

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 3, 2021

CLAIM NO. 202095080

TOTAL BUSINESS MANAGEMENT, INC.

PETITIONER

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

PHILLIP ISON and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Total Business Management, Inc. ("TBM") appeals from the May 21, 2021 Opinion and Order and the June 11, 2021 Order overruling its Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ found Phillip Ison ("Ison") sustained a work-related low back injury on January 18, 2017, for which he awarded temporary total disability

(“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits.

On appeal, TBM argues the ALJ failed to address whether Ison sustained a temporary injury due to the January 18, 2017 work event. TBM argues the ALJ erred in relying upon Dr. Frank Burke’s impairment rating because he did not utilize the DRE method. TBM argues the ALJ failed to carve out a portion of Ison’s impairment for a 2012 low back injury. Because substantial evidence supports the ALJ’s determination, we affirm.

Ison filed a Form 101 alleging he injured his low back on January 18, 2017 when he unloaded a water tank while working for TBM. Ison disclosed a previous workers’ compensation claim (Claim Number 2013-96092) involving his low back. The Settlement Agreement for that claim was approved by Hon. J. Landon Overfield, Administrative Law Judge, on September 23, 2013.

Ison testified by deposition on December 15, 2020 and at the hearing held on March 25, 2021. Ison was born in September 1962 and resides in Lebanon, Kentucky. Ison was self-employed in the construction industry from 1996 through 2001. He then worked for the Powell County Board of Education as a bus driver and substitute teacher from 2001 to 2010. Ison worked as a wire installer for Telamon Corporation from 2010 to 2013 and sustained a low back injury on October 30, 2012. Ison returned to the Powell County Board of Education as a bus driver and substitute teacher from August 2013 through 2015. Ison began working for TBM in the fall of 2015 as a plumber and repairman. He was required to lift and maneuver water

heaters weighing 25 to 200 pounds, and his tool bag weighed approximately 40 pounds. Ison's job required climbing, squatting, crawling, and kneeling.

Ison experienced low back pain radiating into his left leg on October 30, 2012 when he handled heavy cable while working for Telamon. Ison treated with his primary care physician, and then with a specialist for approximately four months. Ison was prescribed Neurontin and Tylenol, underwent physical therapy, and had a lumbar MRI. Surgery was not recommended. Ison was restricted from work for approximately four months, and he was then released to full duty work without restrictions in February 2013. He did not return to work for Telamon but instead obtained his CDL and returned to work as a bus driver and substitute teacher for the Powell County Board of Education in August 2013, when the school year began. Ison settled his claim against Telamon for approximately \$95,000.

Ison did not seek treatment for his low back from August 2013 until the January 18, 2017 work accident. While working for the Powell County Board of Education from August 2013 to 2015, Ison took Tylenol and weaned himself from Neurontin. When he began working for TBM in the fall of 2015, Ison was under no restrictions for his low back. He likewise had no ongoing symptoms nor did he seek treatment for his low back until the January 18, 2017 work incident.

Ison testified that on January 18, 2017, he was unloading a water purification tank from his van, which got caught on a shelf. He experienced excruciating low back pain as he pulled harder on the tank to free it. The pain radiated down his left leg into his little toe. Ison initially treated at Concentra and he underwent physical therapy. He was then referred to Dr. Travis Hunt in February

2017. Dr. Hunt restricted Ison to light duty and administered two lumber epidural steroid injections. A third recommended injection was not approved by TBM's insurer. Dr. Hunt then recommended surgery in September 2017, which Ison opted not to pursue. Dr. Hunt then released Ison to full duty without restrictions. Ison testified he returned to his regular job with TBM, but he received some assistance with lifting.

Ison did not return for any treatment for his low back condition until June 2019. Ison testified that a recent job had been too strenuous, noting that he had to repeatedly carry his heavy tool bag while traversing stairs. His low back and left leg symptoms gradually worsened, causing him to return to Dr. Hunt in June 2019, who again recommended surgery. Dr. Hunt performed the surgery on February 3, 2020. Following a six-week period, Ison returned to light duty work for one day, and he was then laid off in March 2020. Other than the one day, Ison has not returned to any work since the February 3, 2020 surgery.

