work injury on September 9, 2018.

Dr. Vaughan prepared a supplemental report on October 9, 2019 after reviewing the December 9, 2014 emergency department records and the January 2015 MRI. He determined Hubbard had a pre-existing, active low back condition since there was a documented low back injury with the same symptoms of low back

and right leg pain. He also noted the 2015 and 2018 MRIs demonstrate similar findings. Therefore, he attributed the entire 10% impairment rating to the December 2014 injury. Similarly, Dr. Vaughan attributed any need for future medical treatment or restrictions to the December 2014 injury.

Dr. Frank Burke evaluated Hubbard on July 18, 2019 at his attorney's request. Dr. Burke diagnosed an acute lumbosacral strain with development of a right L5 radiculopathy and possibly associated right sacroiliitis due to the June 6, 2018 work injury. Dr. Burke noted, "[s]ince surgery has not been undertaken and because of the fear of the complications of interventional pain treatments and surgical intervention from 'other people's' conversations, he is not proceeding with surgery." He determined Hubbard had attained MMI and assessed a 13% impairment rating pursuant to the AMA Guides. He recommended a re-evaluation with a current 3G MR, as well as an interventional pain consultation. Dr. Burke opined Hubbard is not capable of returning to work as a roofer, and restricted him from crawling, bending, or lifting weights.

Dr. Burke prepared an October 28, 2019 supplemental report after reviewing Dr. Vaughn's October 4, 2019 report, the December 9, 2014 emergency department record, and the 2015 lumbar MRI. Dr. Burke noted there were no additional medical evaluations, follow-ups, or treatment after the December 2014 emergency room visit and the January 2015 MRI. He noted the June 6, 2018 work injury occurred approximately three and a half years later. He concluded Hubbard did not have a pre-existing, active condition within three or four years prior to the work injury noting the lack of prior treatment and the November 2018 EMG.

Dr. Lester testified by deposition on July 30, 2019. Dr. Lester began treating Hubbard in September 2018 and diagnosed him with lumbar radiculopathy and lumbar disc disease. He noted Hubbard's radicular complaints are consistent with the objective findings on his examination, the lumbar MRI, and the EMG/NCS study. Dr. Lester recommended a trial of epidural injections, which Hubbard declined. Dr. Lester stated he would have tried the epidural injections "to see if that would actually decrease his radicular pain and give him some improvement of his symptoms and stuff. What can help in the diagnosis sometimes is if they get really good relief for the pain, they may really have a lot of pressure on that nerve." Dr. Lester referred Hubbard to Dr. Bean, who recommended a lumbar myelogram, which he also declined. Dr. Lester stated as follows regarding the myelogram:

> A: That was Dr. Bean's suggestion of, you know, he was still having the pain. The MRI was positive, the EMG was positive, and to really kind of help look at the level and then see how much pressure was on the nerve root, the myelogram is still the best standard to really elicit the best visualization of pressure on the nerve.
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> Q: Again, in Mr. Hubbard's case, he declined to have the myelogram to try to determine the actual diagnosis to see what treatment may avail him best; is that correct?
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> A: Yeah, he declined really having the myelogram because he really wasn't interested in having surgery.
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> Q: So your understanding is he wasn't willing to undergo the injections, the myelogram, or the surgery?
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> A: Yes.
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> Q: And he verbalized to you that he did not want to take those recommendations either by you or Dr. Bean; is that your recollection or, upon review of your notes, accurate?

> A: Well, he - - I mean, he asked questions about it specifically and tried to - - you know, he kind of asked the right questions of, you know, do you think that's going to change anything or anything, and I said, well, I can't guarantee it. He said, well, I've heard a lot of people have back surgeries and procedures and have a lot of complications, and he just didn't want to proceed with possibly being worse than what he already was.

Dr. Lester testified he could not guarantee the injection therapy or surgery would change Hubbard's symptoms. He also indicated the results of the recommended myelogram could have altered his opinions regarding the need for surgery. If the study demonstrated a disc pushing on the nerve root and there was no improvement in three months, Dr. Lester would have probably recommended a discectomy.

