

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 28, 2018

CLAIM NO. 201566948

R. BRYANT TRUCKING, LLC

PETITIONER

VS.

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

MARTIN WEBB
And HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. R. Bryant Trucking, LLC (“Bryant”) appeals from the April 20, 2018 Opinion, Award and Order and the May 17, 2018 Order rendered by Hon. John B. Coleman, Administrative Law Judge (“ALJ”). The ALJ determined Martin Webb (“Webb”) did not suffer lumbar and cervical injuries, but awarded permanent partial disability benefits enhanced by the three multiplier for a right shoulder injury

and psychological condition. On appeal, Bryant argues the ALJ erred in applying the three multiplier, in awarding benefits for the alleged psychological injury, and in awarding 12% interest on a portion of past due benefits. We affirm.

This appeal concerns only Webb's right shoulder and psychological claims, and our review of the evidence will focus only on proof relating to those injuries. Webb began working for Bryant in May 2015 hauling logs, sawdust, wood chips and bark. On September 18, 2015, his truck left the highway and rolled onto its side, resulting in injuries to his neck, back and right shoulder. He was taken by ambulance to Pikeville Medical Center, where he was treated for abrasions and right shoulder pain. An x-ray of the right shoulder revealed mild arthritic changes. He was treated conservatively for ongoing right shoulder pain with physical therapy.

Eventually, Webb began treating with Dr. John Stuart Blankenship on April 4, 2016, for the right shoulder injury. Dr. Blankenship diagnosed right shoulder subacromial impingement, acromioclavicular arthritis, and partial thickness rotator cuff tear. In making this diagnosis, he referenced a March 15, 2016 MRI of the right shoulder, which revealed AC joint degenerative joint disease, subacromial/subdeltoid arthritis, partial thickness supraspinatus, and infraspinatus tears. He performed arthroscopic subacromial decompression, acromioplasty, rotator cuff debridement, and distal clavicle excision surgery on August 26, 2016. After surgery, he underwent a yearlong course of physical therapy.

At Webb's final appointment with Dr. Blankenship on February 2, 2017, he reported ongoing anterior shoulder pain. Dr. Blankenship noted physical therapy and injections had helped with range of motion and strength, though Webb

still did not feel capable of returning to work. Webb had mildly positive impingement signs and was tender to palpation in the anterolateral shoulder. Nonetheless, Dr. Blankenship opined Webb had reached maximum medical improvement.

Dr. James Owen performed an independent medical evaluation on September 11, 2017. Webb complained of low back, neck, and right shoulder pain, indicating his back pain was the worst of his complaints. On examination, Dr. Owen noted that Webb had a “marked suffering affect and significant show of pain as he was doing various range of motions.” Dr. Owen diagnosed persistent neck, right shoulder and low back pain exacerbated by the motor vehicle accident with chronic significant pain “that may well represent wind up from narcotic use.” He opined Webb could not return to his prior employment, specifically indicating he would not be able to lift, handle or carry objects greater than ten pounds, or walk or stand more than five minutes. He also restricted Webb from climbing on a truck or pulling tarps to cover a truck bed. Dr. Owen assigned an 8% impairment rating for the right shoulder injury pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). He concluded the entire 8% rating resulted from the motor vehicle accident. Dr. Owen also assessed permanent impairment ratings for Webb’s lumbar spine and cervical injuries, though he later clarified the “primary portion of the impairment rating” is related to the right shoulder condition.

Webb testified he continues to have sharp throbbing pain in his shoulder on a daily basis despite surgery and physical therapy. He has difficulty

holding his arm above his head. Webb stated he does not feel capable of returning to the work he performed at the time of his injury, because he would have difficulty with steering, prolonged sitting, and using the foot controls in his truck. He also would have difficulty inspecting his truck, because he is unable to crawl underneath the truck or on top of the trailer.

Webb testified he began suffering from feelings of depression and hopelessness following the accident. He acknowledged suffering from depression following the death of his infant son in 2010, but he was able to continue working. Following the work accident, his depression returned. He described feeling helpless due to ongoing pain and his inability to support his family.

