

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 10, 2019

CLAIM NO. 201560076

WHAS TV

PETITIONER

VS.

APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

BRYAN DERBY
And HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. WHAS TV (“WHAS”) appeals from the October 26, 2018 Opinion, Award and Order and the November 26, 2018 Order on Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge (“ALJ”). The ALJ awarded Bryan L. Derby permanent partial disability benefits for work-related

cervical and shoulder injuries. On appeal, WHAS argues the ALJ erred in finding Derby's cervical fusion surgery compensable. For the reasons set forth herein, we affirm.

Derby alleged injuries to his neck, right shoulder, back and right ankle, manifesting on September 15, 2015, as a result of his work as a field cameraman for WHAS. The work required him to carry equipment and accessories on a nearly constant basis. His camera weighed approximately thirty pounds, and his tripod weighed approximately twenty-five pounds. When covering outdoor events, he often had to run across uneven ground while carrying his equipment. He stated approximately seventy percent of his filming involved holding the camera on his shoulder.

Derby testified he never had problems with his shoulder or neck prior to his employment with WHAS. His neck had been stiff and gradually worsening over the years beginning around 2009. His right shoulder had been intermittently painful but tolerable leading up to September, 2015. On September 15, 2015, Derby was carrying his camera, tripod and accessory bag back to the vehicle at a hurried pace. He experienced a severe twinge and shooting pain through his neck to the right shoulder. He had experienced this type of pain in the past, but it had always resolved within a day or two.

Derby sought treatment with his family physician, Dr. Dhamy Sivamohan, on September 15, 2015 for aches and pains in the right shoulder, neck, between the shoulder blades, right ankle and low back. Dr. Sivamohan diagnosed degenerative disc disease of the lumbar spine, degenerative cervical intervertebral disc,

and right shoulder pain. On October 20, 2015, Derby reported continued neck and shoulder pain. The onset was gradual and progressive. Dr. Sivamohan concluded Derby suffered cervical radiculopathy due to degenerative joint disease, and took him off work.

Dr. Ty Richardson treated Derby on November 24, 2015. Derby had been off from work for ten weeks for neck and right shoulder pain with no significant improvement over that time. Derby reported his pain began after using a new heavier camera for a few weeks. Dr. Richardson obtained an MRI of the right shoulder which revealed impingement with partial-thickness rotator cuff tear. He diagnosed right impingement syndrome and right shoulder synovitis. At a December 22, 2015 follow-up visit, Dr. Richardson noted the shoulder had been improving but Derby was having more numbness and tingling pain in his right forearm. On examination, Derby's cervical spine was very stiff, especially in extension and left lateral rotation. Dr. Richardson diagnosed cervical stenosis with radiculopathy. He recommended referral to a spine specialist or neurosurgeon.

Derby visited Dr. Venu Vemuri on January 26, 2016. Dr. Vemuri noted a cervical MRI revealed severe foraminal stenosis at C5-6 due to disc osteophyte complex. At a March 10, 2016 follow-up, Dr. Vemuri noted worsening neck and right arm paresthesias traveling in a C-6 distribution into the thumb and index finger. He recommended cervical fusion.

Dr. Warren Bilkey performed an independent medical evaluation ("IME") on February 22, 2016. Derby provided a history of a gradual onset of right shoulder pain, neck pain and headache from carrying camera equipment. Derby

described how the pain worsened significantly after September 15, 2015. Dr. Bilkey noted an October 20, 2015 MRI of the cervical spine revealed mild disc bulging at C5 and bilateral foraminal stenosis. Dr. Bilkey diagnosed a September 15, 2015 work injury, cervical strain, aggravation of cervical spine degenerative disc disease, cervical radiculopathy, and right shoulder aggravation of degenerative joint disease. He found no evidence Derby had an active impairment affecting his neck or shoulder prior to September 15, 2015. Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”), Dr. Bilkey assigned a combined 19% impairment rating for the neck and shoulder related to the work injury.