Ison acknowledged he worked light duty for TBM from the date of the accident until September 2017. He then worked full duty without restrictions from September 2017 until February 3, 2020. TBM accommodated him and ensured he was not assigned any jobs that would hurt his back other than the last five months he worked there. Ison testified that between September 2017 and June 2019, he continued to have back problems for which he took Neurontin. Ison received TTD benefits due to the February 4, 2020 surgery.

Ison continues to experience low back pain radiating into his left leg, left foot sensitivity, and he has difficulty sleeping. Dr. Hunt has permanently

restricted Ison from lifting over twenty pounds. Ison does not believe he can return to his job with TBM.

Regarding the October 30, 2012 injury, Ison filed a Form 110, approved on September 30, 2013, and the July 2, 2013 report by Dr. Ellen Ballard. The Form 110 reflects Ison allegedly injured his low back on October 30, 2012 while working for Telamon. The settlement agreement notes a diagnosis of “low back pain with left-sided radiculopathy” and Dr. Ballard assessed a 12% impairment rating. The settlement agreement reflects the parties settled for a lump sum of \$95,743.31, which included buyouts of all Ison’s rights, including his right to future medical benefits and right to reopen.

In the July 2, 2013 report, Dr. Ballard diagnosed low back pain with left leg radicular symptoms due to the October 30, 2012 work accident. She noted Ison’s treating physician had not recommended surgery. Dr. Ballard recommended a functional capacity evaluation to determine work restrictions. Dr. Ballard assessed a 12% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Dr. Ballard found Ison attained maximum medical improvement (“MMI”) on July 2, 2013 and could return to modified duty.

Ison also filed Dr. Hunt’s records, who treated him from February 2017 through September 2017, and from June 2019 through October 2020. Dr. Hunt noted the January 18, 2017 work incident and diagnosed an L5-S1 disc herniation. He restricted Ison from work, prescribed medication, and administered epidural lumbar injections in March and June 2017. Dr. Hunt eventually released Ison to full

duty work without restrictions on April 13, 2017. On September 11, 2017, Dr. Hunt noted Ison continued to experience low back and left leg symptoms. He also noted Ison was working full duty but had difficulty crawling. He diagnosed a L5-S1 disc herniation with left S1 radiculopathy. He noted Ison was a candidate for microdecompression but had expressed his desire to avoid surgery. He stated Ison was at MMI and could work without restrictions. In a September 28, 2017 letter, Dr. Hunt's physician's assistant noted Ison was diagnosed with an L5-S1 disc herniation with an onset consistent with a work-related injury. He noted Ison did not want to pursue surgery recommended by Dr. Hunt. He noted Ison is working full duty and is at MMI since he has completed conservative treatment. He further stated, "However this certainly does not mean that he will not have any potential flare-ups or pain due to this disc herniation from the work injury. We cannot say that the work injury is complete and no further treatment will ever be required, although at this time we're not planning any treatment."

Ison returned to Dr. Hunt on June 13, 2019 complaining of increased low back and left lower extremity symptoms for four months, with no relief from Gabapentin, and that he had been working strenuously. Dr. Hunt opined, "He is still suffering from the same problem that we dealt with 2 years ago. He has an L5-S1 disc herniation at that level ..." Dr. Hunt placed Ison on light duty, prescribed medication, and administered three injections. A November 21, 2019 lumbar MRI demonstrated left paracentral disc protrusion at L5-S1 with moderate compromise of the left lateral recess. Dr. Hunt recommended a left-sided L5-S1 microdiscectomy,

which was performed on February 4, 2020. On October 5, 2020, Dr. Hunt restricted Ison from lifting or carrying over 20 pounds.

