

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 20, 2019

CLAIM NO. 201561305

HOMETOWN HAULING

PETITIONER

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

STEVE HORNUNG AND
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING IN PART & REMANDING

* * * * *

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

ALVEY, Chairman. Hometown Hauling Co. Inc. ("Hometown") appeals from the July 22, 2019 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), awarding Steven Hornung ("Hornung") income and medical benefits for a work-related cervical injury he sustained on November 10, 2015. Hometown also appeals from the August 13, 2019 order on petition for reconsideration.

On appeal, Hometown argues the ALJ failed to perform a proper analysis or provide sufficient findings of fact pursuant to Finley v. DBM Technology, 217 S.W.3d 261 (Ky. App. 2007). We vacate in part and remand to the ALJ to perform a complete analysis pursuant to Finley v. DBM Technology, supra.

Hornung filed a Form 101 alleging he sustained a cervical injury due to a motor vehicle accident (“MVA”) occurring on November 10, 2015 while employed by Hometown. Hornung began working for Hometown as a residential garbage truck driver on April 29, 2013.

Hornung testified by deposition on November 12, 2018, and at the final hearing held May 23, 2019. Hornung is a high school graduate and holds a Class B commercial driver’s license. He began working for Hometown as a residential garbage truck operator on April 29, 2013. Hornung testified at his deposition that on November 10, 2015, he was making a left hand turn, and another vehicle attempted to pass him on the left. The vehicle struck the bucket on the front of the garbage truck jarring him. Hornung immediately experienced right-sided cervical pain and he could hardly move his neck. Hornung treated conservatively at BaptistWorx and with Dr. Stacie Grossfeld. Dr. Grossfeld referred Hornung to Dr. Thomas Altstadt, who ultimately performed cervical surgery on July 22, 2016. Dr. Altstadt released Hornung from his care without restrictions on February 8, 2017. Hornung currently treats at Commonwealth Pain Associates every three months, and is prescribed Hydrocodone, Diclofenac, and Cyclobenzaprine.

Hornung did not return to work for Hometown after the November 10, 2015 MVA. Hometown terminated Hornung on November 30, 2016. Hornung

began working for Republic Services in a similar position as a garbage truck driver on March 22, 2017, and he plans to continue working there indefinitely.

Hornung testified he visited his primary care physician, Dr. Ajit Nanda, prior to the November 10, 2015 MVA on October 26 and 29, 2015, for stiffness and pain in his neck and right shoulder, as well as tingling in his right arm, but he denied having issues with cervical range of motion. Hornung estimated he had experienced those symptoms for approximately two or three weeks without a specific incident or injury. Dr. Nanda prescribed Cyclobenzaprine and Ibuprofen, and ordered x-rays of his cervical spine and right shoulder. Dr. Nanda also scheduled a cervical MRI, which was never performed due to the November 10, 2015 MVA.

Hornung testified as follows regarding his symptoms prior to the MVA and before the July 22, 2016 surgery:

Q: What types of symptoms or complaints were you having prior to the July 22, 2016, surgery?

A: I was having the tingling in my right arm, neck - - stiffness, neck pain, right shoulder pain.

Q: Those were the types of complaints you were having before the accident - -

A: Yes.

Q: - - correct?

A: That's - - that's what you asked, right?

Q: Yes, sir.

A: Okay. Sorry.

Q: Yeah. Were those complaints after November 10 of 2015 the same you had had before or were they worse?

A: The neck pain was worse, if that's what you're asking.

Q: So you had neck pain before November 10, 2015?

A: Yes.

Q: Was it worse after the accident?

A: Ye - - oh yes.

Q: . . . You had right arm tingling before the accident. Was it the same or worse after the November 10 accident?

A: The right arm was the same, the shoulder was the same, the neck was worse.

