Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 25, 2019

CLAIM NO. 201801268

CHARLES IMEL PETITIONER

VS. **APPEAL FROM HON. W. GREG HARVEY, ADMINISTRATIVE LAW JUDGE**

AMAZON AND
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Charles Imel appeals from the May 14, 2019 Opinion, Award and Order rendered by Hon. W. Greg Harvey, Administrative Law Judge ("ALJ") dismissing his claim for a low back injury. On appeal, Imel argues the evidence compels a finding that he sustained a low back injury. For the reasons set forth herein, we affirm.

Imel worked as a "resolution specialist" for Amazon on March 1, 2018, which is a sedentary position. While on a smoking break, he stepped down from a curb and experienced a pop and pain in his low back. He initially treated with Emily Merritt, PA-C, who prescribed pain medication, ordered x-rays and an MRI, and took him off work. Imel then visited Dr. Steven Kiefer who ultimately performed back surgery on June 14, 2018. Later, screws came loose and additional surgery was recommended.

Brandon Fairchild, Imel's supervisor, testified by deposition on January 22, 2019. Fairchild had a discussion with Imel on March 1, 2018. At no time during his conversation did Imel mention that he had fallen off a curb and hurt his back. Imel mentioned his current cancer diagnosis, explaining the cancer was making him hurt all over, especially in his stomach and back.

Imel's history of back injuries and pain prior to the work incident were of paramount importance in this claim. Imel testified he injured his back in a fall from a helicopter in 1987, from which he recovered completely after a period of treatment. He also experienced a back injury in 2005 that fully resolved. Imel testified he received no additional treatment until the March 1, 2018 work incident and was able to meet all of the physical requirements of his job.

Dr. Kiefer previously treated Imel for chronic back pain on September 28, 2005. Dr. Kiefer noted Imel first injured his back in 1987 when he fell fifty feet from a helicopter. On April 15, 2016, Dr. Kiefer noted the previous treatment for chronic back pain in 2005 and that "Mr. Imel has chronic back pain that has been going on literally for decades." On April 22, 2016, Dr. Kiefer noted the back pain

began in the 1980s. Dr. Kiefer recommended fusion from L4 to S1, noting, "He has gotten to the point where he cannot really work or do anything, given his pain."

Just prior to his return to Dr. Keifer, Imel treated at the Laser Spine Institute on March 15, 2016. The patient history notes a chief complaint of low back pain since a fall from a helicopter in 1987. An x-ray revealed mild degenerative changes of the lumbar spine and L5 pars defect with anterolisthesis of L5 on S1. A lumbar MRI on March 1, 2016, revealed mild disc disease at L4-5 and L5-S1 with mild abnormalities of alignment and mild bilateral neural foraminal encroachment at L5-S1. On March 17, 2016, after reviewing diagnostic studies, Dr. Raj Kakarlapudi stated Imel clearly needs a fusion with instrumentation at L5-S1. However, he declined to operate until Imel had ceased smoking.

Imel treated with Means Primary Care on February 13, 2018. The note contains a diagnosis of unspecified fracture of unspecified vertebra, initial encounter for closed fracture. Imel was prescribed Baclofen.

On March 6, 2018, shortly after the work incident, Imel returned for treatment of pain in the back and legs. He provided a history that he stepped off an eight-inch curb, his back popped, and he fell to the ground. It was noted he has been treated for back pain in the past. PA-C Merritt diagnosed lumbago with sciatica, paresthesia of skin, and degenerative disc disease of the lumbar spine.

Imel returned to Dr. Kiefer on April 3, 2018. Dr. Kiefer recorded that Imel was last seen in April 2016. Dr. Kiefer diagnosed L5-S1 spondylolisthesis with instability and lumbar degenerative disc disease. L5-S1 fusion surgery was performed on June 14, 2018.

Dr. James Farrage performed an independent medical evaluation ("IME") on October 17, 2018. Dr. Farrage diagnosed status post L5-S1 decompression and fusion for spondylolisthesis with instability and continued issues with lumbar pain, radicular symptoms, range of motion, decreased core strength, and impaired functional capacity without any interval decline in focal neurological status or evidence of a pseudo-arthrosis. Dr. Farrage stated the overall clinical presentation and historical account are consistent with the proposed mechanism of injury. He opined the abrupt axial loading of the low lumbar region brought the previously asymptomatic spondylolisthesis into disabling reality. Dr. Farrage noted a medical history of low back injury with intermittent exacerbations managed conservatively. He assigned a 22% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Farrage attributed 6% to pre-existing symptomatic spondylolisthesis and 16% to the work injury.

