Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 21, 2018

CLAIM NO. 201578481

VIWINTECH WINDOWS & DOORS, INC. PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH, ADMINISTRATIVE LAW JUDGE**

MARK E. IVEY and
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Viwintech Windows & Doors, Inc. ("Viwintech") appeals from the Opinion, Order, and Award rendered July 2, 2018 by Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ") finding Mark Ivey's ("Ivey") low back condition, including the recurrent herniated disc at L4-5 and subsequent lumbar fusion surgery, related to the June 23, 2015 work injury. The ALJ awarded Ivey temporary total disability ("TTD") benefits, permanent partial disability benefits and

medical benefits. The ALJ also found Ivey had no pre-existing active condition prior to the work injury warranting a carve-out from the 28% impairment rating. Viwintech also appeals from the August 2, 2018 Order denying its petition for reconsideration.

On appeal, Viwintech argues the ALJ erred in finding the entirety of the 28% impairment rating is due to the June 23, 2015 work injury. It argues the evidences establishes Ivey had a permanent, pre-existing 11% or 12% impairment rating due to his prior L4-5 surgeries in 2004 and 2012. Viwintech argues McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001) and Finley v. DBM Technologies, 2017 S.W.3d 261 (Ky. App. 2007), are distinguishable since Ivey had an objective and identifiable harmful change to the human condition prior to the work injury, which was independently and permanently ratable under the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Viwintech asserts the fact that Ivey was asymptomatic prior to the work injury is irrelevant in light of his pre-existing permanent impairment rating. Because the ALJ performed the proper analysis pursuant to Finley v. DBM Technologies, supra, and substantial evidence supports the ALJ's determination that a carve-out is not warranted and no contrary result is compelled, we affirm.

Ivey filed a Form 101 alleging he injured his low back on June 23, 2015, when he lifted a box of D-rings. At the time of his injury, Ivey worked for Viwintech as a shipping manager. Subsequently, Viwintech filed a medical dispute challenging the work-relatedness, reasonableness and necessity of the discectomy

revision and lumbar fusion surgery performed by Dr. Rex Arendall on May 2, 2017. He and Nashville Neurosurgery Associates were joined as parties.

Ivey testified by deposition on July 27, 2017, and at the hearing held May 3, 2018. Ivey began working for Viwintech in September 2012 as a shipping supervisor. Viwintech builds windows and patio doors. Ivey testified he was physically required to lift and load windows and doors weighing anywhere from fifty to two hundred and fifty pounds into trailers. Other employees assisted him in maneuvering the heavier products. Ivey estimated he regularly twisted, bended and lifted over fifty pounds per day.

Ivey testified he experienced a sudden onset of low back pain while lifting a box of D-rings off the floor on June 23, 2015. Viwintech sent Ivey to Occupational Medicine in Paducah for this incident. Ivey also treated with his primary care physician, who referred him to Dr. Arendall. Dr. Arendall performed lumbar surgery in December 2015, which the workers' compensation insurer approved. After obtaining no relief from his low back and left leg pain, Dr. Arendall performed a two-staged lumbar fusion in May and June 2017, which the workers' compensation insurer denied. Ivey continues to treat with Dr. Arendall, as well as with a pain management physician who prescribes him narcotic pain medication. Ivey returned to work for Viwintech as a shipping supervisor following a period of recovery for each surgery. In January 2018, Ivey became the transportation manager at Viwintech, a position that is not physically demanding and the requirements are within the permanent restrictions imposed by Dr. Arendall.

Ivey testified that prior to his employment with Viwintech, he underwent low back surgeries in 2004 and 2012 involving the same disc level he injured on June 23, 2015, both performed by Dr. Theodore Davies. The prior low back injuries and surgeries were non-work-related. At his deposition, Ivey testified that he received no treatment for his low back between 2012 and 2015. He stated he worked during that period of time with no flare-ups and had no treatment. The surgery was in April 2012, and he began working for Viwintech in September 2012.

