

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 26, 2021

CLAIM NO. 201900769

TRADE-MARK INDUSTRIAL LLC

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

JOHN COLVIN<sup>1</sup>  
AND HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**STIVERS, Member.** Trade-Mark Industrial LLC (“Trade-Mark”) seeks review of the October 12, 2020, Opinion, Award, and Order of Hon. Chris Davis, Administrative Law Judge (“ALJ”) finding John Colvin (“Colvin”) sustained cumulative trauma cervical and lumbar spine work injuries while in the employ of

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<sup>1</sup>Although the ALJ referred to the Claimant as Colving in his decision, the record reflects the correct spelling is Colvin.

Trade-Mark. The ALJ dismissed Colvin's claims for cumulative trauma injuries to his hips and right shoulder. The ALJ awarded permanent partial disability ("PPD") benefits and medical benefits unenhanced by a statutory multiplier for each injury. Trade-Mark also appeals from the November 3, 2020, Order overruling its Petition for Reconsideration.

On appeal, Trade-Mark charges the opinions of the doctors upon which the ALJ relied to find Colvin sustained work injuries do not constitute substantial evidence. Trade-Mark also contends Colvin's testimony cannot constitute substantial evidence supporting the ALJ's findings of work-related cervical/neck and low back injuries since causation must be established by medical evidence.

As this appeal pertains to the ALJ's findings of work-related cervical and lumbar injuries, only the lay and medical evidence related to those findings will be addressed herein.

### **BACKGROUND**

Colvin's Form 101 filed June 29, 2019, alleges January 4, 2018, injuries to multiple body parts caused by repetitive motion. Colvin described the cause of the injuries as follows: "Repetitive motion to the bilateral hips, right shoulder, cervical spine and lumbar spine." Colvin asserted notice was provided to Trade-Mark via a June 29, 2019, letter. Among the documents attached to the Form 101 are a copy of the June 29, 2019, letter and the Form 107 medical report of Dr. John W. Gilbert, a neurosurgeon.

At his August 29, 2019, deposition, Colvin testified he is 60 years old, a high school graduate, and attained less than one year of college. He attended no

other schools and has no vocational training. His family physician is Dr. Mark Caruso. In March 1999, he became a millwright and a member of its union.<sup>2</sup> Colvin provided the following explanation regarding the frequency of his millwright work over the ensuing twenty-year period:

Q: But, I mean, would you work for the whole year, would you work a month of the year? I'm just trying to get an idea of how much you were actually working throughout a year, period.

A: Over a period of 20 years? Is that what – I mean –

Q: Or from – from 1999, you began as a millwright through the union. I mean, would you work –

A: I couldn't – I couldn't answer that because, I mean, I can't remember. I used to keep all them records and I did the planner things because of my taxes. If I had all them I could back up and tell you every job and how many hours I worked and I could pin it right down to the exact, but I don't – I don't have that anymore.

Mr. Borders: I think what he's trying to figure out, John, is out of a year, out of 12 months, how many months out of 12 would you normally be working.

A: Maybe average of two. That's – a good year, you might do six. But now, you know, good years, you didn't have that many good years, you know. That's why that you – if you had a chance to get six weeks or five weeks of six 10's, you know, that you'd take it, because it might be another three months before you got – I mean, and I've been to Detroit; I've been to Illinois; I've been to Ohio, Lexington, Louisville, Georgetown, Cincinnati. I mean, just wherever the job was. Baltimore.

Q: You said on average you worked two months out of the year?

A: Over a period of 20, it would probably – when you factor in the good years, you know, you're probably

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<sup>2</sup> Colvin explained that a millwright is an industrial mechanic.

looking at four, if you factor – put all 20 together and average them back out, probably four, four to five months.

Prior to attaining this certification, he was a heavy equipment operator for approximately fifteen years operating a drill and rock truck.

In June 2016, Colvin began working as a millwright for Trade-Mark. Before working for Trade-Mark, he worked approximately six months as a millwright for LG Fox, a contractor performing work in Toyota's Georgetown plant. He testified work as a millwright was not "a full-time thing for twenty years." However, while employed by Trade-Mark, Colvin worked full-time in the Toyota plant working over-time almost every week. He worked as a foreman for eight weeks. He provided the following description of his work for Trade-Mark:

A: We just – I think they had us on evening shift moving a bunch of cells we had to relocate. We had to pick up machinery; we had to cut it loose from the floor, pick it up with a forklift, secure it to the forklift, lay out lines, move the cells, put the fences back around. So we – it's hard to explain. I was just a millwright. I was just moving equipment, relocating it, installing new, leveling, putting it on grade.

