

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: August 12, 2022

CLAIM NO. 202100246 & 202100244

DANIEL GARNER

PETITIONER

VS. APPEAL FROM HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE

ZOELLER PUMP CO.,  
UNIVERSITY OF LOUISVILLE PHYSICIANS,  
AND HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**MILLER, Member.** Daniel Garner (“Garner”) seeks review of the February 25, 2022 Opinion, Award, and Order and the April 6, 2022 Order on Petition for Reconsideration, rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). On appeal, Garner argues the ALJ failed to address his entitlement to medical benefits for lumbar epidural steroid injections. He further argues, because

the ALJ did not specifically address the compensability of injection therapy, she erred in finding Garner had reached maximum medical improvement (“MMI”). For the foregoing reasons, we affirm.

### **BACKGROUND**

Garner worked at Zoeller Pump Co. (“Zoeller”) for 24 years. He is 63 years old and did not complete high school. He began working at Zoeller in 1997 as a drill press operator. In that role, Garner pulled skids to his work area, removed individual parts from the skid, used levels to drill and tap the parts, and then put them in baskets. Each skid weighed 15 to 20 pounds, but there were 300 parts on each skid weighing five to 10 pounds each. Garner stated it took two people to pull the skids to the work area.

After five years as a drill press operator, Garner became a lathe operator for 19 years. He moved skids, put parts into a machine, clamped it down, removed the parts from the machine, checked the parts, and placed the parts onto an empty skid at floor level. He worked two machines at the same time and had a quota of 630 parts per day. The job also required putting coolant into the machine using a five-gallon bucket.

Garner filed two Form 101s on February 15, 2021, one alleging an acute work injury occurring on June 22, 2020 to the low back and one alleging a low back injury caused by cumulative work trauma with a date of February 7, 2020. Garner later amended his second claim to include a cervical injury. The claims were consolidated by Order entered April 5, 2021.

Records from ULP Urgent Care Dupont (“Urgent Care”) revealed Garner was seen on February 7, 2020 for low back pain. He reported he lifted five-pound parts roughly 600 times per day and his pain was worse after work. His provider at Urgent Care prescribed Diclofenac and Norflex. He was placed on light duty restrictions and followed up with Urgent Care one week later. Urgent Care released him to return to work on February 17, 2020.

On June 22, 2020, while at work, Garner sat in a broken chair. The chair was a metal folding chair that had a broken arm on the back rest. Garner twisted around and realized the chair back was broken. Several employees testified by deposition regarding the chair incident. They agreed it looked like a “clean cut” and that Garner turned around to look at the chair but did not fall to the ground.

After the June 22<sup>nd</sup> chair incident, Garner continued working but returned to Urgent Care on July 13, 2020. He complained of lower back pain from bending and picking up parts from the floor. He received Toradol and Norflex injections and was given restrictions of performing sitting work only with walking and standing permitted occasionally. Garner attended follow-up appointments at Urgent Care and various light duty work restrictions were maintained. On August 18, 2020, Urgent Care issued restrictions of no lifting from shoulder or above and no lifting greater than 10 pounds. On September 2, 2020, Urgent Care issued “sitting work only” restrictions. Urgent Care referred Garner to a specialist and to physical therapy. He attended several physical therapy sessions at Frazier Rehabilitation Institute.

On September 23, 2020, Garner saw Dr. Andrew Duffee at ULP Orthopedic Bullitt County. Dr. Duffee referred Garner to neurosurgery and issued a “sit down duty only” restriction. Dr. Duffee also noted, due to uncontrolled diabetes and patient preference, he would hold off on an oral steroid at the time.

On October 26, 2020, Garner had a consultation at ULP Neurosurgery. Garner complained of intermittent right-sided low back pain radiating into the right hip. The medical records from the consultation document the June 22, 2020 event and state Garner started having trouble with his back two to three weeks later. A September 16, 2020 lumbar MRI revealed L4/5 spondylolisthesis with severe bilateral facet arthropathy, moderate spinal canal compromise, and moderate to severe right and moderate left foraminal compromise. ULP Neurosurgery ordered a cervical MRI and recommended a referral to pain management for epidural steroid injections. The doctor also discussed the possibility of surgery with Garner but told him he would need to lose about 50 pounds to become a candidate for lumbar surgery.