Dr. Megan L. Green performed a psychological evaluation on September 15, 2017. Webb reported psychological symptoms since the accident including irritability, wanting to be isolated, feelings of worthlessness, and excessive worry. The report does not mention the death of Webb's son, but notes Webb stated, "It's been a rough couple of years, the accident made it worse. Before the accident, I was coping and dealing with things, and now some days are more than I can bear." Dr. Green diagnosed major depressive disorder, single episode, severe. She felt Webb's psychological complaints were the direct result of the work injury. She noted he reported the onset of symptoms of anxiety and depression after his work injury that were specific to chronic pain, physical limitations and financial problems associated with the injury. She also indicated the medical records were negative for pre-existing psychiatric complaints. Dr. Green did not place any psychological restrictions on Webb. She assessed a 15% whole person psychiatric

impairment under the AMA Guides and opined Webb did not have an active psychological impairment before the work injury.

Dr. Douglas Ruth conducted a psychiatric evaluation on January 10, 2018 and concluded Webb did not suffer a psychiatric injury as a result of the work accident. Webb described to Dr. Ruth the depression, anger and guilt he experienced after the death of his son in 2010. Nonetheless, Webb had been able to continue working. Webb's feelings of sadness and lack of interest returned when he lost his home and was separated from his family following the work accident. Dr. Ruth also noted Webb had not received recent or previous treatment for any psychiatric complaints until he was prescribed Zoloft by a pain management physician.

Based on this information and his testing, Dr. Ruth concluded Webb's current psychiatric condition originated before the September 18, 2015 accident, and was aggravated by his ongoing pain resulting from pre-existing neck and low back conditions. Dr. Ruth noted Webb did not report significant pain relating to the shoulder injury. He assessed a 5% psychological impairment due to his pre-existing psychiatric condition, unrelated to the work accident. His evaluation did not demonstrate the need for work restrictions arising from any work-related psychiatric impairment. He felt Webb retained the mental capacity to engage in any work he is trained, educated or experienced to perform.

Dr. Ruth also reviewed Dr. Green's opinion, with which he disagreed, primarily noting she did not refer to Webb's onset of psychiatric complaints occurring in 2010. He noted Dr. Green indicated Webb reported that he loved to

fish, but had not been able to do so physically. However, Dr. Ruth noted Webb reported he had stopped due to his guilt about fishing at the time his son died. Dr. Ruth also stated Dr. Green was unaware Webb had pre-existing problems with his back, neck and right shoulder, thus leaving the possibility she erroneously attributed the current psychiatric and physical complaints to the work accident as opposed to pre-existing conditions.

In a February 20, 2018 addendum, Dr. Green indicated she had reviewed Dr. Ruth's report and disagreed. She noted that, even if the physical complaints arose before the work injury, Webb became unable to return to work after the September 2015 event, suggesting a decline in his physical condition and at least an added stressor of unemployment. Dr. Green found no indication in the medical records of a pre-existing psychiatric impairment and noted he was not treated for depression and anxiety before the injury. However, he reported symptoms associated with chronic pain, physical limitations, unemployment and financial stressors at the time she evaluated him. These symptoms are known to result in clinically significant distress and functional impairment from a mental health perspective. Dr. Green indicated Webb was prescribed Zoloft in February 2017 for reactive depression secondary to chronic pain syndrome, suggesting the onset of depression was associated with pain after the accident. She recommended a psychiatric consultation for psychotropic medication management, individual therapy to address symptoms of anxiety and depression, sleep hygiene counseling, and instruction in psychological techniques for pain management.

In his April 20, 2018 Opinion, the ALJ determined Webb sustained a temporary exacerbation of pre-existing cervical and lumbar conditions, and dismissed claims for permanent benefits related to those conditions. Adopting Dr. Owen's opinion, the ALJ concluded Webb suffered a right shoulder injury resulting in an 8% impairment. He then turned to the work-relatedness of Webb's psychiatric condition:

