

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 5, 2021

CLAIM NO. 201999917

DUGAN & MEYERS, LLC

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

MICHAEL NIX AND  
HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**BORDERS, Member.** Dugan & Meyers, LLC (“Dugan”) appeals from the October 2, 2020 Opinion and Award, and the November 2, 2020 Order on Petition for Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge (“ALJ”). The ALJ determined Michael Nix (“Nix”) suffered a work-related lumbar spine injury on August 31, 2018. The ALJ awarded permanent partial disability

(“PPD”) benefits based on a 7% impairment rating, temporary total disability (“TTD”) benefits, and medical benefits.

On appeal, Dugan argues the ALJ erred in determining Nix suffered a work-related injury, awarding medical benefits, including surgery, and relying on the impairment rating assessed by Dr. Jules Barefoot. For reasons set forth herein, we affirm.

Nix testified by deposition on May 18, 2020 and at the Hearing held August 12, 2020. Nix worked for Dugan as a lead carpenter. His work was strenuous in nature and required frequent lifting of 30 to 50 pounds, as well as climbing, pushing, and pulling while setting and resetting concrete forms. He also controlled the pump hose on the concrete truck to fill forms with concrete. Nix cannot recall the incident on August 31, 2018, but understands he was struck in the head and lower back by a heavy pump hose. He briefly lost consciousness and felt dazed when he awoke. As a result of the accident, he has stabbing pain with swelling and numbness in his lower back, along with pain radiating into his right lower extremity, often down into his foot. He described having a nodule in the area of his low back and right buttock, making it difficult to sit or lie on his right side. He denied having the nodule prior to the work incident. He had surgery to remove the nodule on June 11, 2019. After the surgery, he was able to sit for longer periods and he no longer experiences stabbing pain. However, he continues to have intermittent sharp pain in his right lower extremity down to his knee. He also has constant pain that increases with activity and pressure in his lower back making it difficult to bend.

Nix filed records from Concentra documenting treatment from September 5, 2018 through October 11, 2018. Nix provided a history of a concrete hose striking him in the head and back, causing him to fall. Diagnoses included a head injury, lumbar contusion, forearm abrasion, scalp laceration, contusion of the right hip, and acute right-sided low back pain without sciatica. Nix returned to work on September 6, 2018 with restrictions against lifting, pushing, or pulling greater than 15 pounds. He was also advised to alternate his position as needed. An October 8, 2018 MRI revealed multilevel degenerative changes most prominent at L2-3, L4-5, and L5-S1. He was subsequently referred to a neurologist for evaluation.

Dr. Noel Rejoj, a neurologist, evaluated Nix on October 18, 2018 for back pain and a head injury. Dr. Rejoj diagnosed lumbosacral radiculopathy. He noted a lumbar MRI showed multilevel degenerative changes and a 4cm lesion from L5-S1 to the sacrum. A CT scan of the pelvis on November 15, 2018 revealed nonspecific, ill-defined, subcutaneous soft tissue in the posterior lower back. Dr. Rejoj felt this could be secondary to soft tissue inflammation or contusion, but no discrete fluid collection or soft tissue masses were identified. The records indicate Dr. Rejoj continued to treat Nix for lumbosacral radiculopathy through June 24, 2019.

Dr. Todd Chadwell, a general surgeon, evaluated Nix on February 4, 2019 for a back mass. He stated Nix did not have a sebaceous cyst. Dr. Chadwell noted Nix had a bony prominence above the top of the gluteal cleft and to the right of midline. Dr. Chadwell stated he did not know if the bony prominence is related to the injury. He did not recommend surgery.

Dr. Kimathi Doss, a neurosurgeon, evaluated Nix on April 1, 2019. Nix complained of worsening low back pain with occasional right leg pain. He reported constant stabbing pain in the low back occasionally radiating into the right leg. On physical examination, Nix exhibited tenderness along the lumbosacral spine and right paraspinal regions. A tender, hard, palpable mass was found on examination. Dr. Doss reviewed an April 30, 2019 MRI of the lumbar spine that revealed multiple levels of spondylosis and facet arthropathy with annular tears at L2-3 and L4-5. He noted some mild foraminal narrowing at L4-5 on the right. There was no significant central canal stenosis. Nix had a visible lesion along the right subcutaneous region with fluid collection. Dr. Doss opined the lesion may be fat necrosis. Dr. Doss referred Nix to a plastic surgeon, Dr. Jarrod Little.