Ison filed Dr. Burke's November 30, 2020 report. He noted the January 18, 2017 work accident, and Dr. Hunt's treatment through September 2017. He further noted Ison continued to work with episodes of chronic back pain and lower extremity numbness and tingling, which he tolerated. However, Ison returned to Dr. Hunt in 2019 after working a long-term job requiring him to use stairs while carrying a tool bag. He noted Dr. Hunt performed surgery on February 4, 2020 and placed Ison at MMI in September 2020.

Dr. Burke noted Ison's history of low back injury with a left radicular pain problem in 2012. He noted Ison's symptoms resolved after he stopped working for Telamon. He noted Ison then worked as a bus driver for several years with complete resolution of his symptoms until the January 18, 2017 work incident. Dr. Burke also reviewed the medical records for treatment received after the January 2017 work injury, and he performed an examination. He diagnosed, "recurrent left L5 radiculopathy as a result of a work-related accident on 01/18/2017. Absent left S1 DTR is present. He has reached [MMI]." He assessed a 29% impairment rating pursuant to the AMA Guides, but apportioned 23% to the January 18, 2017 work injury and 6% to a pre-existing condition. Dr. Burke opined Ison does not have the physical capacity to return to his job. Dr. Burke noted the 2017 MRI showed some narrowing, which increased to a moderate compromise by 2019, compatible with Ison's acute clinical deterioration. Dr. Burke opined Ison suffered a lumbar injury

on January 18, 2017, with clinical and radiographic worsening that is supported by objective medical findings.

TBM filed Dr. Christopher Stephens' December 9, 2020 report. He noted the January 18, 2017 work event and subsequent treatment with Dr. Hunt. He also noted Ison was released without restrictions in September 2017 and did not see Dr. Hunt again until June 2019 when he complained of gradual low back and left leg pain. Dr. Stephens also reviewed Dr. Ballard's 2013 report and Dr. Hunt's treatment records spanning 2017 through 2019.

Dr. Stephens diagnosed chronic back and leg pain, secondary to L5-S1 disc herniation/protrusion on the left, sustained in 2012. He opined Ison had a pre-existing active condition of the back, and left leg pain secondary to an L5-S1 disc herniation, with symptoms dating back to the 2012 injury. Dr. Stephens emphasized the 12% impairment rating assessed by Dr. Ballard in July 2013. Dr. Stephens assessed a present 12% impairment rating pursuant to the AMA Guides utilizing the DRE method.

Dr. Stephens opined the 2017 lifting incident did not cause a new structural lesion in his spinal column. He opined the 2017 work incident resulted in an exacerbation of his pre-existing, active symptoms of back and left leg pain. He also opined the 2017 exacerbation was successfully treated, and Ison returned to full duty work. He opined Dr. Hunt's 2017 treatment is related to exacerbatory effects of the lifting incident for which Ison reached MMI on April 18, 2017. Dr. Stephens opined Ison did not sustain an injury in 2019 when his symptoms returned stating this was "presumably due to an atraumatic exacerbation of the same condition." Dr.

Stephens found the 2019 treatment was unrelated to the 2017 exacerbation since Ison's symptoms had returned to baseline status by the fall of 2017.

Dr. Burke prepared a January 12, 2021 addendum after reviewing Dr. Stephens' report. He opined the 2012 work incident resulted in transient radicular pain, which resolved after a period of convalescence and a change of work. Dr. Burke stated there was no additional symptomology until the January 2017 work accident. Dr. Burke opined Dr. Ballard's assessment of impairment for the 2012 work injury was erroneous since it was not based on the presence of abnormal EMG evidence or significant physical findings supporting a verified electrodiagnostic finding. At most, Dr. Ballard's examination findings in her July 2013 report only support a 6 or 7% impairment rating. Dr. Burke opined Dr. Stephens' impairment rating was inaccurate since he erroneously utilized the DRE method. He noted the AMA Guides specifically state, "When there is a recurrent radiculopathy caused by a new (recurrent) disc herniation or a recurrent injury in the same spinal region, the [ROM] is required." He further noted the ROM method requires the use of an inclinometer, which was not done by Dr. Stephens.