The last condition the plaintiff alleges to be related to the work accident is the mental health condition, which Dr. Green characterized as a major depressive disorder brought about by the effects of the work related injury. Dr. Ruth agreed the plaintiff had a mental health impairment, but felt it to be unrelated to the accident. Dr. Ruth pointed to the plaintiff's loss of his son in 2010 after which the plaintiff reported some symptoms of depression. However, after reviewing Dr. Ruth's conclusions, Dr. Green made it clear the plaintiff was recommended for treatment and prescribed medication for reactive depression secondary to chronic pain after the work related accident. Dr. Ruth felt that if the physical complaints were not attributed to the work accident, but were instead due to pre-existing conditions, then the psychiatric condition would also not be related. However, a psychiatric condition may be found compensable where it is the direct result of a work related event involving physical trauma, regardless of whether the trauma produces a harmful physical change to the human organism. Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564 (Ky. 2001) and McGowan v. Matsushita Appliance Company, 95 S.W. 3d 30 (Ky. 2003). After reviewing the entirety of the evidence, I am most persuaded by the opinion of Dr. Green the plaintiff's major depressive disorder was brought about because of the traumatic work accident occurring on September 18, 2015 resulting in a permanent impairment to the plaintiff's right shoulder and temporary exacerbation of pre-existing active cervical and lumbar injuries. As such, the plaintiff is entitled to medical and income benefits for major depressive disorder.

The ALJ awarded permanent partial disability benefits for right shoulder and psychological injuries, and addressed Webb's entitlement to enhanced benefits pursuant to KRS 342.730(1)(c):

In this instance, Dr. Owen has opined the plaintiff would not be able to climb on his truck, which he was required to do while performing the particular job of a truck driver working for the defendant at the time of his injury. Based upon this restriction, which I am convinced resulted from right shoulder injury; I must find the plaintiff lacks the physical capacity to return to his job as a truck driver. He has not returned to work earning same or greater wages and therefore he is entitled to the 3X multiplier set forth at KRS 342.730 (1) (c) 1.

The ALJ awarded interest at the rate of 12% per annum on all due and unpaid installments of such compensation as of June 28, 2017 and 6% thereafter. Bryant filed a petition for reconsideration seeking additional findings of fact regarding the award of enhanced benefits, psychological impairment, and interest rate. In denying the petition, the ALJ provided the following explanation:

Next, the defendant questions the award of the 3X multiplier. The ALJ found the plaintiff to have sustained a compensable right shoulder injury. The ALJ pointed to the restrictions offered by Dr. Owen that the plaintiff would no longer be able to climb on his truck. It is worthy to note that Dr. Owen offered other restrictions in regards to lifting, handling and carrying objects. He also offered restrictions against prolonged sitting. However, the ALJ inferred those restrictions were for the plaintiff's non-compensable active conditions. However, as a truck driver, the plaintiff must utilize his shoulders and upper extremities to climb on and off of his truck. It was also noted that the plaintiff had to utilize a tarp to cover the loads of sawdust he would haul for the defendant. The ALJ inferred the restrictions against climbing would necessarily be as the result of the

compensable right shoulder injury. As was noted in the decision, the ALJ is required to look at specific tasks, which the individual performed doing his job in making the determination as to whether the plaintiff maintains the physical capacity to return to that type of employment. It is the specific task of climbing, which is affected by the upper extremity and therefore, this portion of the petition for reconsideration is also denied.

Finally, the defendant requests additional findings regarding whether any portion of the 5% impairment rating would be attributable to a pre-existing and active impairment. This issue was thoroughly discussed in the decision wherein Dr. Green noted a lack of prior active psychiatric impairment. While the ALJ was convinced the plaintiff's current impairment rating is 5%, I was not persuaded by the opinion of Dr. Ruth in regards to prior active impairment. Therefore, this request is also denied.

On appeal, Bryant first argues Webb is not entitled to benefits enhanced by the three multiplier. Bryant notes the ALJ awarded benefits for only the right shoulder and major depressive disorder. The ALJ relied on the IME report of Dr. Owen to find Webb would not be able to climb in his truck. This restriction was the sole basis for determining Webb lacks the physical capacity to return to his job as a truck driver. However, Bryant asserts Dr. Owen did not specifically relate this restriction to Webb's right shoulder, or any other specific body part. Bryant contends a review of Dr. Owen's report makes clear the restrictions are more likely attributable to Webb's back, for which the ALJ found only a temporary injury. Bryant emphasizes no restrictions were assigned for Webb's psychological injury.

As the claimant in a workers' compensation proceeding, Webb bore 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 successful in proving

entitlement to the three multiplier, the question on appeal is whether those findings are supported by substantial evidence. 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).

