

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 25, 2019

CLAIM NO. 201595827

MARY HARRIS and  
JOHNNIE L. TURNER

PETITIONER

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

HARLAN CITY SCHOOL ASSOC. and  
HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING IN PART,  
VACATING IN PART & REMANDING**

\* \* \* \* \*

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

**ALVEY, Chairman.** Mary Harris (“Harris”) appeals from the September 4, 2018 Opinion on Remand rendered by Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”), finding she failed to prove she sustained a temporary lumbar injury due to the January 15, 2015 work incident. No petition for reconsideration was filed.

On appeal, Harris argues the records review report by Dr. Russell Travis is incomplete. Harris argues Dr. Henry Tutt erroneously opined her pre-existing lumbar condition and any need for surgical intervention is unrelated to the January 15, 2015 work event. Harris also argues the ALJ did not address the fact that Harlan City School Association (“Harlan”) voluntarily paid temporary total disability (“TTD”) benefits during three time periods following January 15, 2015, which supports a finding she was at least temporarily injured. For the forgoing reasons, we affirm in part, vacate in part and remand to the ALJ for additional findings addressing whether Harris sustained any temporary injuries other than to her low back due to the January 15, 2015 work event.

Harris filed a Form 101 alleging she was pushed from behind while standing on bleachers on January 15, 2015, causing her to fall and sustain injuries to her “back, SI joint, legs, ankles and feet.” At the time of the incident, Harris worked as a secretary for Harlan.

Harris testified she had experienced low back and right leg pain for quite some time prior to the work incident, eventually undergoing low back surgery in May 2014. After the surgery, she had physical therapy. Harris testified her low back and right leg pain resolved, except for stiffness. However, Harris continued to take Lortab for her pain. On January 15, 2015, she was pushed in the back at a school assembly, and fell down several rows of bleachers. She landed on her right shoulder, and rolled onto her right hip. She was taken to the nurse’s office because she had scraped her left shin, and her feet were swelling. The nurse took her to see Dr. Abdul Dahhan, and she next treated with Mr. Eric Roberts, PA-C at the Clover

Fork Clinic. Harris was referred to Dr. William Brooks. He ordered an MRI, physical therapy and a work hardening program. He also referred her to pain management for injections, which did not provide much relief. Harris continues to have a catch in her right hip and right leg pain. Treatment records and medical reports were filed into evidence by the parties, which the Board summarized in its May 18, 2018 opinion.

In an opinion rendered September 25, 2017, the ALJ dismissed Harris' claim in its entirety. The ALJ relied upon Drs. Tutt and Travis. He noted Dr. Tutt opined Harris had a long-standing and pre-existing lumbar condition which was not exacerbated by the work incident. The ALJ noted Dr. Travis similarly determined Harris had severe degenerative changes throughout the entire lumbar spine including a disc herniation at L4-5 left and a disc extrusion at L3-4 right, both present prior to her fall. The ALJ was persuaded by Dr. Travis' opinion that Harris did not suffer any permanent structural alteration of the human organism due to the work incident. He determined Harris had a pre-existing back condition not affected by the work incident. The ALJ reiterated his findings in a February 1, 2018 Order on petition for reconsideration.

In an opinion rendered May 18, 2018, this Board affirmed in part, vacated in part and remanded the claim. The Board affirmed the ALJ's dismissal of Harris' claim for permanent injuries stemming from the January 15, 2015 incident. However, the Board noted that since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may

be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are payable. The Board stated as follows in vacating in part and remanding the claim:

The ALJ determined Harris did not sustain permanent injuries due to the January 15, 2015 fall. However, he did not address whether she sustained temporary injuries. We note Harlan paid some medical bills, and multiple periods of TTD benefits. Therefore, we must remand for an additional determination regarding whether Harris sustained a temporary injury due to the January 15, 2015 work incident, and whether she is entitled TTD benefits and medical benefits, either temporary or permanent, for a temporary injury. The ALJ may make any determination he deems appropriate as long as it is supported by the evidence. We direct no particular result.