Q: This is the equipment at the Toyota plant in Georgetown?

A: Yes.

Q: This is the equipment they utilize to manufacture –

A: Cars.

Q: -- cars.

A: Yeah. Parts.

...

Q: Well, how long were you a foreman?

A: We had a little small job in power train that we did and I think it ended up being about eight weeks. What it was, I just took – I agreed to oversee a crew of men work. Foremen, nowadays, you have to be a working foreman. You don't throw your tools over there and crack the whip. We just – we picked up mill stands, milling machines, set them off the bases, took parts off the old, put parts on the new, put the new milling stands back on, put them back on the line, made sure they was back on center line, put the transfer rails in, cleaned up the work area and you always closed your work area off with caution tape or chain, plastic chain, whatever. So we just – we just relocated equipment, took old out, installed new, just whatever the job called for.

Each day, Colvin drove from Paintsville to Georgetown arriving at the plant by 6:30 a.m. He usually left the plant by 4:30 p.m. He recounted the physical requirements of his job:

Q: Now, what type of lifting was involved? Like, what would be the heaviest item you would have to lift in the position?

A: Well, sometimes we had cribbing that we had to crib machines up with that was, I don't know, 50, 60 pounds. Some pieces that we couldn't move with a forklift we had to manhandle. I know that there was, like, four or five of us moving a – like a 400-pound – well, it was a base is what it was, but it was – I don't know – an inch and a half metal. The dimension, I don't remember the dimension on it. It was as big as this table, half of it. So, you know, it just varied.

Q: But like a normal shift, what types of weights would you be typically lifting?

A: Fifty, sixty pounds, but, I mean, not every move you made, but 50 to 60 pounds.

Q: I mean, how often would you have to lift 50 or 60 pounds?

A: Six or eight times a day.

Q: Now, what about – were you largely walking around, standing, when you were doing your job?

A: Well, you're walking; you're standing; you're squatting; you're kneeling; you're crawling on your knees; you're using hand tools to tighten bolts, loosen bolts; you use grinders, whatever it is to cut the anchor bolts, and then you've got to drive the anchor bolts down through the floor, so, you know, you've got a combination of stand, walk, crawl, squat, on forklift, off forklift, just – it's just a combination of everything. You know, there's no – some days I might have got on and off a forklift two dozen times helping rig stuff and making sure it suited me if I was running the forklift to pick it up, and then, you know ....

Colvin did not remember signing paperwork daily indicating he had not been injured at work that day. The foreman was Russell Miller and the project manager was Mike Sapps. He last worked for Trade-Mark on January 4, 2018. He explained why he stopped working after January 4, 2018:

Q: And why did you stop working then?

A: I was waiting on a test. Actually, they called me while I was off and I told them where I was – I was sick and I told them, I said, look, if you've got a day, I said, just offer it to somebody else, I'm not able to come down there just for a day. If they had four or five days, I told them I would come, but I just got so sick I couldn't go. I was just – I couldn't go. I was waiting on some tests and stuff.

Q: And what were you sick with?

A: Pardon?

Q: What were you sick with?

A: Cancer.

Q: And what kind of cancer?

A: Colon. Colorectal.

Q: When did you get diagnosed with colon cancer?

A: I had my colonoscopy January – let's see – 22<sup>nd</sup>, I believe, of '18.

Q: But you were feeling bad –

A: I was feeling bad in the fall of '17.

Q: And who did you treat with for your colon cancer?

A: My surgeon is Grady Stevens. He works at Pikeville Medical Center.

On February 7, 2018, Colvin underwent surgery for colon cancer at Pikeville Medical Center. After that, he underwent thirty-one chemotherapy and radiation treatments at Highlands Cancer Center which he completed on or around May 24, 2018. At the time of his deposition, he was still being treated for colon cancer. Colvin stopped working because of the cancer. He explained his decision to seek workers' compensation benefits:

Q: Now, when did you decide to make a claim for Workers' Compensation for your hips, shoulder, neck and back?