Dr. Lester agreed Hubbard falls under the DRE Category III, with a lumbar impairment ranging from a 10 to 13% impairment rating. He testified a successful surgery would not alter the impairment rating, but "if it was really successful, he should have a reduction in pain." He also believes a successful discectomy would likely result in a fifty-pound lifting restriction. Outside of surgery, the only treatment available to Hubbard is medication and a home exercise program. Dr. Lester indicated without the myelogram and surgery, Hubbard's lumbar condition may worsen. Dr. Lester testified Hubbard is currently restricted from work and indicated he can only perform sedentary work activities. He currently prescribes Gabapentin, Norco and Zanaflex. Dr. Lester testified Hubbard did not report any previous low back injuries or treatment.

A Benefit Review Conference ("BRC") was held on October 22, 2019. The BRC Order reflects the parties stipulated Hubbard sustained a work-related

injury on June 6, 2018. The parties identified the following contested issues: benefits pursuant to KRS 342.730, average weekly wage, TTD, exclusion for pre-existing impairment, ability to return to work, credit for unemployment benefits, and failure to follow reasonable advice. At the hearing, the ALJ reviewed the stipulations and contested issues. He specifically stated, "The parties further agree that Mr. Hubbard sustained a work-related injury on June the 6th of 2018 . . . ." Counsel for both parties agreed to the stipulations and contested issues as stated by the ALJ.

The ALJ found Hubbard's low back injury warranted a 13% impairment rating. The ALJ specifically found, "Hubbard's permanent impairment is at the upper end of the range given by Dr. Lester. Therefore, based on the medical testimony from Dr. Owen and Dr. Burke, the [ALJ] finds the Plaintiff has a 13% AMA impairment rating related to his current low back condition." The ALJ determined Hubbard did not have a pre-existing, active lumbar condition pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). The ALJ noted Hubbard testified he fully recovered from his 2011 and 2014 injuries and was asymptomatic at the time of the June 6, 2018 work accident. The ALJ noted the lack of medical records indicating Hubbard sought or received any medical treatment for low back symptoms for approximately three and a half years prior to the work incident, during which time he was able to work as a roofer without restrictions. The ALJ determined Hubbard is entitled to the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ also found Hubbard entitled to TTD benefits from July 27, 2018 through January 3, 2019, the date Dr. Lester found he attained MMI.

The ALJ determined Hubbard's refusal to have the injections and myelogram did not constitute an unreasonable failure to follow medical advice pursuant to KRS 342.035(3). The ALJ provided the following analysis:

> The question presented is whether Mr. Hubbard's refusal to have the injections and the myelogram constitutes an unreasonable failure to follow medical advice which would invoke the mandate of KRS 342.035(3). The application of that statute is an affirmative defense and, consequently, the Defendant/Employer bears the burden of proof. *Teague v. South Central Bell*, 585 S.W.2d 425 (Ky. App. 1979). In order to meet that burden, the Defendant/Employer must establish: 1) the failure to follow medical advice, and; 2) that such failure is unreasonable. In addition, it must be proven that any such unreasonable failure to follow medical advice caused, aggravated or continued disability. *Luttrell v. Cardinal Aluminum Company*, 909 S.W.2d 334 (Ky. App. 1995).
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> While no physician has told Mr. Hubbard that he is a surgical candidate, it does appear that the recommendation for a myelogram and the diagnostic aspects of the injections are related to whether or not the Plaintiff is a surgical candidate. Therefore, the reasonableness of Mr. Hubbard's refusal to undergo these procedures depends, at least in part, upon the reasonableness of his refusal to consider surgery on his low back. In other words, if Mr. Hubbard's refusal to consider a prospective surgery is unreasonable, then it follows that his refusal to undergo diagnostic testing related to surgery may also be unreasonable. On the other hand, if Mr. Hubbard's current position relating to possible surgery is not unreasonable, then it can not be said that declining to have diagnostic tests designed to determine the propriety of an operation is unreasonable.
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> Spinal surgery cannot be described as a minor medical procedure. Dr. Lester testified that *if* it were determined that surgery is appropriate and *if* that the procedure were successful, Mr. Hubbard's condition *may* be improved. There is no testimony, however, regarding the likelihood of that prospect. In any event, in *American Tobacco*