Dr. Little saw Nix on May 21, 2019 for evaluation of a lower back mass. He reviewed an MRI and diagnosed a subcutaneous nodule. Dr. Little performed an excision of the nodule on June 11, 2019. He saw Nix for follow-up on June 28, 2019 and noted the pathology of the nodule was consistent with fat necrosis. Nix reported relief of his lower back pain but he continued to have bilateral lower extremity pain. Dr. Little informed Nix that his leg pain was not related to the nodule and opined he would need no further treatment in regard to the nodule.

Dr. Henry Tutt evaluated Nix on January 11, 2019. Dr. Tutt diagnosed superficial abrasions, superficial scalp laceration, mild cerebral concussion (resolved), and back contusion. Dr. Tutt opined Nix sustained a contusion and soft tissue injury to his lumbar spine due to the August 31, 2018 work event. Dr. Tutt did not feel the present complaints correlated with any residuals from that event. He

indicated the palpable lesion in the right SI joint area was a pre-existing subcutaneous cyst that was noticed after the injury secondary to contusion pain in his low back. He stated Nix had reached maximum medical improvement from a lumbar soft spine transient myofascial injury. Dr. Tutt assigned a 0% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, (“AMA Guides”).

In a February 14, 2019 addendum, Dr. Tutt indicated he had personally reviewed a CD-ROM of the CT scan of the pelvis obtained on November 15, 2018. He noted the scan showed disc bulging at L4-5 and L5-S and a cystic structure at the L5-S1 disc level. He suspected it might be a dermal cyst at the midline, but there was a remote possibility it was an encapsulated resolving subcutaneous small hematoma. He indicated his review of the imaging study did not alter his opinions expressed in his earlier report. He continued to believe the lesion was not disabling, nor did it warrant any restrictions.

Dr. Barefoot evaluated Nix on August 10, 2019. Nix provided a history of the work injury and subsequent treatment at Concentra. Nix reported his low back pain was becoming increasingly severe. Nix reported he had no persistent back problems prior to the work incident. On physical examination, Dr. Barefoot found tenderness to palpation throughout the paralumbar musculature. There was no focal motor or sensory deficit present in the upper or lower extremities indicative of a radiculopathy. Dr. Barefoot also reviewed the medical records.

Dr. Barefoot diagnosed a history of a workplace injury to the lower back occurring on August 31, 2018, degenerative disc disease of the lumbar spine

with ongoing, non-verifiable radicular complaints, and a symptomatic lipoma requiring excision. Dr. Barefoot opined Nix sustained a traumatic injury to his lumbar spine with ongoing, non-verifiable radicular complaints. Dr. Barefoot stated the lipoma discovered after the accident was in all probability present prior to the accident, but it became symptomatic because of trauma, thus requiring surgical exploration and removal. He opined within reasonable medical probability, the work accident caused the persistent low back pain. Dr. Barefoot stated Nix had no active, symptomatic, impairment ratable condition present in the lumbar spine prior to the work incident. Dr. Barefoot specifically stated the degenerative arthritis in the spine was asymptomatic prior to the accident. Although the lipoma was not brought on by the accident, treatment would be considered part of the workplace accident in that, once it was discovered, the exact nature of the lesion was uncertain and it was felt that it could have been caused by the accident.

Citing table 15-3 at page 384, Dr. Barefoot placed Nix in DRE Category II, with a 7% impairment rating pursuant to the AMA Guides. The impairment was solely attributable to the work incident. Dr. Barefoot indicated the medication prescribed by Dr. Reloj is reasonable and necessary. Dr. Barefoot stated Nix will have marked difficulty with any job that required repetitive squatting, kneeling, crouching, or crawling. He will also have difficulty lifting and carrying more than 20-25 pounds on an occasional basis. He must be allowed to sit and rest intermittently for relief of pain and discomfort in the lower back. It is not safe for him to work on ladders, scaffolding, or at unprotected heights.

