

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 22, 2019

CLAIM NO. 201658456

DANA INCORPORATED

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

MATTHEW SWITZER, ET AL;
AND HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Dana Incorporated (“Dana”) appeals from the May 28, 2019 Opinion, Award and Order, and the June 28, 2019 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”), awarding Matthew Switzer temporary total disability benefits, permanent partial disability benefits, and medical benefits for thoracic and lumbar back injuries. On appeal, Dana argues there was no

evidentiary basis to find a permanent low back injury or to award lifetime medical benefits for the lumbar condition. We affirm.

Switzer began working for Dana in 1998. Dana builds drive shafts, mostly for Ford. Switzer primarily worked as a balancer, which is a two-man job involving parts weighing 30 to 40 pounds. He was required to turn at a 90-degree angle when working with the drive shafts. On average, he completed 150 to 180 drive shafts per shift. Beginning in the summer of 2016, Switzer worked on the “new line”. The shafts on the new line were lighter, weighing 15 to 20 pounds. However, this position was a one-man job, and he was expected to complete 300 shafts per shift.

Switzer worked a normal shift on Friday, November 18, 2016 but woke up the following morning with a severe, stabbing pain in his mid and low back. He returned to work on Monday and informed his supervisor, who placed him in a team leader position for several days. That position did not involve physical labor. When he returned to work after Thanksgiving, he reported his condition had not improved and he needed to see a doctor.

On December 2, 2016, Switzer visited BaptistWorx where he was issued restrictions and placed on light duty. He worked in that capacity until January 29, 2017 when he was again taken off work because he remained symptomatic. He returned to work on May 9, 2017. Switzer worked several different jobs until he returned to the balancer position several weeks later. He continued to have tightness across his mid to lower back that spread across his sides. He noticed problems with picking up things and his range of motion. He had

epidural injections that initially helped. He also had blocks that were not effective. He stated his condition had not changed despite continued medical treatment.

Switzer was treated for mid-back pain at BaptistWorx beginning on December 2, 2016. He reported the pain began on November 18, 2016. He was diagnosed with a dorsal strain and was allowed to return to work on December 2, 2016, with restrictions of no lifting of more than ten pounds; no pushing or pulling of more than twenty pounds; no repetitive bending or twisting; and no prolonged standing or walking. Switzer returned on December 9 and 16, 2016, and January 6 and 10, 2017, for diagnoses of dorsal strain or thoracic strain. A January 10, 2017 MRI of the thoracic spine revealed endplate osteophytic changes with degenerative endplate irregularity.

Switzer was seen on December 13, 2016, at Baptist Health Physical Therapy for thoracic myofascial strain. He reported constant lower thoracic pain, and occasional mid-thoracic and upper lumbar pain. He returned on December 16, 2016, with minimal to moderate improvement. Switzer reported that his pain had decreased, but was localized more and limited his activities.

Switzer sought treatment at Immediate Care Center-Brownsboro on January 18, 2017, for back pain. He was diagnosed with osteoarthritis of the thoracic spine region, and strain of thoracic paraspinal muscles excluding the T1 and T2 levels. Switzer was released to return to work on January 18, 2017, with no lifting, pushing, or pulling of more than five pounds, and no bending to lift or turning side to side with weight over five pounds.

Switzer treated at Norton Leatherman Spine Center on February 1, 2017, for back pain localized in the thoracolumbar spine that came on suddenly and had been present for three months. Diagnoses included low back pain, unspecified back pain laterally with sciatica presence unspecified; thoracolumbar back pain; and chronic midline thoracic back pain. A February 22, 2017 MRI revealed mild mid and lower thoracic spondylosis; disc protrusions at T8-9 and T9-10 causing mild spinal stenosis, and subtle cord flattening. He was referred to pain management for epidural injections.

Dr. Stephen Young treated Switzer on March 13, 2017, for mid-back and low back pain. Dr. Young diagnosed intervertebral disc degeneration, thoracic region; low back pain; and spinal stenosis, thoracic region. He was restricted to no lifting more than twenty pounds for the next four weeks and directed to continue physical therapy. Dr. Young administered injections for thoracolumbar back pain on that date, and on March 24, 2017. Switzer returned on May 8, 2017 with back pain localized in the mid-thoracic region referring to the lower lumbar region. Switzer was released to return to work without restrictions. He received an additional injection on August 7, 2017.