A: I don't even recall the exact date, but after I quit working and I – I'm still going to my regular physician and I just – I guess where I wasn't working, I'm just deteriorating. I'm just sitting around doing nothing and just falling apart like an old car, I guess is the only way I know how to put it. I just....

Q: I mean, did you ever make – did you ever think that you had any type of injury while working at Trade-Mark?

A: Well, every day when you're working, you know, just go out there and do the best you can, and if it hurts then you just take you a Tylenol or a Motrin and go on and get the job done. So no, I – I just did what I had to do to survive working-wise.

Colvin testified that in 2008, while working for Arch Coal, he sustained a neck injury from which he fully recovered after two years. During this period, he received no medical treatment and missed no work.

Colvin's family physician has treated him for osteoarthritis of his joints for approximately five or six years. He takes Meloxicam for inflammation and pain.

Colvin testified Dr. Leyton Childers, a chiropractor, was the first doctor to inform him that his work caused his physical problems.

Q: Has any doctor told you that your work was the cause of your problems?

A: I had a chiropractic exam and he told me that he felt like that the repetition to where I worked, the type of work I did with my hands and moving all the time ...

Q: And when was that? When was this chiropractic exam?

A: Let's see. March of '19, I believe.

Q: And what chiropractor was that?

A: What is his name? Leyton Childers. Childers, I think. Leyton Childers.

Q: Where is he?

A: Prestonsburg.

Q: Is that the first time you think any chiropractor or physician thought –

A: I went to a chiropractor a little bit for my hips back in – oh, geez, when was it – 2002, maybe, somewhere thereabout. Between 2001 and 2005, I worked and I've had a little issue with one of my hips and I saw a chiropractor for that for a while. It didn't help, so I just quit going.

Q: But that chiropractor said that your work was causing it?

A: Well, he just told me that the type of work I did at that time, that, you know, I could expect that. He said – I guess I was looking for a hundred percent relief and he told me, he said, it just won't happen. He said, you just – the type of work you do is just not going to allow it. You know, you're going to have to tough it out, go with it.

Colvin had not previously been diagnosed with a low back condition nor had he been treated for a low back condition. He described his current low back problems:

Q: What type of problems are you having with your low back?

A: Just when I – I guess when I bend all the time, squat and raise up, that I just have that low back pain, constant low back pain.

Q: And when did you first experience low back pain?

A: I couldn't recall the date. I just – pretty well – I don't know, 10, 12 years ago, I'm going to guess.

Similarly, except for possibly undergoing a cervical MRI, he has neither received treatment for a neck condition nor missed work due to a neck condition.<sup>3</sup> The first notice of an injury provided by Colvin was the June 29, 2019, letter from his attorney to Trade-Mark. Colvin's family physician and the doctor treating the cancer are the only doctors who have provided medical treatment. The doctor treating the cancer directed he remain off work. Colvin described his current neck and low back symptoms:

Q: What about your neck? What problems are you having regarding your neck?

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<sup>3</sup> Colvin was unsure if he underwent a cervical MRI.

A: Sometimes it hurts and sometimes it don't I mean, sometimes I wake up in the night and it's – I guess it's maybe the way I sleep that hurts.

Q: What about your low back?

A: It just comes and goes. You know, sometimes it hurts and sometimes it doesn't.

Q: And how about your hips?

A: They hurt if I'm up on my feet a lot in a day's time.

Q: Now, are you currently taking medications for ...

A: Yeah.

Q: I want to say, are you currently taking medications for the injuries you're claiming as a result of your work?

A: I take medication for all the arthritis, the joint soreness. I take the inflammation and the mild pain for that.

Q: Do you know what medications that you're taking presently?

A: Yeah, it's – meloxicam is my inflammation medicine and then the pain is tramadol.

Q: And is the tramadol for your joint pain or is that for cancer pain?

A: Well, just plain relief, period. I started taking it before I even had [sic] issue with cancer. I've been taking it for, I don't know, three or four years now, maybe more. I can't remember exactly when I started taking it.

At the August 25, 2020, hearing, Colvin testified he has not been employed since he stopped working at Trade-Mark. He provided a more in-depth description of the physical requirements of his job:

Q: Okay. Alright. And what kind of physical activities did you have to do, such as lifting, carrying, or pulling, things of that nature?