In a November 22, 2019 addendum, Dr. Tutt indicated he reviewed the report of Dr. Barefoot. Dr. Tutt disagreed with the opinions expressed in that report, noting Nix had longstanding, pre-existing, mild multilevel lumbar degenerative changes consistent with the natural aging process. Dr. Tutt found no evidence Nix sustained any alteration of the structural integrity or worsening of degenerative changes as the result of the August 31, 2018 event. Dr. Tutt remained of the opinion that Nix suffered only a transient lumbar strain or contusion as the result of the work incident. The continuing complaints of low back pain were inexplicable and did not correlate to the physical examination findings or imaging studies. Dr. Tutt stated, “based on the pathology, the lesion in the right low back was an area of cystic fat necrosis. It is possible that this was related to a direct blow in that area or that it was pre-existing and never noticed; the undersigned would favor the former.” Dr. Tutt noted the lesion was benign and was not the basis for Nix’s pain complaints. Dr. Tutt opined the excision surgery was not necessary except to establish the lesion’s nature. He opined there were no residuals from the lesion and Nix is fully capable of returning to his usual job duties, or at least as capable of performing his job duties as he was on the day prior to the work incident. Dr. Tutt opined Nix has not sustained any permanent alteration of the structural integrity of the lumbar spine relative to the work event and would not warrant any restrictions other than utilizing appropriate body mechanics when performing heavy lifting.

At the Benefit Review Conference and Final Hearing, the parties stipulated the following issues remained for determination: Benefits per KRS 342.730 (multipliers), work-relatedness and causation, average weekly wage, unpaid or

contested medical expenses, injury as defined by the Act, credit for TTD, STD and unemployment, exclusion for pre-existing disability or impairment, TTD (rate and duration), subrogation, and validity of impairment under AMA guides.

The ALJ rendered an Opinion on October 2, 2020, the portions of the Opinion relative to the issues on appeal are set forth, *verbatim*:

**Causation, Work-relatedness, Injury as defined by the Act and Active Disability.**

The defendant contests threshold issues regarding causation of the plaintiff's lower back conditions. The defendant argues the event of August 31, 2018 resulted in only temporary contusions with no permanent injury. The plaintiff argues that he sustained permanent injuries to his lower back and argues that the lesion removed from the plaintiff's lumbar area was also the result of the work event. In regards to the lesion, Dr. Tutt offered the opinion that the lesion was cystic fat necrosis that was possibly related to the direct blow or a pre-existing condition, which was never previously noticed. The plaintiff explained that he did not have the lesion prior to being struck in the back by the concrete hose. The medical treatment records reveal that it was encapsulated necrotic fat tissue, which Dr. Barefoot explained likely became symptomatic as the result of the work event. He also offered the opinion that the degenerative changes in the plaintiff's lumbar spine were made symptomatic by the work event of August 31, 2018 while Dr. Tutt did not believe there was any alteration in the structural integrity of the lumbar spine. Therefore, he concluded the plaintiff had not sustained a permanent work injury.

Injury is statutorily defined in KRS 342.0011(1) as a work related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment, which proximately causes a harmful change in the human organism evidenced by objective medical findings. In McNutt Construction/First General Services v. Scott, 40 S.W. 3d 854 (Ky., 2001), the Kentucky Supreme Court held where work related trauma causes a dormant

degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury.

In this instance, I am most persuaded by the opinion of Dr. Barefoot that the plaintiff sustained an arousal of pre-existing degenerative changes in his lumbar spine and the onset of symptoms in the lipoma as the direct result of the August 31, 2018 event. The plaintiff credibly testified to not having any symptoms in his lumbar spine prior to the work event. While the clinical findings in the lumbar spine seem minimal, the diagnostic studies do support the opinion of Dr. Barefoot, as they objectively show the degenerative changes that Dr. Barefoot believes were aroused by the traumatic work event. As such, I find the lower back condition, including the symptoms and treatment for the encapsulated necrotic lipoma related to the event of August 31, 2018. I further find a lack of evidence that the plaintiff had a symptomatic condition, which was impairment ratable immediately prior to the subject injury. Therefore, there is no offset for prior active condition under Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007).