Garner also sought treatment at the Robley Rex VA Medical Center (“VA”), though his treatment there mainly dealt with managing his diabetes. In progress notes from August 14, 2020, Garner mentioned a history of low back pain, but denied a recent or remote injury; however, notes from a March 16, 2021 visit documented back pain since June 2020 and mentioned the chair incident at work. The progress notes from that date also mention a December 2020 visit where Garner believed he irritated his back at work. Aside from going to the VA for general medical treatment, Garner has not sought any additional treatment for his back or

neck and there is no evidence he ever followed up regarding the recommended injections.

Garner saw Dr. Jules Barefoot for an Independent Medical Examination (“IME”) at his counsel’s request on April 29, 2021. Dr. Barefoot noted Garner lifted five to 10 pounds several hundred times per day. He described Garner’s present complaint as progressively severe low back pain that radiates to his right buttock and intermittently down his right leg. Dr. Barefoot also reviewed Garner’s treatment records, including records from ULP Urgent Care, ULP Neurosurgery, and ULP Orthopedics. He noted that ULP Neurosurgery referred Garner to pain management for epidural injections. Dr. Barefoot opined Garner’s back pain is a result of cumulative trauma sustained to his lumbar spine over the course of his work history at Zoeller which manifested on February 7, 2020. He also believes the June 22, 2020 incident exacerbated Garner’s symptoms. Dr. Barefoot stated Garner would be considered at MMI on the date of the exam, April 29, 2021, if no further treatment was available. He assessed an 8% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”).

Garner also filed a supplemental report from Dr. Barefoot, who later evaluated him for the alleged cervical injury. Dr. Barefoot opined the ongoing cervical pain was also the direct result of work activities. He stated Garner may require further treatment for his cervical complaints in the future.

Dr. Jonathan Hodes performed an IME at Zoeller’s request on November 17, 2020. Garner reported a prior back injury from a motor vehicle

accident 10 or 15 years previous. He said he had back pain for a week or two that resolved and there were no further problems. Dr. Hodes reviewed medical records from ULP Urgent Care, ULP Orthopedics, ULP Neurosurgery, and physical therapy records from Frazier Rehabilitation Institute. He also reviewed the September 19, 2020 lumbar MRI and a November 12, 2020 cervical MRI. He opined the lumbar MRI revealed multilevel degenerative arthritic changes throughout the lumbar spine and the cervical MRI showed degenerative changes with the most significant at C4-5. He assessed a lumbar strain and moderate to severe degenerative arthritis of the lumbar spine, along with other health issues. He opined only the lumbar strain was work-related and Garner suffered no permanent impairment from the injury.

Dr. Thomas Loeb also performed an IME at Zoeller's request on June 22, 2021. Dr. Loeb stated Garner insisted that June 22, 2020 was his date of injury. Garner described the incident, stating the chair gave way and he did not fall but it caused his upper body to twist to the right. He claimed his pain began two to three weeks later. Dr. Loeb also stated Garner admitted having intermittent transient low back pain on and off over the years. Dr. Loeb reviewed medical records and ultimately diagnosed Garner with "longstanding pre-existing, active multilevel degenerative disc disease of the cervical and lumbosacral spine." He agreed with Dr. Barefoot's 8% impairment rating; however, Dr. Loeb attributed the rating to a pre-existing condition, finding no work-related impairment. The only further treatment he recommended was over-the-counter medication, occasional physical therapy, and weight loss.

Garner also testified by deposition on April 12, 2021 and at the final hearing. As a lathe operator, he placed parts into the jaws of the lathe machine using both hands, then would close the machine and hit start. Once it finished, he took the parts out and placed them on a skid. He had to bend over to pick the parts up and each one weighed five to 10 pounds. He testified he only had “just a little stiffness” prior to 2020. When asked about the prior motor vehicle accident, he stated he only had stiffness that lasted about a week or two.