Company v. Sallee, 419 S.W.2d 160 (Ky. 1967), the former Court of Appeals held:

> . . . we are not yet ready to hold that a major operation, involving substantial pain, must be submitted to unless the prospects of unsuccessful results, as well as the risk to life or health, are minimal.

Based on the foregoing, the Administrative Law Judge finds that Mr. Hubbard's refusal to have the myelogram that was recommended by Dr. Bean and his refusal to undergo injections for diagnostic purposes is not unreasonable. In making this ruling, the Administrative Law Judge acknowledges that no physician has proposed surgery for Mr. Hubbard at this time. However, the Plaintiff has expressed his opposition to having surgery, should it be proposed. The Administrative Law Judge having found that the Plaintiff's position regarding surgery is not unreasonable, it follows that his refusal to undergo diagnostic testing for the purpose of determining whether he is a surgical candidate is also not unreasonable.

Finally, there is no evidence that Mr. Hubbard's disability is caused, increased, aggravated or continued by his refusal to have the injections or the myelogram. Dr. Lester testified that these tests may indicate that the Plaintiff is a surgical candidate and that the surgery may increase his functional ability. He also testified, however, that Mr. Hubbard's AMA rating would be the same regardless of whether or not he has surgery. Moreover, any improvement in the Plaintiff's functional ability would be the direct result of the surgery, not the pre-surgery testing. As set forth above, the Administrative Law Judge has determined that Mr. Hubbard's refusal to undergo the myelogram and injections is not unreasonable.

Based on all off the foregoing, the Administrative Law Judge finds that Mr. Hubbard's disability has not been caused, aggravated or continued by an unreasonable refusal to follow medical advice and, therefore, his claim for compensation is not barred by KRS 342.035(3).

Centimark filed a petition for reconsideration making essentially the same arguments it now raises on appeal. The ALJ stated as follows in denying its petition:

> 1. It was patent error for the ALJ to find that this claim is not barred by the Plaintiff failure to follow reasonable medical advice.
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> In order for this affirmative defense to be successful, the Defendant/Employer must prove that: 1) the Plaintiff has refused to undergo appropriate medical treatment; 2) that any such refusal is unreasonable, and; 3) that any such unreasonable refusal has caused, aggravated or continued the Plaintiff's disability. Mr. Hubbard credibly testified that it was his understanding that the myelogram recommended by Dr. Bean was a precursor to surgery, which Mr. Hubbard did not want to have. As set forth in the Opinion and Award, a refusal to undergo a major operation is not unreasonable. *American Tobacco Company v. Sallee*, 419 S.W.2d 160 (Ky. 1967). Mr. Hubbard explained to Dr. Lester that his fear of surgery was the basis for his refusal to have the myelogram. There is no evidence in the record that Dr. Lester, or any other physician, tried to dispel Mr. Hubbard of his belief that the purpose of the myelogram was to determine whether or not he was a surgical candidate. Moreover, there is no testimony from any physician who states that Mr. Hubbard's decision not to follow the recommended treatment is, in fact, unreasonable. Finally, at least with regard to the propriety of additional lumbar injections, Mr. Hubbard's position is consistent with that of the Defendant/ Employer's own IME physician, Dr. Vaughan, who stated:
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> > "I do not think he has any problems in his back amenable to surgical treatment. I do not think injections in his back are medically necessary. I would predict injections would not help his pain."
>
> The foregoing facts led the ALJ to determine that Mr. Hubbard did not act unreasonably in declining to have the myelogram or additional injections. However, even if the refusal of this treatment had been unreasonable,

there has been no showing that it "caused, aggravated or continued" the Plaintiff's disability. No doctor offered an opinion that Mr. Hubbard's AMA rating would be less if the injections and myelogram had been done. Indeed, Dr. Lester testified that the AMA rating would be the same even if Mr. Hubbard eventually had a successful surgery. See also Section III below, regarding any argument by the Defendant/Employer that the Plaintiff's refusal to undergo the myelogram or additional injections prolonged the period of TTD in this case.