#### **Benefits under KRS 342.730.**

The plaintiff argues that he is entitled to benefits based upon the 7% impairment assessed by Dr. Barefoot while the defendant argues the plaintiff is not entitled to permanent income benefits as he is appropriately assessed a 0% impairment as noted by Dr. Tutt. Dr. Tutt opined that because he did not believe the diagnostic studies revealed a permanent alteration of the structural integrity of the lumbar spine, he would not be entitled to an impairment under the AMA guides. On the other hand, Dr. Barefoot placed the plaintiff into a DRE category II because he had a history of injury and unverified radicular complaints. A review of Table 15-3 confirms that a DRE category II is appropriate when there is a history of a specific injury and unverified radicular complaints. As such, I am persuaded the plaintiff has a 7% impairment under the AMA guides. Under KRS 342.730 (1)(b) the 7% impairment carries a

grid factor of .85 resulting in an 5.1% permanent partial disability rating.

Next, the ALJ must determine whether the provisions of KRS 342.730 (1)(c) 1 or 2 apply. Subparagraph 1 applies when the plaintiff lacks the physical capacity to return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. Essentially, it must be determined whether the injury has permanently altered the worker's ability to earn an income. Adams v. NHC Healthcare, 199 S.W. 3d 163 (Ky. 2006). In Trane Commercial Systems v. Tipton, 467 S.W.3d 249 (Ky. 2016) the court cited to Ford Motor Company v. Forman, 142 S.W. 3d 141 (Ky. 2004) reiterating that in determining whether an injured employee is capable of returning to the type of work performed at the time of the injury, the ALJ must consider whether the employee is capable of performing the actual jobs that the individual performed.

Here, the plaintiff admitted his restrictions came from the IME with Dr. Barefoot. On the other hand, Dr. Tutt noted the plaintiff would not have any restrictions, but should continue to utilize appropriate body mechanics when performing heavy lifting. The plaintiff acknowledged making inquiries about returning to his job with the defendant although he testified it would be difficult to perform some of the tasks. The wage records indicate that he has not returned at any point to earning same or greater wages under Ball v. Big Elk Creek Coal Co., 25 S.W. 3d 115, (Ky. 2000) and I am persuaded by the medical opinion of Dr. Tutt that he maintains the physical capacity to perform the job he was performing at the time of his injury. As such, the plaintiff is not entitled to the 2X or 3X multiplier.

### **Compensability of Medical Expenses?**

It is the employer's responsibility to pay for the cure and relief from the effects of an injury or occupational disease, all medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may be reasonably be required at the time of the injury and thereafter during disability. KRS 342.020. The ALJ finds the plaintiff's

medical treatment for the lower back and the excision of the lumbar mass related to the effects of the work injury. He is entitled to reasonable and necessary future medical care for the lumbar injury and reimbursement of the outstanding medical expenses.

Dugan filed a Petition for Reconsideration requesting additional findings from the ALJ on the issue of work-relatedness of the lesion removed from Nix's back. In response, the ALJ entered the following Order, *verbatim*:

This matter is before the ALJ on the defendant's petition for reconsideration regarding the finding of work relatedness of the lesion removed from the plaintiff's lower back. As noted in the original decision, Dr. Barefoot offered the opinion the lesion was encapsulated necrotic fat tissue which was made symptomatic by the traumatic work incident. Further, even Dr. Tutt indicated he favored the opinion the lesion was related to a direct blow in the area. Therefore, the petition for reconsideration is denied.

As the claimant in a workers' compensation proceeding, Nix had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Nix was successful in his burden regarding this claim, we must determine whether substantial evidence of record 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).

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 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 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).