At the hearing, Hornung provided somewhat conflicting testimony regarding his prior symptoms. During direct examination, Hornung testified, "The left shoulder and arm was hurting and I had some tingling going down my right arm into my finger and thumb." When asked if he was experiencing neck pain at the time, Hornung replied, "It wasn't - - the pain wasn't really - - it was in my shoulder and my right arm, you know coming down through here To the top of my right shoulder down into my arm and into my finger and my thumb." Hornung testified he experienced right-sided neck pain immediately after the MVA. When asked if his post MVA symptoms were different from those he experienced previously, he answered in the affirmative, explaining, "I couldn't work. I couldn't hardly turn my neck. I couldn't - - I couldn't work . . . the pain was just unreal." On cross-examination, Hornung again stated he experienced prior pain in his shoulder and

right arm, but only stiffness in his neck. When presented with his deposition testimony, Hornung testified as follows:

Q: You agree with me then that you had pain and stiffness in your neck leading up to November 10, 2015?

A: Yes.

Q: And as a result of that pain and stiffness in the neck and then the tingling you mentioned in your right arm and right hand, Dr. Nanda had prescribed Cyclobenzaprine and prescription Ibuprofen; is that correct?

A: Yes, sir.

Q: But neither of those medications before November 10 of 2015 were helping you?

A: No, sir . . . They weren't helping me, yes.

Q: And because they weren't helping and because you were having the pain and the stiffness and the tingling in your right hand, Dr. Nanda had actually prescribed and recommended a cervical spine MRI before November 10, 2015; is that correct?

A: Yes. Yes, sir.

Hornung testified the July 22, 2016 surgery resolved his right upper extremity and shoulder symptoms, but only somewhat improved his neck pain. Dr. Altstadt released Hornung from his care without restrictions in February 2017. He now treats with Commonwealth Pain Management every three months, and is prescribed Hydrocodone, Cyclobenzaprine, and Diclofenac. His pain management physician has not formally restricted Hornung's activities.

Hometown filed Dr. Nanda's October 26, 2015 and October 29, 2015 treatment records. On October 26, 2015, Dr. Nanda noted Hornung:

Presents with neck pain. Symptoms include neck pain, neck stiffness, muscle spasm and shoulder pain. Symptoms are located in the right posterior neck. The pain radiates to the right arm. The patient describes the pain as burning and stinging. Onset was gradual 2 month(s) ago. The patient describes symptoms as moderate in severity and worsening. The patient is not currently being treated for this problem.

Dr. Nanda diagnosed Hornung with neck and shoulder pain, and ordered x-rays of the cervical spine and right shoulder. He also prescribed Cyclobenzaprine and Ibuprofen 800. In the October 29, 2015 follow-up note, Dr. Nanda stated, "x-ray of c spine and right shoulder is ok, he is still having a lot of pain radiating down his right UE, will refer for MRI c spine." He again assessed neck and shoulder pain.

Hornung filed the treatment records of BaptistWorx from November 10, 2015 to December 3, 2015, most of which are handwritten and illegible. On November 10, 2015, Hornung reported the MVA and complaints of right shoulder and right-sided neck pain, as well as tingling in the right hand and headache. It was also noted that Hornung "is having an MRI of neck, R shoulder + arm numbness/pain. PCP has done x-rays + is treating . . .". Hornung was diagnosed with acute cervical and right shoulder strains, as well as chronic cervical and right shoulder strains. Hornung was treated conservatively and restricted from lifting over ten pounds and commercial driving. A cervical MRI was ordered when Hornung's symptoms persisted. The December 1, 2015 cervical MRI demonstrated left and right protruding discs, mild spinal stenosis with moderate to marked lateral recess stenosis bilaterally, and moderate right and left foraminal stenosis at C6-7. It also demonstrated an annular disc bulge at C5-6 with foraminal stenosis and

straightening of the usual cervical lordosis. On December 3, 2015, Hornung was diagnosed with a cervical strain, C6-7 and C5-6 stenosis, and radiculopathy to the right upper extremity.