The Defendant/Employer's Petition is a re-argument of the merits of this claim as they pertain to this particular issue. Based on the foregoing, this part of the Petition for Reconsideration is overruled.

II. It was patent error for the ALJ to find that the Plaintiff "sustained an injury which would entitle him to benefits per KRS 342.730."

In making this argument, the Defendant/Employer cites the Plaintiff's prior reports of back pain in 2014 and 2015 and states:

> "The Plaintiff's objective medical findings did not change between 2015 and 2018. Therefore, he had no harmful change to the human organism as evidence by objective findings as a result of the 6/6/2018 injury. If the Plaintiff has no "injury" he is not entitled to disability benefits per KRS 342.730."

As set forth above, the Defendant/Employer is essentially arguing in its Petition that it was error for the ALJ to find that the Plaintiff sustained a work-related injury as defined by the Act. However, the Benefit Review Conference Order and Memorandum completed on October 22, 2019 clearly indicates that the parties stipulated that Mr. Hubbard sustained a workrelated injury on June 6, 2018. That same document confirms that "work related injury/causation" and "injury as defined by the Act" are nowhere listed as contested issues in this case. Finally, while on the record at the beginning of the formal hearing held in this case, the ALJ went over the stipulations and contested issues as

> set forth in the BRC. At no time did counsel for the Defendant/Employer seek to include any questions about whether the Plaintiff sustained a work-related injury as a disputed issue in this case.
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> The Defendant/Employer did preserve the issue of exclusion for preexisting active impairment as a contested issue in this case. Indeed, for there to be no injury, as the Defendant/Employer argues in its Petition, the entirety of the Plaintiff's current impairment would have to be pre-existing and active. In order to satisfy its burden of proof with regard to this issue, the Defendant/Employer would have to establish that the prior condition was both impairment ratable and symptomatic immediately prior to the occurrence of the work-related injury. *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky.App. 2007). However, as pointed out in the Opinion, Award and Order, the Plaintiff credibly testified that he fully recovered from the prior episode of back pain and was completely asymptomatic at the time of the injury in 2018. Moreover, there is no medical evidence in the record which would indicate that Mr. Hubbard sought or received any medical treatment for low back symptoms for approximately three and a half years prior to the 2018 incident. Finally, the Plaintiff was able to work as a full-time roofer without any physical restrictions or limitations up until the date of the work injury.
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> Because the Defendant/Employer failed to preserve the occurrence of a work-related injury as a contested issue in this case and, further, since the Defendant/Employer did not sustain its burden of proving that the Plaintiff's current condition is a pre-existing and active condition, this part of the Defendant/Employer's Petition for Reconsideration is overruled.

The ALJ also addressed Centimark's argument the ALJ erred in awarding TTD benefits based on a finding Hubbard reached MMI on January 3, 2019. The ALJ rejected Dr. Vaughan's September 9, 2018 MMI date since it was assessed before Hubbard began treating with Dr. Lester and predated the additional physical therapy and the EMG/NCV he ordered. The ALJ also noted Dr. Lester

was aware of Dr. Bean's recommendations and Hubbard's refusal to have the myelogram. The ALJ noted Dr. Lester could have retroactively placed Hubbard at MMI in November 2018, but declined to do so. Rather, he stated the date of MMI was January 3, 2019.