Dr. Michael M. Best performed an IME on May 18, 2016. Following a records review and physical examination, Dr. Best first noted he reviewed the cervical MRI and disagreed with Dr. Vemuri’s diagnosis of severe foraminal stenosis at C5-6. He also noted Derby reported intermittent numbness and tingling in the fourth and fifth digits of the right hand, which would indicate nerve root impingement at C8, not C6 as found by Dr. Vemuri. On this basis, he recommended against the proposed cervical fusion. Dr. Best diagnosed non-radicular neck pain and right shoulder pain without a rotator cuff tear. However, he found no objective pathology to support Derby’s complaints. He suspected arthritis and the natural aging process are the likely causes of Derby’s symptoms, and found no work-related injuries. Dr. Best assigned a 0% rating for the cervical condition, and concluded Derby had no prior active impairment.

Dr. Michael Moskal performed an IME on May 26, 2016. Derby provided a history of some prior right shoulder pain in 2004 or 2005, and ongoing gradual neck pain since 2005. Derby reported he “tweaked” his right shoulder in September 2015 and the pain gradually worsened. He also reported numbness and tingling in his ring and pinkie fingers. Dr. Moskal diagnosed glenohumeral arthrosis and cervical spondylosis with right C6 mild radiculopathy. He stated Derby’s problem was caused by personal factors such as age, and is unrelated to his work at WHAS. Dr. Moskal also emphasized the work Derby performs around his small farm as a possible reason his symptoms worsened in September, 2015.

Dr. Bilkey testified by deposition on June 14, 2016, that his initial opinions and diagnosis had remained unchanged. He noted Derby did not have a specific injury on September 15, 2015, but his symptoms worsened markedly after that date. Dr. Bilkey stated Derby’s work activities were a factor in terms of accelerating the degenerative process and rendering it symptomatic. He also noted Derby had weakness in the right wrist extensors that comports with a C6 radiculopathy. Dr. Bilkey did not believe Derby had an impairment ratable condition prior to September 15, 2015.

The ALJ issued an Interlocutory Opinion, Award and Order on November 28, 2016, finding, in relevant part, that Derby sustained an injury to his right shoulder and neck. She determined these injuries were the result of cumulative trauma manifesting on September 15, 2015. The ALJ awarded medical benefits, including the cervical fusion recommended by Dr. Vemuri. However, she dismissed

Derby's claim for injuries to his back and right ankle. The claim was placed in abeyance pending treatment.

Dr. Jules Barefoot performed an IME on November 20, 2017. Dr. Barefoot noted Derby had been filming at the Ohio River bridges project in September 2015 for an extended period of time when he developed increasingly severe neck and right shoulder pain. A cervical fusion at C5-6 was performed on August 15, 2016. After surgery, he reported his neck and arm pain, and headaches markedly improved. Dr. Barefoot noted Derby continued to have significant right shoulder pain and weakness, and was re-evaluated in January 2017 by Dr. Richardson who eventually performed a right shoulder arthroscopy on April 10, 2017.

Dr. Barefoot diagnosed status post right shoulder arthroscopy with labral debridement, acromioplasty and distal clavicle excision on April 10, 2017, and anterior cervical fusion C5-6 on August 15, 2016. Dr. Barefoot assigned a 37% whole person impairment rating consisting of 27% for the cervical injury under DRE Category II and 14% for decreased right shoulder ROM pursuant to the AMA Guides. Dr. Barefoot apportioned 100% of Derby's whole person impairment to his work-related activities. He concluded Derby had no active, impairment ratable conditions present in his cervical spine or right shoulder.