We additionally note that on August 22, 2017, Harlan filed a motion to amend its stipulation regarding the correct periods it had paid TTD benefits. The amendment reflects it paid TTD benefits from January 15, 2015 through January 19, 2015; January 22, 2015 through April 26, 2015; and from May 6, 2015 through February 22, 2016. However, the ALJ did not address this motion, and reflected the incorrect dates in his opinion. Therefore, on remand, the ALJ must make a determination regarding Harlan's motion.

The ALJ entered an Order on September 4, 2018, reflecting the parties stipulated Harlan paid TTD benefits in the weekly amount of \$209.44 from January 16, 2015 to January 19, 2015; January 22, 2015 to April 26, 2015; and May 6, 2015, to February 22, 2016 for a total of \$11,728.84. In the September 4, 2018 Opinion on Remand, the ALJ stated as follows in finding no temporary lumbar injury:

1. The ALJ is convinced by the opinion of Dr. Tutt who found that the Plaintiff had an active symptomatic lumbar condition prior to the work event and that the Plaintiff's pre-existing condition produced her ongoing symptoms.

2. The ALJ finds that the opinion of Dr. Travis is also consistent and persuasive in that any impairment suffered by the Plaintiff was due to her prior discectomy by Dr. Brooks on May 7, 2014. He convincingly added that the Plaintiff had severe degenerative changes throughout the entire lumbar spine and a disc herniation at L4-5, left, a disc extrusion L4-3 right, but that both were present prior to the work injury.

3. The ALJ is convinced by this opinion and finds that there has been no temporary injury that has been established that is not related to the prior discectomy. The ALJ therefore finds that there has been no temporary injury credibly established by the Plaintiff.

Neither party filed a petition for reconsideration. On appeal, Harris argues the records review by Dr. Travis is incomplete since he did not discuss the November 21, 2013 lumbar MRI or the Clover Fork Clinic record demonstrating Harris was cleared to return to work for six hours a day with a ten pound lifting restriction. The 2013 lumbar MRI referred to by Harris was not filed into the record. Harris also disagreed with Dr. Tutt's opinion that her pre-existing lumbar condition and any need for surgical intervention for this condition is unrelated to the January 15, 2015 work event. Harris also argues the ALJ did not address the fact that Harlan voluntarily paid TTD benefits for three time periods following the work event supporting a finding she was at least temporarily injured.

Harris cites to the case of Arnold v. Toyota Motor Mfg., 375 S.W.3d 56 (Ky. 2012), but she does not specifically argue the ALJ's opinion fails to meet the standard set forth in that case. Similarly, Harris discusses the holdings in Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982) and Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973), but

does not argue the ALJ failed to set forth sufficient findings of fact to support the conclusions he reached so as to reasonably apprise the parties of the basis for his decision.

Harris concludes by stating it is undisputed she worked, had surgery in 2014, returned to full time work, had a traumatic work injury, and then was physically unable to continue working due to her work-related injury. Harris requests this Board, “remand this case with directions to the [ALJ] to make appropriate findings and further prays for any and all other relief to which she may be entitled.”

We begin by noting this Board, in its May 18, 2018 opinion, affirmed the ALJ’s dismissal of Harris’ claim for permanent injuries stemming from the January 15, 2015 incident. The May 18, 2018 opinion of the Board was not appealed. Thus, it is the law of the case. *See Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982) and *McGuire v. Coal Ventures Holding Company, Inc.*, 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published.

On remand, the ALJ was directed to make an additional determination regarding whether Harris sustained a temporary injury due to the January 15, 2015 work incident, and whether she is entitled to TTD benefits and medical benefits, either temporary or permanent. The ALJ was also directed to make a determination regarding Harlan’s outstanding motion to amend its stipulation regarding the correct periods it had paid TTD benefits.

As directed by this Board, the ALJ entered an order on September 4, 2018 addressing Harlan’s motion to amend the stipulation regarding TTD benefits.

The ALJ ordered the stipulation be amended to reflect Harlan paid TTD benefits from January 15, 2015 through January 19, 2015; January 22, 2015 through April 26, 2015; and from May 6, 2015 through February 22, 2016.