On appeal, Centimark argues the ALJ erred in finding Hubbard did not unreasonably fail to follow medical advice. Centimark asserts the ALJ did not properly weigh the evidence of record and did not consider the therapeutic benefits of the proposed treatment, refusal of which aggravated and continued Hubbard's condition. Centimark similarly asserts the ALJ's decision was against the totality of the evidence. Centimark asserts the ALJ disregarded Dr. Bean's treatment plan that the myelogram is to determine the presence of nerve root compression in order to properly diagnose and treat Hubbard. It argues the ALJ did not acknowledge the benefit in providing a diagnosis for the proper treatment the myelogram and injections would provide. It also asserts the ALJ did not consider Dr. Lester's testimony that he wanted to try injections to decrease pain and improve Hubbard's symptoms. Centimark asserts Hubbard's refusal to undergo the myelogram or injections aggravated and continued his condition. Centimark asserts Hubbard did not undergo the recommended treatment because he did not wish to have surgery and due to his fear of needles. Centimark argues the fear of needles is unreasonable since injections could improve his quality of life and provide a better diagnosis.

Centimark also argues the ALJ erred in finding Hubbard sustained a permanent injury and attributing the entire impairment to the June 6, 2018 work event. Centimark first asserts the ALJ could not rely upon Dr. Lester's impairment

rating since he was unaware of Hubbard's prior low back problems. Centimark also argues the ALJ did not properly consider Dr. Vaughn's opinion Hubbard did not sustain an injury on June 6, 2018. Centimark also asserts the ALJ erred in finding Hubbard did not have a pre-existing, active condition.

As the claimant in a workers' compensation proceeding Hubbard had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, 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).

In rendering a decision, 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). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the 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). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal.

We first find no merit in Centimark's argument the ALJ erred in finding Hubbard sustained an injury due to the June 6, 2018 work event based upon Dr. Vaughan's opinion. As noted by the ALJ in the Order on reconsideration, Centimark did not properly preserve this issue on appeal. 803 KAR 25:010(13)(12) provides only those issues preserved at the BRC for determination by the ALJ "shall be the subject of further proceedings." The October 22, 2019 BRC Order reflects the parties stipulated Hubbard sustained a work-related injury on June 6, 2018. It also reflects the parties did not identify work-relatedness or causation as a contested issue. At the hearing, the ALJ reviewed the stipulations and contested issues contained in the BRC order. He specifically noted, "The parties further agree that Mr. Hubbard sustained a work-related injury on June the 6th of 2018 . . . ." Counsel for both parties agreed to the stipulations and contested issues, and declined to clarify or amend them when provided the opportunity to do so.

Even if the issue had been properly preserved, substantial evidence supports the finding Hubbard sustained a work injury on June 6, 2018. Dr. Owen and Dr. Burke both opined Hubbard sustained a permanent injury due to the June 6, 2018 work accident. Those opinions, coupled with Hubbard's testimony, constitute

substantial evidence supporting the finding that he sustained a work-related injury on June 6, 2018.

We likewise find the ALJ did not err by awarding PPD benefits based upon a 13% impairment rating. Contrary to Centimark's assertion, the ALJ did not rely upon an impairment rating assessed by Dr. Lester. Rather, the ALJ stated, "based on the medical testimony from Dr. Owen and Dr. Burke, the [ALJ] finds the Plaintiff has a 13% AMA impairment rating related to his current low back condition." In his original report, Dr. Burke assessed a 13% impairment rating pursuant to the AMA Guides for Hubbard's lumbar condition due to the work injury. In the October 28, 2019 supplemental report, Dr. Burke noted he reviewed Dr. Vaughan's opinion, as well as the 2014 and 2015 medical records, and declined to amend his assessment of impairment. Similarly, Dr. Owen assessed a 13% impairment rating pursuant to the AMA Guides. The ALJ acted well within his discretion in relying upon the impairment rating assessed by both Dr. Owen and Dr. Burke. We additionally note Centimark does not argue that the impairment rating assessed by both Dr. Burke and Dr. Owen is unreliable or unsubstantial. Therefore, we affirm the ALJ's determination that Hubbard's low back condition warrants a 13% impairment rating.