Dr. Grossfeld treated Hornung from December 10, 2015 thru February 22, 2016. She noted that prior to the MVA, Hornung was seeing his primary care physician for numbness and tingling in his right thumb and index finger, and had been scheduled for a cervical MRI. Hornung denied having prior cervical pain. Dr. Grossfeld noted the MVA and that Hornung complained of cervical pain radiating into his right upper extremity, as well as an increase in tingling involving his right thumb and index finger. Dr. Grossfeld diagnosed a cervical strain secondary to the work injury with a probable pre-existing disc protrusion at C6-7 that was active prior to the MVA which has subjectively worsened since the accident. Dr. Grossfeld recommended physical therapy, a TENS unit, prescription medication and light duty restrictions of no lifting over ten pounds or commercial driving. Dr. Grossfeld referred Hornung to pain management for epidural injections, which were administered on three occasions in February 2016. In the last treatment note, Dr. Grossfeld diagnosed “disc protrusion, work related, along with a cervical strain, work related” and referred Hornung to Dr. Altstadt, a neurosurgeon.

Dr. Altstadt began treating Hornung on March 29, 2016. He diagnosed cervical neuroforaminal stenosis and cervical disc disorder with radiculopathy. He recommended surgical intervention and restricted Hornung from lifting over ten pounds and commercial driving. The July 22, 2016 operative report reflects Dr. Altstadt performed a C6-7 arthroplasty. The post-operative notes reflect

the resolution of Hornung's right upper extremity complaints, but continued complaints of cervical pain radiating into his right shoulder. Dr. Altstadt's most recent diagnosis is cervical disc disorder with radiculopathy. He allowed Hornung to return to work without restriction on February 8, 2017, and referred him to pain management for facet blocks, medial blocks, and a possible ablation.

Hornung began treating at Commonwealth Pain Associates in November 2016. He received cervical medial branch nerve blocks and a radiofrequency ablation at C3-6. Thereafter, Hornung was consistently diagnosed with cervical disc degeneration and cervical spondylosis without radiculopathy or myelopathy, and prescribed Norco, Flexeril and Diclofenac.

Dr. Joseph Zerga evaluated Hornung on May 11, 2016 and on January 31, 2017. In the first report, Dr. Zerga noted the November 10, 2015 MVA and that Hornung denied previous neck problems. He diagnosed C6-7 radiculopathy on the right side related to the MVA. Dr. Zerga agreed with the surgery recommended by Dr. Altstadt.

In his second report, Dr. Zerga re-evaluated Hornung subsequent to his cervical surgery. He performed an examination and reviewed the medical records, including those of Dr. Nanda on October 26, 2015 and October 29, 2015. He diagnosed Hornung with neck pain with a previous history of cervical radiculopathy on the right side, resolved after surgery. He opined Hornung is able to return to full duty work and requires no further treatment or restrictions. Dr. Zerga noted he reviewed the medical records predating the MVA and that Hornung had previously experienced very similar symptoms. He also noted it is possible the MVA

aggravated his symptoms. Dr. Zerga assessed an 11% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Dr. Zerga opined 20% of this impairment is pre-existing and active due to the evidence of pre-existing symptoms immediately prior to the MVA.

Hornung filed Dr. Craig Roberts’s October 24, 2018 report. Dr. Roberts noted Hornung, according to history and records review, had no prior neck problems until the November 10, 2015 MVA. He reviewed the medical records, including those of Dr. Nanda. He summarized the October 26, 2015 with Dr. Nanda as, “Patient . . . who presents with neck pain” and the October 29, 2015 record as “Seen for neck pain.” Dr. Roberts diagnosed, “cervical spine sprain/strain with herniated C6-7 cervical disc with cervical radiculopathy which required C6-7 arthroplasty with some residual signs and symptoms. To a reasonable degree of medical probability, this is the result of the work-related injury of November 10, 2015.” Dr. Roberts found no pre-existing conditions contributed to his impairment. He opined Hornung attained maximum medical improvement (“MMI”) on December 1, 2016. He assessed a 30% impairment rating pursuant to the AMA Guides, and reiterated he did not find any pre-existing active conditions. He noted Hornung will require future medical treatment and assigned permanent restrictions.

Hometown filed the January 16, 2019 report of Dr. Timothy Kriss. He noted, “Hornung acknowledges he did have pre-existing active neck pain, right arm pain and right arm numbness . . . in the days, weeks and months immediately prior” to the MVA, and believes the MVA permanently aggravated those complaints. Dr.