Dr. Jules Barefoot performed an independent medical evaluation ("IME") on August 30, 2018. Dr. Barefoot diagnosed thoracic/lumbar disc disease. He indicated the diagnoses were caused by cumulative trauma to the thoracic spine as a direct result of his workplace activities. He further opined Switzer had no active pre-existing impairment ratable condition of the thoracic spine prior to the onset of his symptoms on November 18, 2016. Switzer would be at maximum medical

improvement (“MMI”) as of the date of the examination if no further treatment is available. Dr. Barefoot placed Switzer in DRE Thoracic Category II and assigned a 6% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). Dr. Barefoot stated all medical treatment thus far has been reasonable and necessary for the effects of the work injury.

Dr. Robert Sexton performed an IME on October 5, 2017. Dr. Sexton found no objective medical evidence to support a medical condition related to the work injury. In forming this opinion, Dr. Sexton first noted Switzer has no history of an acute work injury and was working full time without restrictions. Further, he believes Switzer’s 17 years of employment would “eliminate the possibility of a repetitive disorder.” Dr. Sexton also emphasized there is no current radiculopathy, normal neurological findings, no evidence of myelopathy and no bladder/bowel dysfunction. Sexton would have reached MMI from any thoracic strain on December 10, 2016. Dr. Sexton assigned a 0% impairment rating for any work-related conditions and recommended no restrictions or further treatment. He stated physical therapy and treatment at Pro-Rehab and Commonwealth Pain Management was not reasonable and necessary.

Dr. Kristal Wilson treated Switzer on February 23, 2018 for back pain management upon referral from Dr. Michael Hughes. Switzer reported his back pain started in November 2016, due to repetitive lifting at work. Dr. Wilson diagnosed mild mid and lower thoracic spondylosis; and disc protrusions at T8-T9 and T9-T10 causing mild spinal stenosis and subtle cord flattening. She noted x-rays on February

1, 2017, revealed spondylosis with a spondylolisthesis at L5-S1 and no fractures. On examination, Switzer had decreased range of motion due to pain in the thoracic and lumbar back.

Dr. Rick Lyon performed an IME on November 1, 2018. Dr. Lyon diagnosed thoracicalgia but found no harmful change in the human organism due to a work-related event, and no permanent impairment. Dr. Lyon determined Switzer reached MMI on October 17, 2017 and would require no ongoing treatment or permanent restrictions. Dr. Lyon agreed with the 0% impairment assigned by Dr. Sexton, and disagreed Switzer met the criteria for a thoracic DRE Category II as found by Dr. Barefoot. In forming this opinion, Dr. Lyon emphasized that Switzer had no radicular symptoms or radicular pain as required by the DRE classification. He noted Switzer had degenerative changes in the spine that were appropriate for his age and were dormant prior to the change in his work duties.

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

11. The ALJ is compelled to reference that the Plaintiff was an excellent witness and that he credibly testified that in his twenty years of employment with the Defendant, he had worked all positions in the building but never had any problems with his back before 2016. The credible testimony of the Plaintiff is given significant weight herein.

12. The ALJ finds that the Plaintiff's testimony and the treatment records from the Plaintiff's visit to BaptistWorx lend credence to the opinion of Dr. Barefoot. The Plaintiff was taken off work initially with restrictions of no lifting of more than 10 pounds; no pushing or pulling of more than 20 pounds; no repetitive bending or twisting; and no prolonged standing or walking.

13. The ALJ finds that these records support the medical opinion issued by Dr. Barefoot who diagnosed thoracic and lumbar disc disease. Dr. Barefoot concluded that the Plaintiff sustained a cumulative trauma injury to the thoracic spine as a direct result of his workplace activities and that the Plaintiff had no pre-existing condition to the thoracic spine.

14. The ALJ finds that the opinion of Dr. Barefoot is the most consistent with the credible testimony of the Plaintiff who explained that he had no symptoms prior to the work incident and was working without restrictions before being seen at Baptistworx.

15. Dr. Barefoot assessed a 6% whole person impairment pursuant to the AMA Guides and apportioned 100% to the work incident. He determined that the mechanism of injury was cumulative trauma. These opinions have convinced the ALJ and the ALJ thus finds based upon the credible opinion of Dr. Barefoot that the Plaintiff has sustained a 6% whole person impairment as a result of the thoracic and lumbar spine injury suffered as a result of the Plaintiff's work activities and that the mechanism of injury was cumulative trauma.

Dana filed a petition for reconsideration including the same arguments it now raises on appeal. By order dated June 28, 2019, the ALJ summarily overruled the petition for reconsideration.

On appeal, Dana argues there was no evidentiary basis for finding a permanent low back injury or entitlement to lifetime medical benefits for the lumbar condition. Dana concedes there is substantial evidence to prove a permanent injury to the thoracic spine, and it initially may have been appropriate to examine and treat the lumbar spine. However, Dana challenges the finding of a permanent lumbar injury. It asserts the only medical evidence concerning permanency came from Drs. Barefoot and Lyon, and their opinions do not establish a permanent lumbar injury.