Dr. John Larkin conducted an IME on January 9, 2019. Imel reported he was on a smoking break when he stepped off a curb and felt acute pain in his back. Dr. Larkin stated Imel appears to have suffered aggravation of his pre-existing chronic degenerative disc disease with aggravation of his spondylolisthesis secondary to chronic spondylolysis at L5. He assigned a 23% impairment rating pursuant to the AMA Guides based upon the surgery, but stated the rating is not causally related to the incident at work.

In a January 31, 2019 supplemental report, Dr. Larkin indicated he had reviewed additional records from the Laser Spine Institute and diagnostic

studies. Dr. Larkin stated the necessity for fusion surgery is not attributable to the March 1, 2016 event. Comparison of the March 2016 and March 2018 MRIs shows no acute findings nor any difference between the tests. Dr. Larkin stated, "This patient had a transient aggravation of his preexisting condition and his ongoing need for subsequent L5-S1 fusion was not causally related to the isolated event of 3/1/18."

The ALJ's findings relevant to this appeal are as follows:

> The Plaintiff submits he stepped off the curb during a smoke break, injured his back and required fusion surgery. The Defendant contests the occurrence of a work incident and whether or not a work injury was suffered.
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> Factually, the record includes testimony from Plaintiff regarding his injury. During his discovery deposition testimony, Imel testified he was outside the building and near the smoke shack when he stepped down off the curb and felt and heard a pop in his low back. In describing what he was doing, Imel remarked he was "just walking". He then indicated he told Brandon Fairchild, his supervisor who also happened to be smoking, about the incident and that he had hurt his back. Imel denied any back pain from the time he began working for the Defendant, October 2016, until the work incident on March 1, 2018.
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> Brandon Fairchild, Imel's supervisor, gave a very different account of the alleged incident. He testified Imel approached him and that the two were talking about Imel's disciplinary action and then Imel began talking about his lung cancer and how it was making him feel. Fairchild then explained the employee resources Imel could use to seek assistance for that condition. According to Fairchild, Imel did not mention injuring his back.
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> In addition to disputing the occurrence of a work injury, the Defendant contends the medical evidence does not support a finding of an injury as defined in KRS

342.0011(1). It argues there is a lack of objective medical evidence that the March 1, 2018 step off the curb resulted in a permanent harmful change to the lumbar spine.

Plaintiff contends there is no other factor that caused his lumbar spine condition and the need for the fusion surgery. He acknowledges the 2005 work injury at Copart but argues his back condition had completely resolved and that he did not need surgical intervention until the March 1, 2018 incident when he stepped off the curb on his smoke break.

The undersigned acknowledges the disputed facts regarding the occurrence of a work injury and notice. However the analysis must first begin with the question of whether or not Imel suffered an injury when he stepped off the curb on March 1, 2018. The undisputed medical proof in this case documents Imel suffered a back injury in the 1980s when he fell from a Blackhawk helicopter. The medical records describe that fall as being anywhere from 50 to 190 feet. Imel treated off and on for his back after the fall and ultimately ceased operating heavy equipment due to continuing back problems and pain while running machinery. In 2005 he suffered another injury to his back while working for Copart. Most important to the undersigned, however, is the treatment Imel underwent in 2016. It is clear Imel was having ongoing back pain and actively sought treatment for that pain from both Dr. Kiefer and the Laser Spine Institute. In March [2016] he was diagnosed with bilateral pars defects at L5 and spondylolisthesis with measurable slippage of the vertebrae. Fusion surgery was recommended and scheduled and two days later cancelled due to Imel being a smoker. In the interim, Imel was diagnosed with lung cancer and underwent a lung resection.

The incident Imel describes in stepping off a curb is, in and of itself, sufficient to cause an injury in certain circumstances. However, the undersigned must discern from the proof whether or not that incident caused an injury in the form of a harmful change in the spine. The undersigned is not persuaded from the medical evidence that stepping off the curb caused Imel an injury. It did, consistent with the opinion of Dr. Larkin, exacerbate the

> chronic problems he had in his spine in the form of the bilateral pars defects and spondylolisthesis. Exacerbating Imel's condition is not tantamount to causing an injury as defined by the Act.
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> After the March 1, 2018 incident Imel underwent an MRI and again was diagnosed with bilateral pars defects at L5 and spondylolisthesis. Treatment for that condition was again identified as a fusion surgery. The ALJ is simply not persuaded from the opinion of Dr. Farrage that the stepping down off the 8 inch curb caused an injury to the spine and the need for the fusion surgery. That dye [sic] had already been cast for Imel and the ALJ finds the medical evidence here indicates that the symptoms he experienced during the March 1, 2018 incident were due solely to his previous injuries and did not cause a new and distinct injury. Calloway Co. Fiscal Court v. Winchester, 557 S.W.2d 216 (Ky. App. 1977). This finding is made in reliance upon Dr. Larkin's opinion.
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> Having found Imel has failed to sustain his burden of proving the March 1, 2018 incident caused an injury, the ALJ will not address the remainder of the issues preserved by the parties.