A: Just a little bit of everything. You know, you had to have cribbing to crib up equipment to ... to ... to set it on the floor, and then we had to get it online, and then we had to take it down on the permanent legs and set on what's called the pucks (spelled phonetically), what they set on. So we had to lift and .... and move cribbing and up and down, crawling around, just a little bit of everything.

Q: Okay. And – And can you please tell us what cribbing is?

A: It's just blocks ... blocks of wood that you ... that's cut that ... that you set the ... the machine on. It's just big blocks of wood that we use to ... to unload to put stuff ... put stuff on so you can get a forklift back under it.

Q: Okay. And during that job, were you on your feet?

A: Yes.

Q: Alright. And was it on concrete?

A: Yes.

Concerning the weekly hours he worked, Colvin testified as follows:

Q: Okay. And how often did you work? How many hours a day? How many days a week?

A: Usually five days a week, eight ... eight-hour shifts, ten – Just depends. Some – some days were ten, some were twelve, and sometimes we had to work fourteen, just ... and some Saturdays and Sundays. Just whatever it took to get the job done.

He estimated that from 1999 to approximately 2003, he annually worked nine months as a millwright and received unemployment benefits the other three months. After 2003, because of the difficulty in finding work as a millwright,

Colvin worked in the coal mining industry.<sup>4</sup> As a result, he worked ten years at surface coal mines. He described his job during this period as follows:

Q: .... What kind of physical requirements were ... you know, did that job have?

A: Well, I was a rock truck driver and a drill operator, and actually I did ... I did help the mechanics somewhat if they needed them. But in the rock truck, you ... you just climb up and you sit and drive all day. And then at the end of the shift, you park your truck and you leave. But, now, in a normal day of drilling, you ... you ... you gotta lay your pattern out. First thing, you gotta get up there and lay your pattern out. And then you start drilling. And you'll drill six or seven holes, then you gotta flag them. You have to get out, and we always had to make comments on our flag, if it was busted or just – It was – It was to give ... give the shooters an idea of how good a quality the hole that we drilled was. So, you know, you'd flag six or seven holes and get back on the drill and you'd drill six or seven more and you'd flag them out.

Q: Did that job require bending?

A: Bending over, yeah ...

Q: Okay. What did –

A: ... to insert –

Q: And what did you have to do to bend over?

A: Bending over putting the flags in the ... in the dust piles and stuff like that.

Q: Okay. Did you have to do climbing?

A: On and off of the drill, yes.

Q: Alright. When you worked in the mining industry, did you do millwright work during the weekends?

A: If it was available, yes.

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<sup>4</sup> Colvin testified that after 2003, full-time work as a millwright was not economically feasible because of the travel involved.

His work in coal mining entailed working five ten-hour shifts on the week days and eight hours on Saturday. He explained why his back pain has progressively worsened since 2006:

A: It just – It – You know, I – It’s just from all ... from just the manual labor work. You know, all ... everyday work.

Q: Okay. What kind of everyday work?

A: Just walking, getting in ... getting on and off a fork truck, or a forklift. It’s setting the machinery, helping set it. What – You know, just whatever it took. Just up and down, tightening bolts, leveling, checking bumping machines, just ... just whatever it ... you know, just whatever it took to get the job done.

Q: And did your job at Trade-Mark involve like twisting and turning?

A: Somewhat.

Q: Okay. Let’s talk about your back pain. When did you start experiencing back pain?

A: Probably back in 2006.

Q: Did you have any type of event or incident that brought about the back pain?

A: No.

Q: Alright. And is it your upper back, mid back, or lower back?

A: Lower back.

Q: Okay. And has your back pain progressively worsened since 2006?

A: Yes, worse.

Q: Okay. Can you elaborate on that? How’s it – How has it worsened?

A: Just – I guess just all the years of physical labor that I did. Just – I guess it's just wore out, you know.

Q: Okay. Can you elaborate on any type of specific physical job requirements that you did that you believe worsened your back problem?

A: Just standing and squatting and lifting.

Q: And is that constant, your low back pain?

A: Yes.

Q: And where is it located?

A: Right above my beltline across both sides.

Q: Okay. And does it go into either of your legs?

A: Both legs.

Q: Okay. Is that constant?

A: Constant.

Colvin discussed the restrictions he has in using his lower back:

Q: Okay. What about your low back? Do you have – Do you have any limitations or ... or restrictions in your lower back?