Finally, Dr. Burke disagreed with Dr. Stephens' opinion that Ison had a pre-existing active condition secondary to an L5-S1 disc herniation. He opined Ison was asymptomatic immediately prior to the 2017 accident, both by history and by his work occupation. He noted Ison reported his symptoms stemming from the 2012 incident had resolved and was working as a bus driver without any symptoms for several years prior to this accident. Dr. Burke noted Ison returned to a very heavy physically demanding category job with TBM without any symptoms. Dr.

Burke opined Ison did not have a pre-existing active condition. Rather, Ison had a pre-existing dormant condition that was aroused into disabling reality and further extended by his work injury on January 18, 2017.

In a supplemental report dated March 8, 2021, Dr. Stephens opined Ison's 2012 low back injury had not resolved as opined by Dr. Burke. He emphasized the claim was settled based upon the 12% impairment rating assessed by Dr. Ballard, indicating the 2012 injury was permanent. Therefore, the 12% impairment rating was permanent and pre-existing at the time of the 2017 work accident. Dr. Stephens further disagreed with Dr. Burke's opinion that the ROM method must be utilized, and the DRE method was suitable in this instance. Dr. Stephens did not agree with Dr. Burke's impairment rating utilizing the ROM method based upon the "highly inflated rating." Dr. Stephens opined Dr. Burke's high impairment rating does not represent Ison's residual functional capacities and found no objective basis for it.

TBM also filed Dr. Ralph Crystal's January 27, 2021 vocational report opining Ison is able to perform a typical 8-hour workday on a sustained basis and is not disabled from employment.

A Benefit Review Conference was held on March 25, 2021. The parties stipulated Ison sustained a work-related injury on January 18, 2017. The parties also stipulated TBM voluntarily paid TTD benefits from February 4, 2020 to February 5, 2021 and medical expenses. Benefits per KRS 342.730, exclusion for pre-existing disability/impairment, work-relatedness/causation, TTD, and ability to return to work were identified as contested issues.

The ALJ rendered an Opinion on May 21, 2021, and stated as follows,

verbatim:

4. For purposes of determining the extent of employer's liability for workers' compensation benefits for the work-related arousal of a pre-existing condition, to be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the American Medical Association (AMA) Guidelines immediately prior to the occurrence of the work-related injury. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky.App.2007).

5. The ALJ is presented with the opinions of Drs. Stephens and Burke in this matter. Dr. Stephens has opined that the Plaintiff has sustained no additional impairment since the prior low back injury in 2012. Dr. Burke has opined that the Plaintiff sustained significant additional impairment and that his impairment must be assessed via the range of motion method per the AMA Guides.

6. The ALJ finds that the opinion of Dr. Burke is more consistent with the credible testimony of the Plaintiff as well as with Section 15-2, on page 379, of the AMA Guides, which requires the use of the range of motion method in the Plaintiff's situation. This same requirement casts doubt upon the opinion of Dr. Stephens.

7. The Plaintiff testified that he was performing the duties of his job without difficulty prior to the work injury and Dr. Burke noted that the Plaintiff was asymptomatic immediately prior to the accident. Dr. Burke therefore credibly found that the Plaintiff's dormant pre-existing condition was aroused into disabling reality by the work injury of January 18, 2017. The ALJ finds that this opinion is credible and convincing.

8. The ALJ finds based upon the foregoing that the Plaintiff's low back condition was not symptomatic and

impairment ratable at the time of the work injury and that the medical opinion of Dr. Burke is the most credible and the most consistent with the dictates of the AMA Guides. The opinion of Dr. Burke is for this reason given significant weight herein.

9. Dr. Burke diagnosed a recurrent left L5 radiculopathy due to the January 18, 2017, work injury and assessed a 23% whole person impairment pursuant to the AMA Guides. Dr. Burke also opined that the Plaintiff would not be able to return to the same type of work. These opinions have convinced the ALJ.

