

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 12, 2019

CLAIM NO. 201789519

TIMOTHY BRIAN HAMMONS

PETITIONER

VS.

APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

O'REILLY AUTOMOTIVE STORES, INC.,
And HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Timothy Hammons ("Hammons") appeals from the following opinions rendered by Hon. Christina D. Hajjar, Administrative Law Judge ("ALJ"): the March 7, 2018 Interlocutory Order, the April 9, 2018 Order on Reconsideration, the January 30, 2019 Opinion and Order, and the February 26, 2019

Order on Reconsideration. The ALJ determined Hammons suffered a temporary work-related injury. On appeal, Hammons argues the evidence compels a finding he suffered a permanent injury. For the reasons set forth herein, we affirm.

Hammons worked as a manager for O'Reilly Automotive Stores, a position which required him to lift up to fifty pounds alone. On February 28, 2017, a box fell on him and he moved to catch it. In doing so, he felt a pop in his mid to low back. The pain continued down the back of his right leg.

The pain persisted, which prompted Hammons to visit Premier Family Health on March 2, 2017. He reported low and mid back pain with sensory changes in his right toes. On March 23, 2017, a lumbar MRI revealed moderate spondylosis, disc extrusion at L3-4, and disc herniation at L4-5. At a March 31, 2017 follow-up, Dr. Donnie Bunch took Hammons off work for a month.

Prior to the February 28, 2017 incident, Hammons testified he strained his lumbar spine in 2002 and 2010. Records from Premier Family Health indicate Hammons was also treated for low back pain in 2015. On March 3, 2015, Hammons reported low back pain radiating into both legs. A March 24, 2015 lumbar MRI revealed foraminal narrowing at L4-5, mild facet arthropathy, and moderate foraminal stenosis at L5-S1. Dr. Bunch referred him for a neurosurgical evaluation.

Dr. Amjad Bukhari evaluated Hammons on October 14, 2015 for bilateral abnormal sensation from the knee down. Hammons reported a gradual onset of intermittent episodes of moderate bilateral low back pain. Dr. Bukhari prescribed Tramadol. Hammons reported similar complaints at follow-up visits on February 19, 2016, July 2, 2016, October 3, 2016, and January 7, 2017.

Meanwhile, Hammons continued to treat with Premier Family Health. At follow-up visits through August 10, 2015, Hammons continued to report low back pain and pain into his legs. He did not treat with Premier Family Health again until March 28, 2017, when he reported low back pain after twisting while at work. At that time, he was still taking Gabapentin and Robaxin, which had been initially prescribed in 2015. On January 24, 2017, Hammons again presented with low back pain and lumbar radiculopathy.

Hammons did not visit Premier Family Health after January 24, 2017 until March 2, 2017, following the work incident. After Dr. Bunch had taken Hammons off work for a month, he also referred him to Dr. William Brooks. Dr. Brooks noted Dr. Bunch's assessment of musculoligamentous strain and noted medication and physical therapy had not improved Hammons' pain. He interpreted Hammons' lumbar MRI to show degenerative disc disease but no abnormality which would warrant surgical intervention. Dr. Brooks referred Hammons to pain management.

Hammons next visited Dr. Amr El-Naggar on August 7, 2017. Hammons reported he had experienced no significant pain since 2015. Dr. El-Naggar scheduled a trial spinal cord stimulator. However, the request was denied. Because Hammons' pain was still severe six months after the work incident, he recommended a lumbar epidural steroid injections and a three level fusion at L3-4, L4-5 and L5-S1.

Dr. Christopher Stephens conducted an independent medical evaluation ("IME") on June 7, 2017. Dr. Stephens reviewed Hammons' medical records and performed a physical exam. He noted Hammons had somewhat

diminished range of motion but neurologic and sensory exams were normal. Dr. Stephens declined to offer an opinion on causation but concluded Hammons had suffered an exacerbation of his ongoing degenerative disc disease.

After Dr. Stephens was provided Hammons prior MRI scans, he supplemented his report. In the June 28, 2017 supplement, Dr. Stephens stated he found no evidence of any acute anatomic change in the lumbar spine. He also emphasized Premier Family Health records, which documented a history of lower back pain with periodic flare-ups. Dr. Stephens concluded Hammons' lumbar spine condition was active on February 28, 2017 and the lifting incident caused a temporary exacerbation of the chronic condition. In an October 9, 2017 supplement, Dr. Stephens reviewed Hammons' most recent treatment and concluded he suffered a 5% whole person impairment prior to the work incident.