As noted by the ALJ, the issue of exclusion for pre-existing impairment was properly preserved. A pre-existing condition is deemed active, and therefore not compensable, if it is "symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." As an affirmative defense, the burden to prove the existence of a pre-existing

active condition falls on the employer. Finley v. DBM Technologies, 217 S.W.3d at 265. Since Centimark was unsuccessful in its burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, supra. "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Substantial evidence supports the ALJ's determination Hubbard did not suffer from a pre-existing, active condition, and a contrary result is not compelled. The ALJ relied upon Hubbard's testimony he fully recovered from the December 2014 injury and sought no additional treatment after the January 2015 MRI for his low back and right leg until the June 6, 2018 work injury. The ALJ also noted the lack of medical evidence indicating Hubbard sought or received any medical treatment for low back symptoms for approximately three and a half years prior to the work incident, during which time he was able to work as a roofer without restrictions. Additionally, after reviewing the prior 2014 and 2015 records, Dr. Burke determined Hubbard did not have a pre-existing, active condition within three or four years prior to the work injury. He noted the lack of treatment in the three or four years prior to the work injury and the 2018 EMG/NCS study. This constitutes substantial evidence supporting the ALJ's determination. Therefore, we affirm.

KRS 342.035(3) provides that, "[n]o compensation shall be payable for the death or disability of an employee if his or her death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice." As an affirmative defense, the burden of proof lies with the employer. Teague v. South Central Bell, 585 S.W.2d 425, 428 (Ky. App. 1979). The employer must show that: 1) the employee failed to follow medical advice; and 2) that the failure to follow the medical advice was unreasonable. A third factor is whether the unreasonable failure to follow the medical advice caused the disability in question. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334, 336 (Ky. App. 1995). The determination of whether the failure to follow medical advice is unreasonable is a question of fact for the ALJ. Fordson Coal Co. v. Palko, 282 Ky. 397, 138 S.W.2d 456 (1940). Refusal to submit to treatment is unreasonable if it "is free from danger to life and health and extraordinary suffering, and, according to the best medical or surgical opinion, offers a reasonable prospect of restoration or relief from the disability." Id.

The ALJ applied the correct legal standard and simply found Centimark failed to prove Hubbard unreasonably refused to submit to epidural injections and a lumbar myelogram. The issue regarding the unreasonableness of refusing medical treatment presents a question of fact. Luttrell v. Cardinal Aluminum Co., supra. The ALJ focused on whether Hubbard's refusal was reasonable in light of the evidence. He found no evidence Hubbard's disability was caused, increased, aggravated, or continued by his refusal to have the injections or the myelogram. He noted Dr. Lester testified Hubbard's impairment rating would

remain the same regardless of whether he has surgery. Moreover, any improvement in Hubbard's functional ability would not result from pre-surgery testing.

In the Order on reconsideration, the ALJ again focused on Hubbard's understanding in analyzing the reasonableness of his refusal to undergo the myelogram and injections. He found Hubbard's testimony credible regarding his reluctance to undergo possible lumbar surgery. The ALJ then found no evidence that any physician attempted to dispel Mr. Hubbard of his belief that the purpose of the myelogram was to determine whether he was a surgical candidate. The ALJ found no evidence from any physician stating Hubbard's decision to not follow the recommended treatment was unreasonable. The ALJ also noted Dr. Vaughan opined, "I do not think he has any problems in his back amenable to surgical treatment. I do not think injections in his back are medically necessary. I would predict injections would not help his pain."

We find the ALJ performed the proper analysis, properly considered and weighed the evidence presented, and provided the basis for his factual determination. Because substantial evidence supports the ALJ's determination, and a contrary result is not compelled, we affirm.

Accordingly, the December 16, 2019 Opinion, Award and Order, and the January 16, 2020 Order on petition for reconsideration rendered by Hon. Jeff V. Layson III, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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