10. The ALJ therefore finds based upon the credible evidence herein that the Plaintiff has sustained a 23% whole person impairment due to the January 18, 2017, work injury and that he does not retain the physical capacity to return to the same type of work.

The ALJ found Ison attained MMI from the January 18, 2017 work injury on November 30, 2020. He found Ison was entitled to TTD benefits from February 4, 2020 to November 30, 2020.

TBM filed a Petition for Reconsideration requesting the ALJ to address whether it overpaid TTD benefits by \$2,161.29, and whether it is entitled to a credit. TBM asserted the ALJ failed to address whether Ison's low back condition had returned to baseline pursuant to Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), and if so, how the January 18, 2017 work incident proximately caused the left L5 radiculopathy and need for surgery in 2020. TBM also asserted the ALJ did not address whether the issue of pre-existing and active impairment was *res judicata* based upon the impairment rating used to arrive at the 2013 settlement. In overruling TBM's Petition, the ALJ noted he had already awarded TTD benefits

and issued a credit for any amount overpaid. The ALJ summarily denied the remainder of TBM's Petition.

On appeal, TBM argues the ALJ erred in failing to address whether Ison sustained a temporary injury due to the January 18, 2017 event, and did not perform an analysis pursuant to Robertson v. United Parcel Service, *supra*. TBM points out, "it is undisputed Ison had a L5-S1 herniation" when he began working there, as evidenced by a prior MRI and the Form 110. According to TBM, Ison sustained a temporary aggravation of a pre-existing condition on January 18, 2017 and returned to baseline in September 2017. It notes Ison was placed at MMI and returned to full duty work without restrictions at that time and ceased treatment for nearly two years. Therefore, all treatment received in 2019 and thereafter, including the surgery, is unrelated to the 2017 work event.

TBM argues the ALJ erred in relying upon Dr. Burke's assessment of impairment since he did not utilize the DRE method. TBM asserts Dr. Burke erroneously opined the placement in the DRE II was only possible if an injured worker had undergone surgery stating, "This is patently false." It also argues the ALJ erred in carving out a portion of the impairment rating for Ison's pre-existing condition. TBM notes Dr. Stephens opined Ison had a 12% impairment rating at the time the work injury occurred. It also states the Form 110 "clearly documents Ison had 12% whole person impairment when the January 18, 2017 work incident occurred . . . It is disingenuous to argue Ison had no impairment in 2017 yet accept PPD benefits at the same time for an impairment."

As the claimant in a workers' compensation proceeding, Ison had the burden of proving each of the essential elements of his cause of action, including whether he sustained an injury, temporary or permanent, and impairment. *See* KRS 342.0011(1); Snowder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Ison was successful in that burden, the question on appeal is whether there is substantial evidence of record to support the ALJ's decision. 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was

no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We conclude substantial evidence supports the ALJ's finding Ison sustained an injury due to the January 18, 2017 work incident warranting an award of PPD benefits. The ALJ was confronted with the conflicting opinions of Dr. Burke and Dr. Stephens. Dr. Burke opined Ison sustained a work injury due to the January 18, 2017 work incident. He opined Ison had a pre-existing dormant condition that was aroused into disabling reality and further extended by the January 18, 2017 work injury. On the other hand, Dr. Stephens opined Ison had a pre-existing active condition secondary to an L5-S1 disc herniation stemming from the 2012 work injury. He opined the January 18, 2017 work incident exacerbated Ison's pre-existing and active condition, which was successfully treated, and he attained MMI on April 18, 2017. In finding Dr. Burke's opinion most persuasive, the ALJ rejected the opinion that the 2017 work incident resulted in a temporary exacerbation of the 2012 work injury. Dr. Burke's opinion constitutes substantial evidence upon which

the ALJ could rely in determining Ison had a dormant pre-existing condition which was aroused into disabling reality by the January 18, 2017 work injury. Therefore, we affirm on this issue.