Similarly, Ivey testified at the hearing he had experienced no back problems after the 2012 surgery until the June 23, 2015 work injury. Ivey also confirmed he had stopped taking any narcotic medication at the time of a July 25, 2012 follow-up visit with Dr. Davies. Ivey did not return to Dr. Davies after he began working for Viwintech, and he required no additional treatment for his low back until June 23, 2015. He received no complaints from anyone at Viwintech regarding his ability to perform his job.

Ivey disputed the June 25, 2015 medical record from Occupational Medicine. Ivey denied reporting a history of intermittent flare-ups of back symptoms for which he took leftover medication prescribed by Dr. Davies. He explained he took the leftover medication the night following his June 23, 2015 work injury.

Viwintech filed the operative reports from the prior surgeries. The September 27, 2004 operative report reflects Ivey reported low back and left leg pain, as well as numbness and weakness after lifting firewood. A subsequent diagnostic study demonstrated a left sided disc herniation at L4-5. Ivey was diagnosed with lumbar disc displacement and lumbar radiculopathy. Dr. Davies performed a

hemilaminotomy and discectomy at L4-5, left. The April 10, 2012 operative report reflects pre-operative diagnoses of recurrent lumbar disc displacement with lumbar radiculopathy. Dr. Davies performed a hemilaminotomy and foraminotomy with discectomy at L4-5, left.

Ivey filed the treatment records and reports from Dr. Arendall, who began treating him on September 24, 2015. On that date, Dr. Arendall noted a history of low back pain radiating into the left leg, as well as associated numbness, tingling and weakness, since lifting a box at work. He also noted Ivey underwent lumbar laminectomies in 2002 and 2012 by Dr. Davies. Dr. Arendall performed an examination and noted a lumbar MRI demonstrated post-op L4-5 "stenosis left L3 4, L4 5 w/recurrent HNP." Dr. Arendall assessed lumbar disc displacement and stenosis and recommended surgery. The December 22, 2015 operative report reflects diagnoses of recurrent disc herniation left L4-5, with stenosis at left L4-5 and left L3-4 and two prior lumbar laminectomies. Dr. Arendall performed a re-exploration of the lumbar laminectomy, left L4-5 with removal of recurrent lumbar disc herniation, left L4-5 with lateral recess decompression, posterior foraminotomies, and left L4-5 and L3-4 microscopic dissection.

Despite surgery and additional conservative treatment, Ivey continued to complain of low back and left leg pain. In a March 2, 2017 note, Dr. Arendall noted a lumbar myelogram demonstrated grade I spondylolisthesis at L4-5 with recurrent stenosis at L3 through S1, worse at L4-5. Dr. Arendall diagnosed lumbar radiculopathy, spondylolisthesis and spinal stenosis. He recommended a two-staged surgery. The May 3, 2017 operative report reflects Dr. Arendall performed

"decompressive lumbar laminectomy with extension of laminectomy, L4-5, with lateral recess decompression, posterior foraminotomies, left L4-5 with microscopic dissection"; 2) pedicle screw fixation, bilateral L4-5; 3) open reduction spinal deformity with correction of spondylolistheses, L4-5 back to essentially normal anatomical alignment; and 5) posterolateral fusion in situ, L4-5. The June 7, 2017 operative report reflects Dr. Arendall completed the second stage of the anterior lumbar interbody fusion at L4-5.

In a letter dated August 7, 2017, Dr. Arendall noted Ivey:

> suffered three lumbar disc herniations due to his work-related injury. This involved three recurrent disc herniations at the same level – one in 2004, the second in 2012 (both operated on by [Dr. Davies] and the third one operated on by me in 2015. Subsequently due to the herniations at L4 5 he developed spondylolisthesis at L4 5 due to the failure of that L4 5 disc that resulted in the L4 vertebra slipping forward over the L5 vertebra.

Dr. Arendall opined the two-staged procedure to address the spondylolisthesis is reasonable, necessary and directly related to his work injury.