Though Garner could not recall specific dates he visited Urgent Care, he remembers going there and receiving two injections that provided temporary relief. He also recalled that surgery was recommended if he lost some weight, as well as injections. He could not remember if he had attended further treatment after that, but stated he is not currently being treated. He stated he stopped working around March 5, 2021 because he was only able to produce at less than 50% capacity. He testified he still has issues with his back, but “not a lot” with his neck.

At the final hearing, Garner provided additional information about his position at Zoeller. He stated he would move the skids, take the parts off, put them in the lathe machine and then pull them out, check them, and place them on an empty skid. He stated he worked two machines at the same time and that two skids equaled 630 parts per day. He said the job was fast-paced and he was constantly bending and turning.

Garner stated Zoeller sent him to Urgent Care. He also said Zoeller paid for an Uber for him to get to physical therapy. He testified he wanted to get the recommended injections; however, they were denied. Garner would also like to have

his neck further evaluated. He stated he has no insurance outside of VA care, and his short-term disability benefits were denied.

Garner filed a Motion to Bifurcate on the issues of compensability of medical treatment and entitlement to temporary total disability (“TTD”) benefits and later renewed the Motion. The ALJ overruled the Motion on August 2, 2021.

The Benefit Review Conference (“BRC”) Order and Memorandum indicates the contested issues were as follows: benefits per KRS 342.730, work-relatedness/causation, average weekly wage, exclusion for pre-existing disability/impairment, injury as defined per the Act, ability to return to work, wages on return to work, credit, maximum medical improvement, TTD, entitlement to medical benefits, and idiopathic injury.

The ALJ held a final hearing on December 22, 2021 and rendered her Opinion, Award, and Order on February 25, 2022. The ALJ found Garner sustained a back injury caused by cumulative work activities, relying on Garner’s testimony regarding his job duties, treatment records, and Dr. Barefoot’s diagnosis. She awarded an 8% impairment rating, again relying on Dr. Barefoot’s opinion. She also noted Dr. Loeb agreed Garner had an 8% impairment rating, and although he believed it was pre-existing, he failed to address whether a pre-existing ratable condition was present. The ALJ found Garner reached MMI on April 29, 2021. Accordingly, she awarded TTD benefits from March 6, 2021 to April 29, 2021, permanent partial disability benefits beginning February 7, 2020, and medical benefits for the low back injury. The ALJ found Garner failed to satisfy his burden regarding the June 22, 2020 acute back injury and the neck injury caused by

cumulative trauma. Garner did not appeal the ALJ's findings regarding the June 22, 2020 injury or the neck injury.

Garner filed a Petition for Reconsideration requesting additional findings regarding MMI, TTD benefits, and medical benefits. He requested specific findings regarding the lumbar epidural steroid injections recommended by ULP Neurosurgery. He argues that, because he has not received the recommended treatment, he is not at MMI and he is entitled to continued TTD benefits. Garner also requested the ALJ amend her findings to delete language regarding benefits terminating pursuant to KRS 342.730(4), arguing it does not apply to him. The ALJ sustained the Petition of Reconsideration to clarify the termination of benefits language but overruled the remainder of the Petition. This appeal follows.

### **ANALYSIS**

On appeal, Garner argues the ALJ overlooked issues preserved in the BRC Order and erred by failing to determine whether Garner is entitled to medical benefits for lumbar epidural steroid injections. As he did in his Petition for Reconsideration, Garner argues his condition has not stabilized and he has not received all recommended treatment. Accordingly, he also argues the ALJ erred in finding him at MMI without first addressing whether the epidural steroid injections are compensable.

As the claimant, Garner had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was not successful in proving he was entitled to continued TTD benefits, the question on appeal is whether the evidence compels a different

result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). This is a high burden to overcome as it is not enough to show there was evidence of substance which would have justified a finding in his favor. Special Fund v. Francis, 708 S.W. 2d 641 (Ky. 1986).

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). The 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, this 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).