We next find the ALJ did not err in relying upon the impairment rating assessed by Dr. Burke. The proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003); *See also* Lanter v. Ky. State Police, 171 S.W.3d 45, 52 (Ky. 2005). However, the ALJ has discretion to choose the rating used as the basis for an award of PPD benefits. Pella Corp. v. Bernstein, 336 S.W.3d 451, 453 (Ky. 2011). Where opinions from medical experts conflict regarding the appropriate percentage, it is the ALJ's function as fact-finder to weigh the evidence and select the rating upon which PPD, if any, will be awarded. Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002). Dr. Burke assessed a 23% impairment rating attributable to the 2017 work injury pursuant to the AMA Guides. Dr. Stephens did not opine Dr. Burke's assessment of impairment failed to conform to the AMA Guides. Rather, he opined Dr. Burke's assessment was highly inflated. Dr. Burke's opinion constitutes substantial evidence supporting the ALJ's determination Ison sustained a 23% impairment rating due to the 2017 work injury. The ALJ acted within his discretion in adopting Dr. Burke's assessment of impairment and it is not the function of this Board to disturb his conclusions.

We next determine the ALJ did not err in declining to carve out a portion of the impairment rating for a pre-existing active condition. We note the ALJ was not bound by the 12% impairment rating reflected in the 2013 settlement

agreement and he was not compelled to find Ison had a pre-existing impairment. No statement in a settlement agreement is binding in future actions. Beale v. Faultless Hardware, 837 S.W.2d 893 (Ky. 1992) and Newberg v. Davis, 841 S.W.2d 164 (Ky. 1992) stand for the principle that “facts” contained in settlement agreements, including declarations specifying the extent and duration of the employee’s disability, are not binding in the litigation of claims for subsequent injuries. *See also* Whittaker v. Pollard, 25 S.W.2d 466, 469 (Ky. 2000). Simply put, “[t]he disability figure contained in a settlement agreement is a negotiated figure and may or may not equal the claimant’s actual occupational disability. Newberg v. Davis, 841 S.W.2d at 166. The parties did not litigate the claim related to the October 2012 injury and there was no judicial determination on any issue including the occurrence of an injury and the extent and duration of disability. Therefore, the settlement agreement did not bind the parties on the issue of whether the October 2012 work event produced a permanent impairment rating.

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." Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007). As an affirmative defense, the burden to prove the existence of a pre-existing active condition falls on the employer. Id. Since TBM was unsuccessful in its burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, supra.

Substantial evidence supports the ALJ's determination that Ison did not suffer from a pre-existing, active condition, and a contrary result is not compelled. The ALJ relied upon Ison's testimony that he performed his job duties without difficulty prior to the January 2017 work injury. He specifically testified he was released to return to work without restrictions around February 2013 and he returned to work for the Powell County Board of Education in August 2013. He did not seek treatment for his low back from August 2013 until the January 18, 2017 work accident. Ison testified that when he began working for TBM in the fall of 2015, he had no restrictions for his low back. Likewise, Ison was not experiencing any symptoms nor did he seek treatment for his low back until the January 18, 2017 work incident.

The ALJ also relied upon Dr. Burke, who opined the 2012 work injury had resolved after a period of convalescence and changing his work. Dr. Burke stated there was no additional symptomology until his January 2017 work accident. He opined Ison was asymptomatic immediately prior to the 2017 accident, both by history and by his work occupation. This constitutes substantial evidence supporting the ALJ's determination, and a contrary result is not compelled. Therefore, we affirm.

Accordingly, the May 21, 2021 Opinion and Order and the June 11, 2021 Order on Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON TROY K PEAKE
138 SOUTH THIRD STREET
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

LMS

HON TIM WILSON
309 NORTH BROADWAY
LEXINGTON, KY 40508

ADMINISTRATIVE LAW JUDGE:

LMS

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