In a letter dated November 3, 2017, Dr. Arendall assessed a 28% impairment rating pursuant to the AMA Guides, page 384, Table 15-3:

> as a result of the injuries received from the work related injury. He suffered four recurrent ruptured lumbar discs at L4-5, and that resulted in spondylolisthesis at L4-5 when that disc failed and allowed the L4 vertebra to slip forward over the L5 vertebra. This was due to instability at the joint due to his L4-5 disc failure which again was due to his work injury.

Dr. Arendall opined Ivey had attained maximum medical improvement ("MMI") and restricted him from pushing, pulling or lifting over twenty-five pounds.

In a letter dated February 16, 2018, Dr. Arendall again noted the prior 2004 and 2012 surgeries. He noted Ivey had not sought medical treatment for nearly three years since the summer of 2012. He also noted Ivey was performing a job requiring regular lifting without difficulty until the June 23, 2015 incident, when he experienced a sudden onset of pain with lifting. Dr. Arendall noted Ivey presented with left foot drop, significant weakness in the left leg, and pain in the left L4 and L5 dermatomes at the initial evaluation. The MRI and the December 2015 surgery confirmed the disc herniation. Dr. Arendall opined that any person who was suffering pain and had the exam findings similar to Ivey would have sought medical treatment. Ivey did not seek treatment in 2013, 2014, and the early part of 2015, and sought treatment immediately after the June 2015 work injury. Dr. Arendall stated as follows:

> the June 23, 2015 lifting incident caused the disc herniation and that Ivey's pre-existing low back condition had returned to a asymptomatic and dormant state and was aroused into disabling reality by the 6/23/15 work related injury. Unfortunately, Mr. Ivey continued to have problems after the December 22, 2015 surgery and had to have an L4-L5 fusion surgery which was carried out on May 3, 2017.

Dr. Arendall assessed the 28% impairment rating based on a DRE lumbar Category V, and explained why the DRE method was more appropriate over the range of motion method. With regard to the fusion surgery, Dr. Arendall stated Ivey became temporarily, totally disabled on March 22, 2017 and attained MMI on October 19, 2017.

Viwintech filed Dr. Ellen Ballard's November 28, 2016 report. Dr. Ballard also testified by deposition on March 28, 2018. Dr. Ballard evaluated Ivey

before he underwent the two-staged fusion surgery in May and June 2017. She noted the 2004 and 2012 surgeries and the fact he took no pain medication after he recovered from the 2012 surgery. Dr. Ballard noted the June 23, 2015 lifting incident and the subsequent treatment rendered primarily by Dr. Arendall, including the December 22, 2015 surgery. Dr. Ballard diagnosed a history of low back pain, status post lumbar surgery times three. She found Ivey had attained MMI, and recommended no additional treatment. Regarding causation, Dr. Ballard stated, "Based on history, his current complaints were based on his date of injury. There are no records from any previous treating doctors, which would help to determine whether or not he had any pre-existing condition. If those exist then this may not have been caused by his work injury." Dr. Ballard assessed an 11% impairment rating pursuant to the AMA Guides for the December 2015 surgery addressing the left lumbar disc herniation. She did not carve out any portion of the impairment rating noting, "Although he did have previous lumbar surgery, he was asymptomatic. Therefore, this is a de novo 11% impairment (DRE Category III, Table 15-3, page 384)."

At her deposition, Dr. Ballard was provided the operative reports from 2004, 2012, and 2017. Dr. Ballard testified Ivey had a permanent impairment rating for his low back prior to the June 23, 2015 work injury. Pursuant to the AMA Guides, the 2004 operation warranted a DRE category III, 10-13% impairment rating. Therefore, Ivey had at least a 10% impairment rating due to the 2004 surgery even if he became asymptomatic thereafter. Dr. Ballard testified that pursuant to the AMA Guides, the 2012 procedure would have resulted in an additional 1%

permanent impairment rating utilizing the range of motion method. During cross-examination, Dr. Ballard acknowledged Ivey sustained a distinct injury on June 23, 2015, while lifting the box of D-rings at work. She also acknowledged Ivey reported the prior two surgeries to her at the evaluation, and that she assessed the 11% impairment rating since he was asymptomatic prior to the work injury and had reported no other problems. Assuming Ivey was truly asymptomatic after the 2012 surgery, Dr. Ballard stated he would still have pre-existing impairment rating for the 2004 and 2012 surgeries:

> Q: Likewise, Dr. Ballard, if he were two years from now to be completely asymptomatic, pain-free, would he still have an impairment under the AMA Guides 5th Edition, because of the procedures he's undergone at L4-5?
>
> A: Yes.
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> . . .
>
> Q: Just a couple of follow-up, Doctor. The fact that he had symptoms in July 2012 that did not require narcotic pain medication doesn't mean that in 2013 when he was working doing heavy lifting, having no complaints of pain, not getting any prescription medication, not seeing any doctor, the same in 2014 and the same in 2015 up until June 23, 2015, would that indicate at least that he was asymptomatic for some time prior to June 23, 2013? [sic]
>
> A: Well, given your hypothetical, yes.

Viwintech filed the January 4, 2018 report by Dr. Thomas O'Brien, who also testified by deposition on March 27, 2018. In his report, Dr. O'Brien noted Ivey's longstanding history of chronic back and left leg pain dating back to 2004, as well as the 2004 and 2012 surgeries. Dr. O'Brien noted since 2012, Ivey treated recurrent flair-ups of back pain with over-the-counter medication and leftover

medication from Dr. Davies. Dr. O'Brien noted Ivey reported a flare-up while at work on June 23, 2015, and reviewed the subsequent treatment rendered by Dr. Arendall and pain management. Dr. O'Brien diagnosed Ivey with chronic low back pain secondary to multilevel lumbar degenerative disc disease, unrelated to his work. He opined Ivey sustained neither a work-related re-herniation of L4-5 disc nor a temporary or permanent aggravation, acceleration or precipitation of his longstanding, active, progressive, degenerative lumbar condition on June 23, 2015. Dr. O'Brien opined Ivey's symptoms represent a manifestation and known natural history of progressive multilevel degenerative disc disease in a middle-aged, former smoker with an established diagnosis of chronic low back pain and radiculopathy secondary to multilevel degenerative disc disease who has already undergone two spinal surgical procedures. Likewise, Dr. O'Brien opined none of the treatment rendered after June 23, 2015 is work-related.

Regardless of causation, Dr. O'Brien opined Ivey reached MMI on November 3, 2017. He assessed a 16% impairment rating pursuant to the AMA Guides using the range of motion methodology, apportioning 12% to the prior 2004 and 2012 surgeries, and 4% to the December 2015 and 2017 surgeries. Dr. O'Brien opined Dr. Arendall inappropriately utilized the DRE method in calculating a 28% impairment rating pursuant to the AMA Guides.

Dr. O'Brien's testimony is consistent with his report. He opined Ivey had a pre-existing 12% permanent impairment rating prior to June 23, 2015, based upon multi-level degenerative disc disease and two surgical procedures in 2004 and 2012, using the range of motion method pursuant to the AMA Guides, Table 15-7.

However, if utilizing the DRE method, Ivey would qualify for a 10-13% pre-existing impairment rating. Dr. O'Brien refused to agree that Ivey had been asymptomatic for a period following the 2012 surgery. Regardless, Ivey had a pre-existing impairment prior to the work incident.

Dr. O'Brien again emphasized the range of motion method is preferred over the DRE method when multiple surgical procedures in the same region of the spine are involved pursuant to the AMA Guides. However, using the DRE method, Dr. O'Brien noted Ivey would qualify at DRE Category V, 25-28% range. He would adopt the 25% impairment rating for Ivey's low back condition.

A benefit review conference was held on May 3, 2018. The parties stipulated Ivey sustained a work injury on June 23, 2015, for which Viwintech received due and timely notice. The parties identified the following contested issues: benefit per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, exclusion for pre-existing impairment, TTD from March 22, 2017 through September 5, 2017, underpayment, rate and duration of TTD, medical dispute for lumbar fusion, and all medical treatment since November 28, 2016.

