

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 28, 2020

CLAIM NO. 201791338

LARRY BROWN

PETITIONER

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

FORD MOTOR COMPANY and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING AND REMANDING**

* * * * *

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

ALVEY, Chairman. Larry Brown (“Brown”) appeals from the Remand Opinion rendered October 22, 2019 by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”) dismissing his claim for falsely representing his medical history on his job application with Ford Motor Company (“Ford”) pursuant to KRS 342.165(2). Brown also appeals from the November 22, 2019 Order overruling his petition for reconsideration.

On appeal, Brown argues the ALJ erred in finding a causal connection between the false statement on his Ford job application and the February 21, 2017 work injury. Brown asserts the ALJ relied upon the same evidence as in the original opinion, which was found insufficient to support a finding of a causal connection by the Board in the August 9, 2019 Opinion Affirming in Part, Vacating in Part and Remanding. Brown also argues the ALJ failed to address the error identified by the Board in the August 9, 2019 opinion. The ALJ failed to point to any evidence establishing Brown's 2017 low back injury at Ford is causally related to his previous fusion, thereby establishing the third prong required by KRS 342.165(2). Therefore, we must vacate the ALJ's determination and remand for a determination consistent with the evidence.

The Board provided a detailed summary of the evidence of record in the August 9, 2019 opinion. Therefore, for the sake of brevity, we will not again summarize the entire evidence of record.

Brown filed a Form 101 alleging he injured his low back on February 21, 2017, when he lifted a box while working for Ford. He also allegedly injured his left leg and buttocks, and developed blood clots. Ford filed a special answer and Form 111 denying Brown's claim alleging he knowingly failed to disclose his prior low back surgery on his employment application.

Brown testified he previously sustained a work-related low back injury in 1999, for which Dr. George Raque eventually performed a lumbar fusion in 2003. Brown testified that after a period of post-operative treatment and recovery, he returned to work and his symptoms resolved. Brown does not recall injuring his low

back in a fall at work in 2008. Brown had a motor vehicle accident in 2011, from which he had low back pain that resolved following a few weeks of rest. Brown testified he experienced no low back symptoms, and he took no medication after recovering from the 2011 motor vehicle accident until the February 21, 2017 work injury. Brown began working for Ford in May or June 2016. He described the application process and acknowledged he answered no to questions in a medical history questionnaire completed on April 4, 2016 asking if he had ever experienced back trouble or back pain, operations, or whether his work had ever been limited or restricted because of his health.

Dr. Russell Travis examined Brown at Ford's request on June 12, 2017. Dr. Travis noted the previous 2003 lumbar fusion and the February 21, 2017 work injury. He opined Brown possibly sustained a lumbar sprain and strain due to the February 21, 2017 work injury. Dr. Travis could not explain Brown's history of severe pain following the work injury. He noted his review of the 2008 and 2017 imaging studies showed no evidence of neural compromise, and only demonstrated mild age-related degenerative changes at levels above a solid L5-S1 fusion with no evidence of disc herniation, spinal stenosis, or neural compromise at any level. Dr. Travis noted he found no changes in the February 22, 2017 MRI and the February 23, 2017 lumbar CT and myelogram compared to the previous September 11, 2008 lumbar MRI.

Dr. Travis prepared addendums on August 3, 2017, August 31, 2018 and September 16, 2018. He repeatedly emphasized there was no significant change comparing the 2008 and 2017 imaging studies, except for minor degenerative

changes consistent with age, and showed no evidence of neural compromise at any level.

The ALJ rendered a decision on February 18, 2019. He found persuasive Dr. Travis' comparison of his exam findings to the results of Brown's lumbar MRIs. Dr. Travis found no changes when comparing the MRI from February 22, 2017 to one from September 11, 2008, and he noted the studies revealed only age-related degenerative changes with no evidence of neural compromise.

The ALJ dismissed Brown's claim pursuant to KRS 342.165(2). That statute bars a claim when an employee knowingly and willfully makes a false representation as to his physical condition or medical history, the employer relies on the false representation, the reliance was a substantial factor in hiring, and there is a causal connection between the false representation and the injury for which compensation has been claimed. The ALJ provided the following findings supporting a dismissal pursuant to KRS 342.165(2):

19. The ALJ finds that the deposition testimony of Dr. Hart is credible in this matter and must therefore conclude that the Plaintiff has intentionally made a false representation regarding his prior medical history. Dr. Hart noted that the Plaintiff marked "no" on the application indicating that he denied having prior operations, back pain, or that he had been otherwise restricted or limited due to his health.