Kriss found Hornung's symptoms were the same both before and after the MVA, with exception of a subjective worsening of his complaints after the MVA. Dr. Kriss diagnosed Hornung as status post anterior cervical discectomy and fusion at C6-7 for treatment of right C7 cervical radiculopathy due to a combination of chronic, bony foraminal stenosis and disc herniation at C6-7. He opined Hornung's continued neck pain is multifactorial, including cervical degenerative disc disease, arthritis, spondylosis, whiplash musculoskeletal strain from November 10, 2015, and deconditioning.

After reviewing Dr. Nanda's October 2015 records, Dr. Kriss noted Hornung complained of pain radiating down his right arm just eleven days prior to the MVA. He noted Hornung had radicular symptoms of two months duration, which were worsening on October 26 and 29, 2015. He noted the pre-existing symptoms were severe enough to merit evaluation twice in three days, prescription medication, x-rays and the ordering of a cervical MRI.

Dr. Kriss concluded the right C7 cervical radiculopathy and neck pain were pre-existing and active, and found no objective medical evidence of permanent harmful change specifically due to the November 10, 2015 MVA. However, Dr. Kriss acknowledged post-MVA records consistently document subjective worsening of the pre-existing active complaints. "Therefore, I conclude that while Mr. Hornung's neck pain and right C7 cervical radiculopathy were clearly pre-existing active prior to November 10, 2015, the [MVA] on that date appears to have permanently aggravated this pre-existing active condition, culminating in the July 22, 2016 surgery." Dr. Kriss assessed a 25% impairment rating pursuant to the AMA

Guides, attributing 16% to pre-existing, active and symptomatic radiculopathy and 9% to the MVA. Dr. Kriss opined Hornung reached MMI on February 24, 2017 and requires no permanent restrictions.

A benefit review conference (“BRC”) was held on May 7, 2019. The BRC order reflects the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, and exclusion for pre-existing disability/impairment. In its brief to the ALJ, Hometown argued Hornung had a pre-existing, active condition pursuant to Finley v. DBM Technology, *supra*.

In the July 22, 2019 opinion, the ALJ found Dr. Roberts’ opinion most credible since it is consistent with Hornung’s credible testimony. Therefore, the ALJ found Hornung sustained a 30% impairment due to the work injury to the cervical spine. The ALJ awarded temporary total disability benefits as already paid, permanent partial disability benefits, and medical benefits. The ALJ provided the following statement regarding Hornung’s pre-existing condition: “[Dr. Roberts] further found that the Plaintiff had no pre-existing active conditions.”

Hometown filed a petition for reconsideration arguing the ALJ failed to make findings of fact and did not adjudicate the issue of pre-existing disability/impairment despite the fact the parties identified the issue as contested at the BRC and it likewise addressed the issue in its brief to the ALJ. Hometown argued the ALJ’s one sentence did not constitute a finding addressing the issue of exclusion for pre-existing disability/impairment based upon a review of all the evidence. Hometown requested findings of fact and an adjudication of this issue as supported by Hornung’s testimony and the medical evidence in this claim.

The ALJ provided the following additional findings of fact in the Order on petition for reconsideration:

1. The ALJ finds that the Plaintiff was credible and convincing in his testimony that the pain he experienced as a result of the work accident was different from what he had experienced for the prior two weeks.
2. The ALJ further finds that the Plaintiff's credible testimony on this point bolsters the opinion of Dr. Roberts relied upon herein that the Plaintiff had no pre-existing active condition. The ALJ remains convinced by the testimony of the Plaintiff and the report of Dr. Roberts and thus declines to disturb the result reached herein.

On appeal, Hometown argues the ALJ did not apply the correct standard to determine pre-existing and active impairment. Pursuant to Finley v. DBM Technology, supra, the ALJ was first required to determine if there was a work-related injury. The ALJ was then required to determine whether a pre-existing condition was symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the work event. Hometown argues the ALJ did not perform this analysis and that if he did, he would be compelled to find Hornung had a pre-existing active condition. Hometown argues Hornung's testimony supports a finding of a pre-existing active condition, and does not support Dr. Roberts' opinion. Further, Hometown argues Dr. Roberts relied upon an inaccurate history provided by Hornung and failed to consider his treatment with Dr. Nanda immediately prior to the MVA.