Garner argues the ALJ erred in failing to address the compensability of the recommended steroid injections. KRS 342.020(1) provides:

[T]he employer shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter for the length of time set forth in this section, or as may be required for the cure and treatment of an occupational disease.

The ALJ ordered Zoeller to pay medical expenses pursuant to KRS 342.020. Although Garner provided evidence showing injections were recommended, there is nothing in the record indicating they had been ordered or that he had sought authorization for them. Dr. Barefoot, who performed an IME, recommended a referral to pain management and injection therapy. ULP Neurosurgery also stated it would make a referral to pain management for lumbar epidural steroid injections, but there is no evidence in the record indicating Garner was ever treated or sought an appointment with a pain management provider. While Garner testified he did not get injections because they were denied, there was no specific testimony regarding any attempt to seek treatment or whether the injections had actually been ordered by a provider. The ALJ ordered the employer to pay medical expenses. Without specific evidence showing injections were ordered, pre-authorization sought, and thereafter denied by utilization review, the ALJ did not err in failing to specifically address the compensability of a certain type of future medical

treatment. It appears from the record that no specific treatment has been rendered for Garner's low back condition since late 2020.

Further, Garner argues, because there is a recommended treatment he has not received, he cannot be at MMI and he is, therefore, entitled to continued TTD benefits. TTD benefits are payable if the plaintiff has not reached MMI and has not reached a level of improvement permitting a return to employment. Magellan Health v. Helms, 140 S.W.2d 579 (Ky. App. 2004). The AMA Guides defines maximum medical improvement as "well stabilized and unlikely to change substantially in the next year with or without medical treatment." Garner argues because he is still symptomatic and has not received all recommended treatment, the ALJ's finding that he reached MMI on April 29, 2021 was premature.

Garner had the burden of proving each essential element of his claim, including his entitlement to TTD benefits and their appropriate duration. Snawder v. Stice, *supra*. As fact-finder, the ALJ had sole discretion to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, *supra*. The ALJ is entitled to 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., *supra*. The ALJ may also pick and choose among conflicting medical opinions. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1978). A worker can be declared at MMI even if receiving additional treatment. Tokico (USA), Inc. v. Kelly, 281 S.W.3d 771 (Ky. 2009).

We must determine whether substantial evidence supports the ALJ's finding that Garner reached MMI on April 29, 2021. The ALJ relied on Drs. Barefoot and Loeb to determine Garner has an 8% permanent impairment rating. She also relied on Dr. Barefoot in determining Garner attained MMI on April 29, 2021. Dr. Barefoot issued an 8% whole person impairment rating utilizing Table 15-3, DRE Lumbar Category II contained in the AMA Guides. When asked whether Garner had reached MMI, Dr. Barefoot stated he would be considered at MMI "on this date if no further treatment is available." When asked to confirm that further treatment would not affect the MMI date, Dr. Barefoot answered in the affirmative. Dr. Loeb also found an 8% impairment rating, though he disagreed with Dr. Barefoot regarding causation. Dr. Loeb did not recommend further specific medical treatment other than over-the-counter medications, occasional physical therapy from time to time, and weight loss. This constitutes substantial evidence to find Garner's condition was "well stabilized and unlikely to change substantially in the next year with or without medical treatment." Accordingly, the ALJ did not err in finding Garner is at MMI, and thus, Garner was no longer entitled to TTD benefits.

We note, however, that Garner is not without recourse in obtaining recommended treatment for his back condition, which may include injection therapy. In the future, if Garner is recommended to have lumbar injections or other specific treatment, the request should proceed through the utilization review procedure and if the request is denied, it could culminate in a medical dispute/reopening per KRS 342.125. *See* 803 KAR 25:012; 803 KAR 25:190.

Because the ALJ's Opinion, Award, and Order is supported by substantial evidence, we do not find that the evidence compels a different result.

Accordingly, the February 25, 2022 Opinion, Award, and Order and the April 6, 2022 Order on Petition for Reconsideration, rendered by Hon. Monica Rice-Smith, are hereby **AFFIRMED**.

ALL CONCUR.

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