20. Dr. Hart also credibly testified that the Defendant relied on the false information provided by the Plaintiff during the hiring process and that if the Plaintiff had been truthful, he would not have been hired with his medical history.

21. The ALJ finds, based upon this testimony and the application completed by the Plaintiff that the matter must be **DISMISSED** per KRS 342.165(2).

22. The Plaintiff's explanation for his false statements on the employment application were due to the voluminous documents that he was required to complete. He also added that he did not have the intent to mislead. While the ALJ is not persuaded by this and finds specifically that the Plaintiff made a knowingly false statement on the application that if answered truthfully would have disqualified him from employment, the ALJ declines to make a fraud referral as the Plaintiff's intent in making the knowingly false statement has not been fully established herein.

Brown filed a petition for reconsideration and requested additional findings addressing whether there was a causal connection between the work accident and the prior fusion surgery. After repeating verbatim paragraphs 19 and 20, the ALJ made the following additional findings in support of his dismissal pursuant to KRS 342.165(2):

21. The ALJ finds, based upon this testimony and the application completed by the Plaintiff that the Plaintiff knowingly and willfully made a false representation as to his medical history, that the employer relied upon the false representation, and that this reliance was a substantial factor in the hiring of the Plaintiff. **The ALJ further finds in accordance with the opinion of Dr. Travis that the Plaintiff's MRI results in 2017, were essentially unchanged from the results seen in 2008. The ALJ therefore finds that there is an unmistakable[sic] causal connection between the prior undisclosed medical history and the injury claimed herein for which benefits are sought. The ALJ therefore concludes that this matter must be DISMISSED per KRS 342.165(2).** (Emphasis added).

Brown appealed to this Board arguing the ALJ erred in dismissing the claim based upon Dr. Raymond Hart's testimony. Brown also argued the ALJ erred in finding a causal connection between the false statement and the injury.

In an opinion rendered August 9, 2019, we affirmed the ALJ's determination that Brown knowingly and willingly falsified his job application and that Ford relied upon this falsification as a substantial factor in his hiring. However, this Board vacated in part and remanded regarding the ALJ's causal connection analysis, stating as follows:

As noted by the ALJ, KRS 342.165(2) bars recovery by an employee for an alleged work injury if three criteria are met. First, it must be established that the employee knowingly and willfully made a false statement regarding his physical condition or medical history. Second, the employer has to have relied upon the false statement as a substantial factor in hiring. Finally, there must be a causal connection between the false representation and the injury for which compensation is claimed.

In Gutermuth v. Excel, 43 S.W.3d 270 (Ky. 2001), the Kentucky Supreme Court affirmed the dismissal of a claim based upon the employee's falsification of her job application. In that instance, the ALJ determined the job application was falsified, the employer relied upon the job application in hiring the employee, and the injury was causally related to the misrepresentations. There, the employee had previously undergone multiple surgeries, and additional surgery had been proposed in the past for precisely the same injuries she alleged. The employee failed to disclose any of this information to her employer regarding her previous injuries. The evidence supported the ALJ's determination that the undisclosed information was causally connected to her alleged work injury.

In Baptist Hosp. East v. Possanza, 298 S.W.3d 459 (Ky. 2009), the Kentucky Supreme Court found the ALJ erred in dismissing the claim. In that case, the employee

claimed a neck injury. He had previously sustained lumbar injuries for which he underwent surgery. He did not disclose his previous injury, surgery, or restrictions due to the lumbar injury. The Court found as follows:

We presume that by listing three separate factors and by stating that all must be present the legislature intended for KRS 342.165(2) to create distinct requirements. If subsection (c) requires only proof that the injury would not have occurred because the worker would not have been hired, and employer will always win simply by showing that it relied on a misrepresentation and would not hired the work had it known the truth. KRS 342.165 (2)(c) requires “a causal connection between the false representation and the injury for which compensation has been claimed.” The hospital states correctly that the claimant failed to disclose his lifting restriction; that he exceed the restriction by lifting a heavy patient; and that he injured his neck as a consequence of lifting the patient. We do not agree that these facts supported a finding under KRS 342.165 (2)(c) because we view whether exceeding the lumbar lifting restriction helped to cause the claimant’s neck injury to be a medical question.