As the claimant in a workers' compensation proceeding, Hornung had the burden of proving each of the essential elements of his claim. Snawder v. Stice,

576 S.W.2d 276 (Ky. App. 1979). However, 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 Hometown was unsuccessful in its burden, 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).

The arousal of a pre-existing dormant condition into disabling reality by a work injury is compensable. However, an employer is not responsible for a pre-existing active condition present at the time of the alleged work-related event. McNutt Construction/First General Services vs. Scott, 40 S.W.3d 854 (Ky. 2001). In Finley v. DBM Technologies, 217 S.W.3d at 265, the Court of Appeals stated a pre-existing condition is deemed active, and therefore not compensable, if it is "symptomatic and impairment ratable pursuant to the AMA [Guides] immediately prior to the occurrence of the work-related injury." Id.

We agree with Hometown that the ALJ did not perform the appropriate analysis pursuant to Finley v. DBM Technologies, supra, in the July 22, 2019 opinion despite the parties identifying “exclusion for pre-existing disability/impairment” as a contested issue at the BRC. The ALJ found Hornung sustained a cervical injury due to the MVA, a finding that is not disputed by either party. However, the single sentence provided by the ALJ, that “[Dr. Roberts] further found

that the Plaintiff had no pre-existing active conditions,” is insufficient pursuant to Finley v. DBM Technologies, supra.

The ALJ’s additional findings of fact contained in the order on petition for reconsideration did not cure the deficient analysis. As noted above, the ALJ found Hornung sustained a cervical injury due to the MVA. Pursuant to Finley, the ALJ was required to determine if Hornung had a pre-existing, active cervical condition. In other words, the ALJ was required to determine whether Hornung had a pre-existing cervical condition that was symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to November 10, 2015.

We acknowledge there is conflicting testimony regarding Hornung’s symptoms in October 2015. Dr. Nanda’s October 26 and 29, 2015 records reflect severe and worsening symptoms of right posterior neck pain, neck stiffness, muscle spasm, shoulder pain and right arm pain which began two months prior. At his deposition, Hornung acknowledged he experienced prior neck pain, but it had worsened after the MVA. However, at the hearing, Hornung initially indicated his prior pain was more located in his right shoulder and arm, and not his neck. On cross-examination, Hornung then agreed he experienced neck pain prior to the MVA. Dr. Zerga, Dr. Roberts and Dr. Kriss additionally offered opinions addressing whether Hornung was suffering from a pre-existing, active condition. In light of the above evidence, we find the ALJ’s statement that Hornung was credible and convincing in his testimony “that the pain he experienced as a result of the work accident was different from what he had experienced for the prior two weeks” and his conclusory reliance upon Dr. Roberts’ opinion is inadequate pursuant to Finley.

The ALJ did not perform the appropriate analysis addressing whether Hornung's pre-existing cervical condition was "symptomatic and impairment ratable pursuant to the AMA [Guides] immediately prior to the occurrence of the work-related injury." In light of the above, the ALJ is directed on remand to conduct an analysis pursuant to Finley v. DBM Technologies, supra, in determining whether Hornung's pre-existing cervical condition was symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the November 10, 2015 work-related injury.

Accordingly, the award of PPD benefits set forth in the July 22, 2019 Opinion and Award and the August 13, 2019 order on petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, is **VACATED**. This claim is **REMANDED** to the ALJ for a determination in accordance with the views expressed herein.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON R CHRISTION HUTSON
PO BOX 995
PADUCAH, KY 42002

COUNSEL FOR RESPONDENT:

LMS

HON STEPHANIE N WOLFINBARGER
640 S FOURTH ST, STE 400
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

LMS

HON JONATHAN R WEATHERBY
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3RD FLOOR
FRANKFORT, KY 40601