A: I can't bend over a whole lot in a day's time. I mean, bending and trying to ... try – Well, I don't even try to pick stuff up anymore. It – You know, I got – My granddaughters weighs like twenty-seven pounds and it's a job wrestling them all day when I've got them with me.

He testified he entered the job market at age 16 and all of his past jobs required physical labor. Colvin has continued to undergo extensive cancer treatment. Accordingly, his doctor recommended he remain off work.

After he stopped working, Colvin noticed his body began to deteriorate due to inactivity. His first round of chemotherapy intensified his existing neck pain.

Colvin again acknowledged receiving no treatment for a neck or low back condition nor missing work due to either condition. Consequently, work restrictions were never imposed for either condition. Regarding the nature of his work after 2003, Colvin provided the following explanation:

Q: After 2003, then, would you say you averaged two months of work as a millwright?

A: Yes, and the rest of the time I was doing mining work.

Q: Okay. Well, do you recall a deposition you testified that when you ... you didn't do ... you did the mining work before you were a millwright?

A: I – I start – Yeah, I did mining work before that ... beforehand. I did, yes.

Q: Okay. Now, on your – On your application, you didn't really mention anything about doing mining work since 1999, but now you're ... you're telling us that you did mining work while you were do ... doing the millwright?

A: No, no, no, no, no, no. '99 to 2003, I did solid millwright work. And then in 2003 when the ... when the work got thin and jobs got far off, I went into the mining industry. And then there was ... there would be weekend work at Toyota, so I would go and work weekends at Toyota every time it was available.

Q: Okay.

A: If they needed me.

Colvin did not recall telling Dr. Caruso he was not experiencing neck or back pain either before or after Dr. Gilbert's examination. At the time he stopped working on January 4, 2018, Colvin was experiencing low back pain and "bad" neck pain.

In addition to the report of Dr. Gilbert, Colvin introduced the report of Dr. Childers with Bluegrass Family Chiropractic. Trade-Mark relied upon Dr. Timothy Kriss' report and the deposition of Josh Atwell, its general manager.

In finding Colvin sustained neck and low back work injuries, the ALJ provided the following Findings of Fact and Conclusions of Law, which are set forth, in relevant part, *verbatim*:

**Work-relatedness/causation and Injury as Defined by the Act**

Kentucky law clearly recognizes the existence of work-related cumulative trauma injuries. In this matter, I have been presented with the conflicting opinions of Dr. Gilbert and Dr. Kriss. Dr. Kriss merely states the entirety of the conditions are not work-related but rather due to poly-arthritis. However, other than stating there is no medical evidence to support a finding of work-relatedness he does not sufficiently discuss the Plaintiff's work, symptoms or condition, relative to his age. I am not persuaded by Dr. Kriss' opinions alone. Conversely, Dr. Gilbert diagnoses the hips, cervical spine, lumbar spine and right shoulder as work-related conditions. However, as for the right shoulder the Plaintiff had minimal treatment for it, some years ago, and does not continue to be clearly symptomatic. For the hips, there is very little evidence in the record of actual medical treatment for them and none recently. **However, I am persuaded, by a combination of the Plaintiff's testimony, the opinions from Dr. Gilbert, and prior diagnoses made by Dr. Childer, which includes cervical and lumbar segmental and somatic dysfunction, that the cervical and lumbar spine conditions are work-related. (Emphasis added).**

In dismissing Colvin's claims for injuries to his hips and right shoulder, the ALJ provided the following:

In keeping with the above analysis, and with specific reliance on Dr. Gilbert, the cervical and lumbar conditions are work-related. In reliance on the above

analysis and Dr. Kriss the hips, right shoulder and any other conditions are dismissed.

Accepting Dr. Gilbert's 8% impairment ratings for each spinal injury, the ALJ found Colvin retained a 15% impairment rating.<sup>5</sup> The ALJ found Colvin was not permanently totally disabled and the cervical and lumbar spine conditions did not prevent him from returning to the type of work performed on the date of the injury. The ALJ also found Dr. Gilbert's opinions were in conformity with the AMA Guides. Consequently, PPD benefits and medical benefits were awarded for each injury.

Trade-Mark filed a Petition for Reconsideration asserting a miscalculation of the PPD benefits as well as the same argument it now makes on appeal. Except for correcting the error concerning the amount of PPD benefits awarded, the ALJ declined to change his decision.