This is not a case in which lumbar weakness or symptoms contributed to the mechanism of the injury. Nor is it a case in which the claimant’s lumbar condition increased his susceptibility to the type of harm that occurred.

Id. at 463.

That said, we believe the ALJ could reasonably conclude based upon the evidence that Brown “knowingly and willfully made a false representation as to his or her physical condition or medical history”, and Ford “relied upon the false representation, and this reliance was a substantial factor in the hiring”.

However, the “causal connection between the false representation and the injury for which compensation

has been claimed” is not as clear. Although Brown previously sustained multiple low back injuries, one of which resulted in a lumbar fusion, it is unclear from the evidence whether there is specific connection between the alleged injury, and the previous back injuries he concealed. As noted above, the ALJ relied upon Dr. Travis’ findings in determining the MRI results in 2017 were unchanged from the 2008 MRI. The ALJ concluded this establishes a causal link between the prior undisclosed medical history and the injury he now claims.

We disagree. Standing alone, Dr. Travis’ finding of no structural change appears to establish that Brown’s current complaints are unrelated to his previous injury for which surgery was performed. There appears to be no evidence in the record establishing that Brown sustained any structural lumbar injury on February 21, 2017 while working for Ford. The ALJ failed to provide a finding as to how a possible strain in 2017 is related to a previous structural injury without interval change demonstrated on imaging studies. Dr. Travis acknowledged that Brown might have sustained a sprain or strain, despite his opinions regarding symptom embellishment. This would seem to establish his complaints are unrelated to the previous structural changes which were not disclosed to Ford.

We must therefore vacate the ALJ’s dismissal of Brown’s claim. We remand for additional findings regarding the causal connection between Brown’s falsification regarding his medical history and the injury he sustained on February 21, 2017 in accordance with KRS 342.165 (2)(c). We direct no particular result. However, the ALJ’s determination must be based upon the evidence of record.

If the ALJ determines there is no causal connection between the previous injuries and the surgery Brown failed to disclose, he must make a determination regarding whether an injury occurred on February 21, 2017. If the ALJ finds an injury occurred, he must determine if it is temporary or permanent, the extent of disability (if any), and entitlement to medical benefits (temporary or permanent). Again, we direct no particular result, and the ALJ may make any

determination supported by the evidence. (emphasis added).

In the Remand Opinion rendered October 22, 2019, after reciting KRS 342.165(2), the ALJ provided the following analysis in finding a causal connection between the false representation and the alleged work injury:

2. The ALJ finds that the opinion of Dr. Travis supports the causal connection between the false representation and the injury for which compensation has been claimed because the objective findings referenced by Dr. Travis reveal that the Plaintiff's back condition had not changed since his prior undisclosed injury thus making the complaints directly related to the prior undisclosed back condition of the Plaintiff.

3. Dr. Travis examined the Plaintiff on June 12, 2017, and found no changes from the Plaintiff's MRI dated February 22, 2017, or the prior one dated September 11, 2008. The ALJ therefore finds that the alleged injury occurring on February 21, 2017, stems from the same back condition present in 2008.

4. The Kentucky Supreme Court found in *Daniels v. B.R.&D. Enterprises, Inc.*, 2006 WL 734407, as follows:

The claimant falsely represented to Dr. Dahhan that the "pulled muscle" was his only prior back injury, and Dr. Dahhan cleared him to perform a job requiring heavy manual labor. In the presence of a reasonable finding that the claimant's failure to disclose the 1998 back injury was a substantial factor in the hiring and the claimant's own testimony regarding the physical demands of the work and the events of June 11, 2002, it was reasonable for the ALJ to conclude that a causal connection existed between the false representation and the 2002 back injury, which occurred while pulling on a miner cable.

5. The ALJ likewise finds that the Plaintiff in this matter failed to reference a prior fusion and that there is

a causal connection between the omission of the prior injury and the current allegation of a low back injury.

Brown filed a petition for reconsideration asserting the ALJ again relied upon Dr. Travis' opinion comparing the 2008 and 2017 lumbar MRIs in support of a causal connection, despite the Board's opinion. Brown asserted the ALJ erred in dismissing his claim since he failed to cite to other evidence as directed by the Board to establish a causal connection and likewise requested additional findings of fact identifying any other evidence he relied upon to support such dismissal. Brown also requested additional findings based upon the issues preserved at the Benefit Review Conference, and whether he sustained a work-related lumbar injury. Brown also requested additional findings addressing his low back in the five years prior to the work injury, whether he was under restrictions or taking medication for his low back at the time of the work injury, and whether Brown had difficulty performing his job with Ford.