Dr. Barefoot did not identify a permanent harmful change to the low back, and Dr. Lyon specifically stated there was no injury to the low back. Dana asserts Switzer's testimony that he had low back pain at the time of the hearing in and of itself is insufficient to establish medical causation, or that the source of that pain is an objective change in the lumbar spine caused by work as opposed to a symptom emanating from the thoracic spine.

As the claimant in a workers' compensation proceeding, Switzer bore 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 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); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The record contained substantial evidence that Switzer's thoracic and lumbar spine were made symptomatic by his work at Dana. Dr. Barefoot diagnosed thoracic and lumbar degenerative disc disease, and found no pre-existing active conditions. Switzer's initial treatment was for a thoracolumbar strain and pain, and he received lumbar injections. At the Norton Leatherman Spine Clinic and at physical therapy, Switzer was treated for low back pain. Dr. Barefoot stated that treatment was reasonable and necessary for the effects of the work injury. Although Switzer's thoracic complaints predominated, he testified to ongoing thoracic and lumbar pain. There is no evidence of a pre-existing active lumbar or thoracic condition. Because Switzer's predominant complaints involve the thoracic region of

the spine, Dr. Barefoot focused on that condition and assigned his rating based on DRE Thoracic Category II.

Although the lumbar condition was not impairment ratable, it is well established the absence of a permanent impairment rating does not preclude a finding of entitlement to medical benefits. In FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007), the Court stated as follows in finding a claimant's eligibility for medical benefits does not require a permanent impairment rating:

Unlike KRS 342.0011(11) and KRS 342.730(1), KRS 342.020(1) does not state that eligibility for medical benefits requires proof of a permanent impairment rating, of a permanent disability rating, or of eligibility for permanent income benefits. Moreover, it states clearly that liability for medical benefits exists "for so long as the employee is disabled regardless of the duration of the employee's income benefits." Mindful of the relationship between impairment and disability under the 1996 Act, we conclude that disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits.
Id. at 319-320.

Switzer testified regarding the effects of the thoracic and lumbar condition on his ability to perform various work-related tasks. While the lumbar condition was not rated, the record contains evidence the lumbar condition continues to cause impairment.

While Dana has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. 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 28, 2019 Opinion, Award and Order and the June 28, 2019 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON. STANLEY S. DAWSON **LMS**
1315 HERR LANE, SUITE 210
LOUISVILLE, KY 440222

COUNSEL FOR RESPONDENT:

HON. STEPHANIE N. WOLFINBARGER **LMS**
640 SOUTH 4TH ST. STE 400
LOUISVILLE, KY 40202

MEDICAL PROVIDERS:

ANTHEM **USPS**
P O BOX 15187
ATLANTA, GA 30348

BAPTIST HEALTH MEDICAL GROUP **USPS**
P O BOX 950248
LOUISVILLE, KY 40295

BAPTIST HEALTH PHYSICAL THERAPY **USPS**
2701 EASTPOINT PARKWAY
LOUISVILLE, KY 40223

BAPTIST HEALTH SERVICE AREA **USPS**
2701 EASTPOINT PARKWAY
LOUISVILLE, KY 40223

COMMONWEALTH PAIN ASSOCIATES **USPS**

7145 EAST VA STREET
EVANSVILLE IN 47715, IN 47715

COMMONWEALTH PAIN ASSOCIATES **USPS**
P O BOX 21890
BELFAST, ME 04915

DIAGNOSTIC IMAGING ALLIANCE **USPS**
P O BOX 950121
LOUISVILLE, KY 40295

NORTON BROWNSBORO HOSPITAL **USPS**
P O BOX 36370
LOUISVILLE, KY 40233

NORTON IMMEDIATE CARE CENTER **USPS**
P O BOX 776351
CHICAGO, IL 60677

NORTON LEATHERMAN SPINE CENTER **USPS**
P O BOX 776351
CHICAGO, IL 60677

PRO REHAB OF LOUISVILLE LLC **USPS**
P O BOX 5629
EVANSVILLE, IN 47716

ZHOU PAIN MGMT CENTER **USPS**
1230 SOUTH HURSTBORNE PARKWAY, STE 120
LOUISVILLE, KY 40222

KROGER PHARMACY **USPS**
12450 LA GRANGE ROAD
LOUISVILLE, KY 40245

ADMINISTRATIVE LAW JUDGE:

HON. JONATHAN R. WEATHERBY **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO STREET, 3RD FLOOR
FRANKFORT, KY 40601