Trade-Mark first asserts Dr. Gilbert's opinions are inadequate and incomplete and Dr. Childers did not provide a causation opinion. It also asserts Colvin, a layperson, cannot express a causation opinion or provide "a hearsay medical causation opinion from Dr. Childers." Trade-Mark also complains Dr. Gilbert's report contains no discussion of Colvin's job duties while employed by it and how his work for Trade-Mark caused a change in the human organism. It also notes Dr. Gilbert examined Colvin a year and a half after he stopped working for Trade-Mark. According to Trade-Mark, Dr. Gilbert apparently was unaware Colvin was treated by Dr. Caruso for polyarthritis since he failed to rule out polyarthritis as

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<sup>5</sup> Dr. Gilbert assessed an 8% impairment rating for each of the two compensable conditions which pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") resulted in a combined impairment rating of 15%.

a possible cause of Colvin's neck and back complaints. Similarly, Dr. Gilbert did not acknowledge Colvin had not complained of an injury or a traumatic event while working for Trade-Mark and was also unaware Colvin had not undergone treatment for neck or low back conditions prior to seeing him. Dr. Gilbert also failed to acknowledge Colvin did not seek treatment for an injury while working for Trade-Mark, missed no work, and had no work restrictions. Further, it complains Dr. Gilbert did not provide the medical records he reviewed and explain how Colvin's neck and low back condition worsened over the year and a half he worked for Trade-Mark.

Trade-Mark insists the ALJ could not rely upon Dr. Childers' report as support for a finding of work-related neck and back injuries since the report is devoid of an opinion regarding causation. It observes Dr. Childers' report does not reflect he was ever provided a history that Colvin had been treating with Dr. Caruso for polyarthritis for several years.

Trade-Mark maintains Colvin's testimony cannot be relied upon in finding work-related cumulative trauma low back and neck injuries, as such a diagnosis must be provided by medical experts. Concerning Colvin's testimony about what Dr. Childers informed him, Trade-Mark offers the following:

Colvin's hearsay testimony cannot be the basis of the ALJ's causation findings. Per KRE 801(c), a hearsay is a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted. In *Valentine v. Weaver*, our highest court then advised that 'hearsay evidence alone will not support an award by the compensation board, but is admission is not prejudicial if, independent of such evidence, there is sufficient legally competent evidence to sustain the award.'

*Valentine v. Weaver*, 191 Ky. 37, 228 S.W. 1036, 1037 (1921). As argued above, Dr. Gilbert's causation opinion is not substantial evidence as he never even identified the work that Colvin performed for TMI and never opined how that work at TMI caused or contributed to cause Colvin's cumulative trauma injuries to his neck and low back. Further, as also indicated above, Dr. Childers never provided an opinion that Colvin's work at TMI caused his cumulative trauma to his neck and/or low back. Therefore, Colvin's hearsay testimony cannot be the basis for the ALJ's causation finding.

Finally, Trade-Mark argues although Cepero v. Fabricated Metals Corporation, 132 S.W.3d 839 (Ky. 2004) has been narrowly construed, it is applicable as Dr. Gilbert's causation opinion is based on erroneous and deficient information. As urged by Trade-Mark, the ALJ's decision should be set aside and Colvin's entire claim dismissed.

### **ANALYSIS**

Since Colvin, the party with the burden of proof was successful in proving work-related cervical and low back cumulative trauma injuries, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same parties' total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to show there was some evidence which would support a contrary

conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, ordinarily we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As an initial matter, we point out that in cumulative trauma injury claims the employer on the date of manifestation of impairment and disability is solely liable for the claimant's injury, despite the fact his/her prior employment may have contributed somewhat or substantially to the injury. Hale v. CDR Operations, Inc., 474 S.W.3d at 138 (Ky. 2015). Therefore, since Trade-Mark was Colvin's last employer upon the date of manifestation, it is solely liable for any injury found.

Trade-Mark first argues the ALJ's conclusion Colvin sustained low back and cervical cumulative trauma injuries caused by his work at Trade-Mark is unsupported by substantial evidence. While medical causation usually requires proof from a medical expert, the ALJ may properly infer causation, or a lack thereof, from the totality of the circumstances as evidenced by the lay and expert testimony of record. *See* Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., Ky. App., 618 S.W.2d 184 (1981); Cf. Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scarce, *supra*; Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969).