The ALJ rendered an opinion on July 2, 2018. She found Ivey's low back condition, including the recurrent herniation at L4-5, was caused by the June 23, 2015 work injury. The ALJ relied upon Dr. Arendall's opinion that the June 23, 2015 lifting incident caused the recurrent herniation and his pre-existing low back condition was aroused into disabling reality. The ALJ also noted Dr. Ballard opined Ivey sustained a specific injury on June 23, 2015. The ALJ found the lumbar fusion performed by Dr. Arendall is compensable, and Ivey is entitled to TTD benefits from

March 22, 2015 to September 5, 2017. In addressing benefits per KRS 342.730, the ALJ provided the following analysis:

> To qualify for an award of permanent partial benefits under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, he is also required to prove the harmful change resulted in a permanent disability as measured by an AMA impairment. KRS 342.0011(11), (35), and (36). Additionally, when work-related trauma arouses or exacerbates a preexisting condition, it has caused a harmful change in the human organism, *i.e.*, an injury as defined by KRS 342.0011(1). Although the impairment that results is compensable, the type and duration of benefits depends on whether the impairment is permanent or temporary.
>
> The ALJ finds Dr. Arendall's opinion regarding impairment most credible. Dr. Arendall is Ivey's treating surgeon and is in the best position to evaluated[sic] Ivey's condition and abilities. Dr. Arendall explained his basis for choosing the DRE method. Dr. Arendall assigned a 28% whole person impairment for the June 23, 2015 work injury.
>
> The ALJ finds Ivey had no pre-existing active condition prior to the work injury that would warrant a carve-out. A pre-existing condition must be both symptomatic and impairment-ratable immediately before a work-related injury occurs in order to be viewed as being a pre-existing active condition that is not compensable in a claim for injury. *Finley v. DBM Technologies*, 217 S.W.3d 261 (KY CT APP 2007). The exclusion from a partial disability award equals the impairment rating that the pre-existing active condition produces. *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181 (KY 2003).
>
> It is undisputed that Ivey had a pre-existing back condition that resulted in two prior back surgeries. *Finley* requires the condition to be symptomatic and impairment-ratable to be active and justify a carve-out. Although Ivey's prior condition may have been impairment-ratable, ViWintech has failed to prove the prior condition was symptomatic. Ivey received no treatment following his last surgery with Dr. Davies for

> almost three years. Ivey worked full-time performing a job doing heavy lifting on a daily basis. There is no evidence he had any problems completing his job or that he missed any work due to his back condition between 2012 and the work injury in 2015. In addition, there was no evidence he was working under any work restrictions prior to the June 23, 2015 work injury.
>
> The ALJ finds Ivey's testimony credible in all aspects. Although ViWintech argues the initial treatment records [sic] Ivey reporting intermittent flare ups of pain, the ALJ is convinced by Ivey's testimony regarding the medical record. His testimony is consistent with the treatment records or the lack thereof.

Viwintech filed a petition for reconsideration, essentially raising the same arguments it now makes on appeal. Finding she made all the necessary findings of fact pursuant to Finley v. DBM Technologies, supra, the ALJ overruled the petition.

On appeal, Viwintech argues the evidence compels a finding that Ivey had a pre-existing permanent impairment rating of 11 or 12% due to his prior two L4-5 surgeries, which are not erased simply because Ivey did not experience any symptoms for a period of time. Viwintech acknowledges Ivey was asymptomatic and does not appeal this finding. Viwintech argues a carve out of pre-existing impairment rating pursuant to the AMA Guides "should not hinge upon a claimant's subjective statements during the course of litigation about whether he felt fine just before the work injury." Viwintech argues McNutt Construction/First General Services v. Scott, supra, and Finley v. DBM Technologies, supra, are distinguishable since McNutt dealt with only age-related changes with no proof of any impairment before the work injury and Finley dealt with a prior congenital condition with no showing of permanent impairment. Ivey had an objective and identifiable harmful

change to the human condition prior to the work injury, which was independently and permanently ratable pursuant to the AMA Guides. Viwintech asserts the fact that Ivey was asymptomatic prior to the work injury is irrelevant in light of his pre-existing permanent impairment rating.