Substantial evidence supports the ALJ’s decision to award enhanced benefits pursuant to KRS 342.730(1)(c)1, which requires a showing that he does not retain the physical capacity to return to the type of work he performed at the time of the injury. The requisite analysis considers whether the employee can perform the actual tasks that he performed at the time of the injury. Trane Commercial Systems v. Tipton, 467 S.W.3d 249 (Ky. 2016) *citing* Ford Motor Co. v. Forman, 142 S.W.3d 141 (Ky. 2004). In this claim, Webb testified he was required to climb into his truck and cover the load in the truck bed. He also testified he has daily, sharp pains in his right shoulder and is unable to raise his arm above his head. In assigning restrictions, Dr. Owen stated Webb “certainly would not be able to climb on a truck and put the top on the truck.”

This proof constitutes the requisite substantial evidence to support the award of enhanced benefits. Bryant is correct that Dr. Owen did not specifically state the restriction against climbing and covering the truck is related only to the shoulder injury, however, we conclude the ALJ could reasonably infer the physical motions of climbing and pulling covers necessarily involves the use of one’s shoulder. The ALJ is entitled to draw reasonable inferences from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997).

Further, an ALJ may give weight to a claimant's own testimony regarding his retained physical capacity. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). This proof adequately supports the ALJ's determination Webb lacks the physical capacity to return to his pre-injury position.

Bryant next argues the ALJ erred in finding Webb suffered a psychological injury. It asserts Dr. Green's report is the only evidence to establish Webb has a work-related psychological injury. However, Bryant claims Dr. Green was unaware of, or did not take into account, the death of Webb's son in 2010. According to Bryant, this omission renders Dr. Green's opinion wholly unreliable.

We find no error in the ALJ's reliance on Dr. Green's opinion. Although Dr. Green's initial report does not refer to the history of psychological complaints following the death of Webb's son, Dr. Green later reviewed Dr. Ruth's report which referenced the loss. Even if Dr. Green was not aware of this tragedy prior to reading Dr. Ruth's report, she did not change her opinions regarding Webb's current psychological condition. Thus, even if Dr. Green's initial opinions were based upon an incomplete or inaccurate history, her opinions expressed in the supplemental report were based upon a history that included complaints in 2010 after the death of Webb's son. Her opinions constitute substantial evidence upon which the ALJ could rely in reaching his decision.

Finally, Bryant argues the ALJ erred in awarding interest at the rate of 12% for past due benefits arising prior to June 29, 2017. The interest rate found at KRS 342.040 was amended by the General Assembly, effective June 29, 2017. Bryant argues interest is payable at a rate of 6% for all past due benefits because the

award was entered after the effective date of the amendment. It points to Section 5 of Kentucky House Bill 223 (“HB 223”) to support this contention, which states the amended section shall apply to all orders “entered after the effective date of this Act.”

We recently considered the question of the appropriate rate of interest in Lawnco, LLC v. White (Claim No. 2014-69882, WCB January 12, 2018) and we continue to adhere to the rationale expressed therein. In White, we explained that we must interpret statutes based on their plain language, and cannot import meaning from external sources when no statutory ambiguity exists. Revenue Cabinet v. O’Daniel, 153 S.W.3d 815 (Ky. 2005). The General Assembly did not include the provision contained in Section 5 of HB 223 in the final amended version of KRS 342.040(1). We, therefore, cannot conclude the General Assembly intended it to apply nonetheless. Furthermore, application of Section 5 is tantamount to retroactive application of the statute to unpaid installments that were due prior to June 29, 2017. We may not construe a statute to be applied retroactively unless expressly so declared. KRS 446.080(3).

In Stovall v. Couch, 658 S.W.2d 437 (Ky. App. 1983), the Court of Appeals clarified that the interest rate set forth in KRS 342.040(1) is controlled by the date of accrual and not by the date a judgment is rendered. Here, the ALJ determined Webb’s award of income benefits should commence on September 18, 2015, which has not been appealed. Therefore, Webb’s entitlement to income benefits vested on this date. Thus, from September 18, 2015, through June 29, 2017,

Webb is entitled to 12% interest on all unpaid benefits. He is entitled to 6% interest on income benefits accrued after June 29, 2017.

Accordingly, the April 20, 2018 Opinion, Award and Order and the May 17, 2018 Order rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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