In this instance, the ALJ could reasonably infer from the totality of the circumstances evidenced by the lay and medical testimony that Colvin's low back

and cervical injuries were caused by his work activities at Trade-Mark. In Dravo Lime Co., v. Eakins, *supra*, the Supreme Court elaborated that “o[u]r courts have also held that a fact finder may, in piecing together the entirety of the testimony, conclude that causation has been established by viewing the totality of the circumstances, including the history related by the injured worker.” *Id.* at 6.

In the case *sub judice*, the ALJ primarily relied upon Dr. Gilbert’s opinions in concert with Dr. Childers’ prior diagnosis, and Colvin’s testimony in concluding the cervical and lumbar spine conditions are work-related. In his May 23, 2019, report concerning the low back and cervical region, Dr. Gilbert provided the following employee history:

Plaintiff/employee related history of complaints or alleged injury/hearing loss/psychological condition as follows:

The patient is a 60-year-old white male who has done heavy manual labor since he was 16 years old mostly construction and heavy equipment mechanicing and the last 10 years about 7 years in strip mining, operating heavy equipment and three years of construction up until about 01/2018, he has been disabled since finally got approved for social security disability 03/2019. He describes cumulative trauma. He said he did walk into a rock truck and hit his neck in about 2000, he just toughed it out. He states he has got neck and low back pain with intermittent pain, numbness and weakness radiating into the extremities in dermatomal and myotomal type distribution.

Dr. Gilbert indicated he reviewed the list of Colvin’s injuries and illnesses, employment history, and job description. His physical examination of the low back and neck revealed the following:

Results of physical examination, including objective medical findings to support complaints and/or diagnosis:

He has got spasms, tenderness, decreased range of motion in the neck and low back. He has got positive Spurling's test bilaterally and positive straight leg raise test bilaterally.

Dr. Gilbert diagnosed, in relevant part, the following:

Cervical and lumbar pain muscle spasms and degenerative disc disease and spondylosis and bilateral cervical and lumbar radiculopathy in dermatomal and myotomal type distribution with bilateral hip degenerative joint disease, limited range of motion, tightness, tenderness and weakness in bilateral hip muscle groups, see physical exam. Right shoulder degenerative joint disease with tenderness, tightness, limited range of motion and reproducible weakness as well, see physical exam. All due to cumulative trauma doing heavy manual labor for many, many years.

Dr. Gilbert opined that Colvin's work at Trade-Mark in conjunction with his prior work as described to him is the cause of the impairments found. He recounted Colvin's description of the physical requirements of the type of work performed at the time of injury as follows: "Heavy manual labor, operating heavy equipment, working as a mechanic, doing construction, strip mining for many years."

In his March 12, 2019, report, Dr. Childers set forth Colvin's chief complaints. With respect to the cervical and lumbar region, he noted as follows:

Cervical: Cervical Paraspinal Muscles guarding, muscle adhesion, prominence, spasm, tenderness, tension, trigger point(s) and weakness bilaterally.

Lumbar: Paraspinal Muscles guarding, muscle adhesion, prominence, spasm, tenderness and weakness bilaterally.

Dr. Childers set forth Colvin's range of motion for the cervical and lumbar regions:

**Cervical**

Flexion: 30/50 with pain from 50% to 100% ROM  
Extension: 30/60 with pain throughout entire ROM  
LLF: 20/45 with pain from 25% - 100% ROM  
RLF: 20/45 with pain from 25% - 100% ROM  
LR: 45/80 with pain from 50% - 100% ROM  
RR: 50/80 with pain from 50% - 100% ROM  
Total loss in Cervical ROM: 46%

**Lumbar**

Flexion: 35/60 with pain from 25% - 100% ROM  
Extension: 15/25 with pain throughout entire ROM  
LLF: 15/25 with pain throughout entire ROM  
RLF: 15/25 with pain throughout entire ROM  
LR: 15/30 with pain throughout entire ROM  
RR: 15/30 with pain throughout entire ROM  
Total loss in Lumbar ROM: 44%

After providing the results of his cervical and lumbar testing, Dr.