In overruling Brown's petition, the ALJ made the following additional findings:

1. The ALJ finds that the false representation and the alleged work injury involved the same body part and injury as confirmed by the MRI dated February 22, 2017, which showed minimal changes when compared to the prior one dated September 11, 2008, as referenced by Dr. Travis and previously cited by the ALJ.
2. The ALJ finds based upon this comparison and the observation made by Dr. Travis that there is an unmistakable causal connection between the prior fusion and the back injury claimed herein.

On appeal, Brown argues the ALJ relied upon the same evidence as in the original opinion and did not address the error posed by the Board. Therefore, Brown argues the same evidence relied upon by the ALJ on remand, i.e., Dr. Travis' opinion and the comparison of the MRIs, fail to establish a causal connection pursuant to KRS 342.165(2) between the false statement and the work injury. Brown points out Dr. Travis opined he may have sustained a lumbar strain/sprain. He also argues the ALJ's reliance upon Daniels v. B.R. &D. Enterprises, Inc., 2006 WL 734407 (Ky. March 23, 2006)(unpublished opinion), is erroneous since it is an unpublished case, is not binding, and is distinguishable from the facts of this particular claim.

As noted above, KRS 342.165(2) bars recovery by an employee for an alleged work injury if three elements are established: the employee knowingly and willfully made a false statement regarding his physical condition or medical history; the employer relied upon the false statement as a substantial factor in hiring; and there is a causal connection between the false representation and the injury for which compensation is claimed. This appeal only concerns the final element requiring a causal connection.

We agree with Brown that the ALJ relied upon the same evidence, i.e., Dr. Travis' opinion comparing the 2008 and 2017 imaging studies, in determining his false representations on the employment application are causally connected to the alleged February 21, 2017 work injury in the Remand Opinion and Order on reconsideration. The ALJ noted Dr. Travis found no changes from the September 11, 2008 MRI and the February 22, 2017 MRI, and therefore found the alleged work

injury stems from the same back condition present in 2008. The ALJ found a causal connection between the omission of the prior fusion and the current alleged low back injury. The ALJ reiterated his findings in the Order overruling Brown's petition.

Because the ALJ failed to identify other evidence in the record supporting his conclusion regarding the causal connection between the previous fusion and the 2017 lumbar strain, we are compelled to vacate his determination pursuant to KRS 342.165(2), and remand for a determination on all remaining issues if necessary.

We again disagree that the comparison of the 2008 and 2017 imaging studies by Dr. Travis supports a causal link between the prior undisclosed fusion and the alleged February 21, 2017 work injury. Standing alone, Dr. Travis' finding of no structural change appears to establish that Brown's current complaints are unrelated to his previous injury for which surgery was performed. Dr. Travis noted a "solid fusion" in reviewing the imaging studies in 2008 and 2017. He noted the same imaging studies showed only mild age-related degenerative changes at levels above the solid L5-S1 fusion performed in 2003. Dr. Travis found no changes in the February 22, 2017 MRI compared to the previous September 11, 2008 lumbar MRI, with exception of only age-related degenerative changes at levels above an L5-S1 fusion with minimal increasing degenerative changes from 2008 to 2017 and no evidence of neural compromise at any level.

We find the evidence cited by the ALJ does not establish Brown sustained an injury at the fusion site while working for Ford. On remand, the ALJ again failed to provide a finding as to how a possible strain in 2017 is related to a

previous structural injury without interval change demonstrated on imaging studies. Dr. Travis' diagnosis of a possible lumbar sprain/strain establishes Brown's complaints are unrelated to the previous structural changes, which were not disclosed to Ford. After review of the Remand Opinion and the Order on reconsideration, we determine the ALJ failed to provide additional findings regarding the causal connection between Brown's falsification regarding his medical history and the injury he sustained on February 21, 2017 in accordance with KRS 342.165 (2)(c), as directed by the Board in its August 9, 2019 opinion.

Therefore, we are compelled to vacate the finding that Ford established the final element of KRS 342.165(2), and remand this claim to the ALJ for a determination on this issue if necessary, including those identified in the December 4, 2018 Benefit Review Conference Order.

Accordingly, the October 22, 2019 Remand Opinion and the November 22, 2019 Order on petition for reconsideration by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **VACATED**. This claim is **REMANDED** for entry of an amended opinion in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

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