In the Opinion on Remand, dated September 4, 2018, the ALJ found Dr. Tutt's opinion persuasive that Harris had an active symptomatic lumbar condition prior to the work event and that her pre-existing condition produced her ongoing symptoms. The ALJ also found persuasive Dr. Travis' opinion that any impairment is due to her prior discectomy performed by Dr. Brooks on May 7, 2014. The ALJ also noted Dr. Travis opined Harris had severe degenerative changes throughout the entire lumbar spine and a disc herniation at L4-5 left, a disc extrusion L4-3 right, but that both were present prior to the work injury. Therefore, the ALJ found, "there has been no temporary injury that has been established that is not related to the prior discectomy. The ALJ therefore finds that there has been no temporary injury credibly established by the Plaintiff."

The opinions of Drs. Tutt and Travis constitute substantial evidence supporting the determination that Harris did not sustain a temporary injury to her lumbar spine due to the January 15, 2015 work event. In the February 5, 2016 report and February 15, 2016 addendum, Dr. Tutt opined Harris' lumbar complaints stem from a longstanding, pre-existing lumbar condition consisting of lumbar degenerative disc disease with symptomatic bilateral neuroforaminal stenosis and are unrelated to the January 15, 2015 fall. He further opined the pre-existing lumbar condition was actively symptomatic prior to the work event, and was not exaggerated or even exacerbated by the January 15, 2015 fall. Dr. Tutt opined Harris had a pre-existing,

active lumbar condition warranting a 10 to 13% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment. In the November 25, 2015 records review, Dr. Travis opined Harris suffered no additional injury to the lumbar spine or sacroiliac joint due to the January 15, 2015 fall. He found no evidence of any injury to the sacroiliac joints due to the work event. Dr. Travis also noted severe degenerative changes throughout Harris' lumbar spine, a L4-5 left disc herniation, and L3-4 right disc extrusion, both of which were present before and unchanged by the January 15, 2015 fall. Dr. Travis assessed a 10% pre-existing, active impairment for the 2014 surgery. The above constitutes substantial evidence supporting the ALJ's determination Harris did not sustain a temporary lumbar injury to the January 15, 2015 work event, and no contrary result is compelled.

With that said, we vacate in part and remand the claim to the ALJ to address whether Harris sustained any temporary injuries to body parts other than her lumbar spine. We note that Harris claimed injuries to her "back, SI joint, legs, ankles and feet" in the Form 101. Harris testified she scraped her left shin and experienced swelling in both of her feet immediately after the fall. We also note Harris initially received treatment for her left leg and ankle, as well as for her right shoulder and hip, at the Clover Fork Clinic and Dr. Ronald Belhasen.

In addition, when asked what injuries Harris sustained due to the January 15, 2015 injury, Dr. Tutt stated, "Distal lower extremity contusions, ecchymoses, and abrasions, left greater than right, resolved." He noted the examination records at the time of the work event revealed swelling, bruising and

abrasions. He opined Harris did not sustain any permanent structural alteration of the human organism due to the work event and assessed a 0% impairment rating. He opined Harris attained maximum medical improvement relative to her lower extremity contusions at least by four to six weeks following the work event. He opined that due to the work injury, Harris requires neither further treatment nor permanent restrictions. Dr. Travis only addressed Harris' lumbar spine and sacroiliac joint condition in his November 25, 2016 report.

As noted in our prior decision, since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are payable. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability because of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Id. at 286.

The ALJ determined in the Opinion on Remand that Harris did not sustain a temporary injury to her lumbar spine due to the January 15, 2015 work event. However, he did not address whether she sustained temporary injuries to other body parts alleged in the Form 101, particularly to her lower extremities in light of the ALJ's reliance upon Dr. Tutt. Therefore, we must remand for an additional determination regarding whether Harris sustained a temporary injury for conditions other than her lumbar spine due to the January 15, 2015 work incident, and whether she is entitled to TTD benefits and medical benefits for a temporary injury. The ALJ may make any determination he deems appropriate as long as it is supported by the evidence. We direct no particular result.

Accordingly, the September 4, 2018 Opinion on Remand rendered by Hon. Jonathan Weatherby, Administrative Law Judge, is **AFFIRMED IN PART**, **VACATED IN PART**, and this claim is **REMANDED** for a determination regarding whether Harris sustained temporary injuries other than to her lumbar spine due to the January 15, 2015 incident.

ALL CONCUR.

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