Childers provided the following diagnosis:

- A. M54.42 Lumbago with sciatica, left side
- B. M99.03 Segmental and somatic dysfunction of lumbar region
- C. M51.36 Other intervertebral disc degeneration, lumbar region
- D. M54.2 Cervicalgia
- E. M99.01 Segmental and somatic dysfunction of cervical region
- F. M50.320 Other cerv disc degeneration, mid-cervical rgn, unsp level
- G. M54.6 Pain in thoracic spine

Dr. Gilbert's report, though succinct, qualifies as substantial evidence sufficient to support the ALJ's finding as to causation. The same holds true for the report of Dr. Childers as it firmly demonstrates Colvin had significant limitations of motion in the cervical and lumbar regions. We agree with Trade-Mark that Dr. Childers did not proffer an opinion as to the cause of Colvin's lumbar and cervical limitations. However, Colvin's deposition testimony establishes he was informed by Dr. Childers that his lumbar and cervical problems are work-related. Trade-Mark's protestations to the contrary, the ALJ properly relied upon Dr. Childers' findings in concert with Colvin's testimony recounting what Dr. Childers informed him concerning the cause of his conditions in finding Colvin sustained work-related lumbar and cervical work injuries. Significantly, Trade-Mark elicited the very testimony from Colvin about which it now complains. After obtaining this testimony from Colvin, Trade-Mark did not object to the admission of this testimony nor move to strike his testimony from consideration by the ALJ. Therefore, Colvin's testimony regarding what he was told by Dr. Childers may be considered by the ALJ along with the medical evidence in resolving the work-relatedness of Colvin's low back and cervical conditions.

In its Petition for Reconsideration, Trade-Mark took issue with the ALJ's statement on page 4 of his decision that Colvin had been examined by Dr. Childers and was informed the repetition of work with his hand and moving caused his joint issues. The basis of Trade-Mark's objection was that it was not contained within the report of Dr. Childers. However, Trade-Mark did not reference Colvin's testimony which it secured in the August 28, 2019, deposition regarding what he was

told by Dr. Childers. Moreover, in its Petitioner for Reconsideration, Trade-Mark did not request additional findings regarding the ALJ's reliance upon Colvin's testimony in resolving causation.

Trade-Mark complains Dr. Gilbert provided no discussion of Colvin's job and how it affected him. It also complains Dr. Gilbert's report did not list the medical records reviewed, Colvin's past treatment, the fact he missed no work, and no work restrictions were imposed. Nonetheless, Trade-Mark did not request additional findings of fact or a more explicit ruling regarding the ALJ's failure to address the alleged deficiencies within Dr. Gilbert's report in its Petition for Reconsideration, as required by KRS 342.281 and KRS 342.285. As such, the ALJ's alleged improper reliance, in part, upon Colvin's testimony, Dr. Childers' report, and Dr. Gilbert's alleged deficient report are not properly preserved for review by this Board. *See Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890, 893 (Ky. 2007) (failure to make statutorily-required findings if fact is a patent error which must be requested in a Petition for Reconsideration in order to preserve further judicial review). Thus, Trade-Mark waived its right to assert on appeal the ALJ's failure to address the alleged deficiencies in the medical reports and improper reliance upon Colvin's testimony as grounds for reversal.

Further, while the contrary opinion of Dr. Kriss pertaining to causation may have been articulated in greater detail, such testimony represented nothing more than conflicting medical evidence compelling no particular outcome. *Copar, Inc. v. Rogers*, 127 S.W.3d 554 (Ky. 2003). Likewise, Dr. Gilbert's perceived lack of specificity and detail in reaching his expert opinion regarding causation

merely went to the weight and credibility to be afforded his opinions, which was a matter to be decided exclusively within the ALJ's province as fact-finder. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Hence, we find no error on the part of the ALJ.

We are unconvinced by Trade-Mark's assertion that Cepero, *supra*, is applicable in the case *sub judice*. Cepero was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. We find nothing akin to Cepero in the case *sub judice*.

In summary, we find no error in the ALJ's reliance upon the opinions of Drs. Gilbert and Childers and Colvin's testimony in finding Colvin sustained work-related cumulative trauma lumbar and cervical injuries. As previously stated, where the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, *supra*. Consequently, we find no error in the ALJ's reliance upon the opinions of Drs. Gilbert and Childers and Colvin's testimony in resolving causation. Because the outcome selected by the ALJ

is supported by the record, we are without authority to disturb his decision on appeal. Special Fund v. Francis, *supra*.

Accordingly, the October 12, 2020, Opinion, Award, and Order and the November 3, 2020, Order overruling the Petition for Reconsideration are **AFFIRMED**.

ALVEY, MEMBER, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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