Injury is statutorily defined in KRS 342.0011 (1) as a work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment, which proximately causes a harmful change in the human organism evidenced by objective medical findings. A harmful change diagnosis satisfies KRS 342.0011 (1)'s and (33)'s requirements, if direct observation and/or testing, which applies objective or standardized methods, confirms the claimant's symptoms. Gibbs v. Premier Scale Co./Ind. Scale Co., 50 S.W.3d 754 (Ky. 2001). A dormant, non-disabling, pre-existing condition is compensable under

the Act if a work-related injury causes it to become symptomatic. McNutt Construction v. Scott, 40 S.W.3d 854 (Ky. 2001). In addition, the proper interpretation of the AMA Guides and any assessment of an impairment rating in accordance with those guides are medical questions reserved only to medical witnesses. Lanter v. Kentucky State Police, 171 S.W.3d 45, 52 (Ky. 2005); Ky. River Enters. Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003)

On appeal, Dugan makes three arguments. First, that a symptomatic condition is not compensable unless it has caused a harmful change in the human organism. Second, the ALJ misinterpreted Dr. Tutt's findings in determining compensability. Lastly, Nix failed to adequately establish an impairment rating per the AMA Guides.

Dugan argues that a symptomatic condition is not compensable unless it causes a harmful change in the human organism. In the cases of Gibbs v. Premier Scale Co/Ind. Scale Co, *supra*, and McNutt Construction Company v. Scott, *supra*, the Court held it is acceptable to allow the ALJ to rely on medical evidence derived from direct observation and/or testing, which applies objective or standardized methods, and confirms the claimant's symptoms. In this instance, the ALJ was confronted with conflicting medical opinions. Dr. Tutt opined Nix's condition had completely resolved, while Dr. Barefoot found objective evidence of a lumbar spine condition that was permanent and warranted a 7% impairment rating. The ALJ determined he was more persuaded by the opinion of Dr. Barefoot, which constitutes substantial evidence on which he could rely, in finding Nix met his burden of proof. This was a proper exercise of the ALJ's discretion and will not be disturbed on appeal. We affirm in this regard.

Next, Dugan argues the ALJ misinterpreted Dr. Tutt's findings in determining compensability. We disagree. The testimony from Dr. Tutt concerns his opinion regarding the compensability of the neuroma that was surgically removed from Nix's back. Dr. Tutt stated, "based on the pathology, the lesion in the right low back was an area of cystic fat necrosis. It is possible that this was related to a direct blow in that area or that it was pre-existing and never noticed; the undersigned would favor the former." As can be seen from a plain reading of this statement, Dr. Tutt stated the neuroma was "possibly" caused by the direct blow occurring at work, and in fact he "favored" this possibility. The ALJ could reasonably infer Dr. Tutt felt it more likely than not that the work incident caused the arousal of the neuroma into disabling reality. He properly exercised his discretion, as the finder of fact, to so infer. This was likewise a proper exercise of discretion, supported by substantial evidence, and will not be disturbed on appeal. We affirm in this regard.

Lastly, Dugan argues Nix failed to adequately establish an adequate impairment rating per the AMA Guides. We disagree. The ALJ was confronted with two conflicting opinions regarding the assessment of impairment. Dr. Tutt opined Nix did not retain a functional impairment rating. Dr. Barefoot opined Nix retained a 7% impairment rating. Dr. Tutt addressed Dr. Barefoot's assessment of impairment and stated he disagreed with the same but did not offer any evidence to challenge the assessment of the impairment itself. See, Lanter v. Kentucky State Police, 171 S.W.3d 45, 52 (Ky. 2005); Ky. River Enters. Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003). Dr. Tutt simply disagreed with Dr. Barefoot. The ALJ properly exercised his discretion and was more persuaded by the opinion of Dr.

Barefoot. The ALJ was well within his rights as the finder of fact to make such a determination. In addition, the medical proof from Dr. Barefoot constituted substantial evidence on which he could rely; therefore, we affirm.

Accordingly, the Opinion and Award dated October 2, 2020 as well as the Order on Petition for Reconsideration dated November 2, 2020 by Hon. John B. Coleman, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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