Imel did not file a petition for reconsideration. On appeal, he argues the evidence compels a finding that he sustained a work-related injury to his low back on March 1, 2018. Imel contends the entirety of the lay and medical evidence, and inferences drawn from that evidence, establish the work incident was directly responsible for his medical treatment and resulting restrictions and limitations. He contends the occurrence of an event on March 1, 2018, is not disputed and the ALJ erred in finding the low back injury did not meet the definition of "injury." Imel emphasizes there was no other recent history of active medical treatment, and he was able to meet all of the physical requirements of his position without symptoms or limitations. Imel further notes a condition must be symptomatic and impairment

ratable immediately prior to the work injury to be considered a pre-existing active condition. Alternatively, Imel argues the ALJ erred in failing to provide an analysis as to whether the incident was a temporary injury and compensable pursuant to Robertson v. UPS, 64 S.W.3d 284 (Ky. 2002). He notes Dr. Larkin admits there was an aggravation of the pre-existing degenerative disc disease with aggravation of his spondylolisthesis. At the minimum, Imel argues he is entitled temporary total disability benefits and a period of medical benefits.

The record contains substantial evidence that the alleged incident produced no permanent harmful change. Dr. Larkin found no change between the 2016 MRI and the MRI conducted after the work incident. The surgery performed in 2018 is the same surgery originally recommended by Dr. Kiefer and the Laser Spine Institute in 2016, prior to the alleged injury. Imel received treatment for chronic low back pain sixteen days prior to the alleged incident. Dr. Farrage, though finding a work injury, assigned a 6% pre-existing impairment rating. Dr. Kiefer noted Imel had chronic back pain for decades. There is substantial evidence Imel had a pre-existing active condition prior to the alleged incident, and the work incident produced no permanent harmful change.

Regarding the issue of entitlement to a period of TTD and medical benefits, we begin by noting Imel did not file a petition for reconsideration from the May 14, 2019 Opinion, Award and Order to request additional findings or analysis or raise any alleged error. KRS 342.281 provides that errors patently appearing on the face of an award, order or decision must be brought to the attention of the ALJ by way of petition for reconsideration. When a petition for reconsideration is not

filed, the award or order of the ALJ shall be binding as to all questions of fact. Hence, when an ALJ fails to make an essential fact-finding with regard to a contested issue, the Board statutorily lacks authority to address the matter on appeal unless that failure is first brought to the ALJ's attention by way of a petition for reconsideration. Wells v. Ford, 714 S.W.2d 481 (Ky. 1986). In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is any 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 substantial evidence 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).

The ALJ was convinced by the medical evidence that the symptoms Imel experienced during the March 1, 2018 incident were due solely to his previous injuries and the alleged event did not cause a new and distinct injury. The medical records documenting Imel's symptoms and treatment for chronic back and leg pain shortly before the alleged work injury are substantial evidence supporting the ALJ's determination. Both Dr. Kiefer and the Laser Spine Institute determined the condition produced symptoms severe enough to require surgery prior to the alleged incident. Merely experiencing symptoms at work is not necessarily sufficient to establish causation. Symptomatic pain which arises out of a non-work-related condition absent a work-related proximate cause may not form the basis for an

award of a workers' compensation benefits. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W. 2d 165 (Ky. App. 1980). The ALJ simply was not convinced that Imel's symptoms and condition differed materially following the alleged incident.

Imel has identified evidence supporting a different conclusion. He has also emphasized the fact that the ALJ did not expressly address whether he suffered any temporary exacerbation of his pre-existing condition, and points to portions of the ALJ's opinion which might support such a conclusion. However, again, Imel did not file a petition for reconsideration. Our review is limited to an analysis of whether substantial evidence exists in the record to support the ALJ's ultimate conclusions, and we find such proof exists. As such, the ALJ acted within his 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).

Accordingly, the May 14, 2019 Opinion, Award and Order rendered by Hon. W. Greg Harvey, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON. CHED JENNINGS **LMS**
401 WEST MAIN STREET STE 1910
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON. ALLISON M. HELSINGER **LMS**
HON. LACEY D. HICKS **LMS**
771 CORPORATE DRIVE STE 430
LEXINGTON, KY 40504

ADMINISTRATIVE LAW JUDGE:

HON. W. GREG HARVEY **LMS**
ADMINISTRATIVE LAW JUDGE
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601