As the claimant in a workers' compensation proceeding, Ivey had 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). Since Ivey was successful in that burden, the question on appeal is whether substantial evidence of record supports 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We note Viwintech does not appeal the ALJ's determination regarding work-relatedness/causation. The ALJ found Ivey's low back condition, including the recurrent herniation at L4-5, are related to the June 23, 2015 work injury, relying upon Drs. Arendall and Ballard. The ALJ noted Dr. Arendall specifically found the June 23, 2015 lifting incident caused the recurrent herniation and his pre-existing low back condition was aroused into disabling reality. Dr. Arendall provided a thorough explanation addressing his causation opinion. She also noted that although Ivey had undergone two prior surgeries, he received no treatment for his low back after recovering from the 2012 surgery until the work injury, and he worked full time performing constant heavy lifting during the same time span. Likewise, the ALJ found the lumbar surgery performed by Dr. Arendall and the medical treatment rendered since November 28, 2016 are compensable.

Viwintech additionally does not challenge on appeal the 28% impairment rating assessed by Dr. Arendall for Ivey's low back condition. Rather, Viwintech appeals the ALJ's finding that a carve-out from the 28% impairment rating for Ivey's prior lumbar surgeries is not warranted in this instance. The arousal

of a pre-existing dormant condition into disabling reality by a work injury is compensable. However, an employer is not responsible for a pre-existing active condition present at the time of the alleged work-related event. McNutt Construction/First General Services vs. Scott, supra. In Finley v. DBM Technologies, 217 S.W.3d at 265, the Court of Appeals stated 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." Moreover, as an affirmative defense, the burden to prove the existence of a pre-existing active condition falls on the employer. Id. The Court concluded by stating as follows:

> To summarize, a pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition. When a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable. A pre-existing condition may be either temporarily or permanently aroused. If the pre-existing condition completely reverts to its pre-injury dormant state, the arousal is considered temporary. If the pre-existing condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent, rather than temporary. With these legal principals in mind, we shall undertake a review of the ALJ's award. Id.

With the above standards in mind, we find the ALJ performed the proper analysis pursuant to Finley v. DBM Technologies, supra. As noted above, the Court in Finley held that to be characterized as active, an underlying pre-existing condition must be **symptomatic** and impairment ratable. While there appears to be little dispute Ivey possessed an impairment rating attributable to his pre-existing low

back condition, substantial evidence supports the determination that his low back condition was not symptomatic prior to the work-related injury.

As noted by the ALJ, there is no evidence in the record establishing Ivey sought treatment for his low back condition after he recovered from the 2012 surgery until the June 23, 2015 injury. Ivey began working for Viwintech after the 2012 surgery in September 2012, without restriction. Ivey testified he regularly lifted over fifty pounds, and had to lift approximately two hundred pounds with assistance. His job also required him to bend and twist. Ivey indicated he had no problem performing his job from September 2012 through the June 23, 2015 work injury. Dr. Arendall was additionally aware of the prior 2004 and 2012 surgeries when he assessed the 28% impairment rating, which he attributed in its entirety to the June 23, 2015 work incident. Dr. Arendall also noted Ivey had not sought medical treatment for nearly three years since the summer of 2012, and was performing a job requiring regular lifting without difficulty until the June 23, 2015 incident. After reviewing Ivey's prior history and the work injury, Dr. Arendall concluded, "the June 23, 2015 lifting incident caused the disc herniation and that Ivey's pre-existing low back condition had returned to a asymptomatic and dormant state and was aroused into disabling reality by the 6/23/15 work related injury." Therefore, we conclude the ALJ performed the proper analysis in concluding Ivey's low back condition was not an active, pre-existing condition.

Accordingly, the Opinion, Order, and Award rendered July 2, 2018, and the August 2, 2018 Order on petition for reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

DISTRIBUTION:

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