Dr. Stephen Autry conducted an IME on October 18, 2017. Following a medical records review and physical exam, Dr. Autry diagnosed herniated lumbar disc with intractable symptoms. Dr. Autry noted Hammons' prior low back episodes in 2002 and 2015 but stated these injuries had fully resolved. He recommended a lumbar laminectomy and disc excision. He did not believe Hammons was at maximum medical improvement.

In the March 7, 2018 Interlocutory Opinion, the ALJ determined Hammons suffered a work-related injury on February 28, 2017. Relying on Dr. Stephens' report, the ALJ concluded Hammon suffered a pre-existing and active impairment at the time of the work incident. She noted the Premier Family Health records which recorded treatment up until a month before the work incident. The

ALJ further relied on Dr. Stephens to conclude the surgery recommended by Dr. El-Naggar was not required or compensable. She additionally cited Dr. Brooks' report, which found no abnormality on Hammons' lumbar MRI which would require surgery. She awarded temporary total disability benefits from March 1, 2017 through June 7, 2017, the date on which Dr. Stephens placed Hammons at maximum medical improvement. Hammons' subsequent petition for reconsideration was denied.

Despite this decision, Hammons underwent surgery on April 22, 2018. He testified that the pain was unbearable, which compelled him to agree to the fusion surgery. Hammons later filed a motion to amend his Form 101 to include gait derangement.

On August 23, 2018, Dr. John Gilbert conducted an IME. Dr. Gilbert reviewed medical records, including the surgical report of a three-level decompression arthrodesis. He also conducted a physical exam. In addition to chronic pain, weakness and muscle spasms, Dr. Gilbert diagnosed mobility and gait disturbance. He attributed this diagnosis to the February 28, 2017 work incident. He further concluded Hammons did not have an active impairment prior to the work injury.

Dr. Stephens testified by deposition on November 28, 2017. Dr. Stephens had previously evaluated Hammons on July 7, 2017, and had followed the course of treatment since that date. He found no objective evidence of radiculopathy, and considered Dr. Gilbert's diagnosis of gait derangement was highly premature considering it was assessed just a few months following a major spinal surgery. Dr. Stephens concluded that Hammons suffered no additional permanent impairment as

a result of the work incident. However, on cross-examination, he acknowledged he had not personally examined Hammons since 2017.

In the January 30, 2019 Opinion and Order, the ALJ stated that she was unpersuaded by Dr. Gilbert's opinion. She reaffirmed her prior holdings that the work incident caused only a temporary flare-up of Hammons' pre-existing degenerative disc disease, and caused no permanent impairment. Hammons filed a petition for reconsideration which was denied.

Hammons now appeals, arguing the evidence compels finding he suffered a permanent work-related injury. He acknowledges he suffered episodes of low back pain prior to the work incident, but emphasizes that he was working full-time and under no restrictions prior to the event. Hammons argues the evidence compels a finding the work incident aroused a previously dormant condition into disabling reality.

As the claimant in a workers' compensation proceeding, Hammons 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 unsuccessful in that 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 function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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 ALJ relied on Dr. Stephens' opinion to conclude Hammons suffered only a temporary exacerbation of his pre-existing condition. She stated the reasons for her reliance on his opinion, and Hammons has not identified any deficiency in the opinion which would render it unreliable. The ALJ enjoys the discretion to determine which medical opinions upon which to base her ultimate decision. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Dr. Stephens' opinion alone constitutes the requisite substantial evidence supporting the ALJ's determination that Hammons suffered only a temporary injury.

Furthermore, we reject Hammons' argument that Dr. Stephens was not at liberty to assign an impairment rating for his condition prior to the work incident. Hammons additionally emphasizes that he was working without restrictions on February 28, 2017. While we disagree that Dr. Stephens was prohibited from assigning an impairment rating for Hammons' condition prior to the incident, we need not reach that question. The ALJ relied on Dr. Stephens' opinion to the extent he believed the work incident caused only a temporary injury from which Hammons' condition returned to baseline. Therefore, it was unnecessary for the ALJ to consider the legal significance of a pre-existing, active condition.

Finally, the ALJ thoroughly reviewed the evidence and explained her reasoning. She provided more than adequate discussion to explain the basis of her determination, and the proof on which she relied. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991).

The function of the Board in reviewing an ALJ's decision is limited to determining 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). Hammons' appeal is a request for this Board to re-weigh the evidence and rely instead upon Dr. Gilbert's opinion. When the ALJ's decision is supported by substantial evidence, as here, this Board is not permitted to disturb it.

For the foregoing reasons, the March 7, 2018 Interlocutory Order, the April 9, 2018 Order on Reconsideration, the January 30, 2019 Opinion and Order, and the February 26, 2019 Order on Reconsideration rendered by Hon. Christina D. Hajjar are hereby **AFFIRMED**.

ALL CONCUR.

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