Dr. Moskal performed a second IME on April 30, 2018. Derby reported a new onset of cervical stiffness and cervical radiculopathy after painting and sanding a bathroom at home, during a period he was not working for WHAS. Derby underwent cervical fusion surgery and reported resolution of altered sensation until a new injury with new onset altered sensation, neck pain, and neck stiffness due to

sanding and painting a bathroom in his house. Dr. Moskal diagnosed right glenohumeral arthrosis with concomitant pathologies with report of pain, cervical spondylosis after cervical fusion with reported pain, and report of altered sensation. Dr. Moskal felt Derby's cervical spondylosis and radiculopathy were not related to his work activities. As a result, Dr. Moskal opined Derby's cervical fusion was not related to his work activities. Dr. Richardson testified by deposition on May 29, 2018. He performed an acromioplasty and distal clavicle excision on April 10, 2017. Dr. Richardson stated Derby's cervical condition was asymptomatic and dormant prior to the work injury. He concluded Derby's work is likely a contributing factor in making his shoulder and cervical conditions symptomatic and requiring the medical attention that followed. Dr. Richardson opined Derby should not return to work as a cameraman.

The ALJ's findings relevant to this appeal are as follows:

Defendant argues Plaintiff exhibited new findings on 12/22/2015 of sharp nerve pain radiating into his right medial forearm, which began on 12/16/2015. Dr. Richardson characterized this as a new finding, and referred Plaintiff to Dr. Vemuri. Dr. Moskal notes a history of increased symptoms while sanding.

However, there is little to indicate when the alleged increase occurred. Conversely, this ALJ firmly believes Plaintiff's symptoms began on September 15, 2015. Plaintiff reported these symptoms to Dr. Sivaohan [sic] and a right shoulder and cervical x-ray was recommended. These symptoms progressed and became more evident as Plaintiff sought further treatment. Ultimately, this ALJ is not convinced Plaintiff's symptoms, including numbness and tingling documented in December 2015, was related to some non-work related condition or non-work-related injury.

Defendant challenges Dr. Bilkey's causation opinion based upon a failure to obtain a detailed history of Plaintiff's job duties. However, Dr. Barefoot obtained a detailed description of Plaintiff's job duties and attributed Plaintiff's current right shoulder and cervical condition to Plaintiff's work activities. After reviewing the evidence, this ALJ continues to find Plaintiff sustained an injury to this right shoulder and neck as the result of his work activities. In making this finding, the ALJ relies on Dr. Barefoot.

....

This ALJ has reviewed the record and the conflicting testimony. Drs. Moskal and Best felt Plaintiff suffered from a pre-existing, active impairment. However, Dr. Richardson deemed Plaintiff's condition to be pre-existing and dormant. Defendant argues Plaintiff was significantly symptomatic prior to 9/15/2015. However, this ALJ notes Plaintiff performed work which required extensive use of his right shoulder and unlimited cervical range of motion. This, ALJ does not feel Plaintiff could have performed this work, as he did, if he was as symptomatic as Defendant claims. Thus, this ALJ finds Plaintiff did not suffer from a pre-existing, active condition, relying on Dr. Barefoot.

WHAS filed a petition for reconsideration requesting additional findings of fact regarding the compensability of the cervical fusion surgery, arguing it was the result of new findings that first occurred in December 2015. The ALJ denied the petition for reconsideration as a re-argument of the merits.

On appeal, WHAS argues the medical evidence does not establish compensability of the cervical fusion, and the ALJ invaded the province of the medical experts in her consideration of the proof. WHAS asserts the record is clear that Derby had a long history of neck stiffness with complaints of infrequent findings of pain in the third and fifth fingers. On December 22, 2015, Drs. Richardson and Vemuri for the first time found increased numbness and tingling, paraspinal muscle

spasms, and a positive Spurling's test for the right upper extremity. Dr. Vemuri noted paresthesias in a C6 distribution into the thumb and index finger on March 10, 2016. WHAS asserts these new symptoms were the reason Dr. Richardson referred Derby to a neurosurgeon for a possible cervical fusion, which Dr. Vemuri performed. WHAS contends the fusion surgery and any resulting disability is not compensable.

Additionally, WHAS argues "symptoms" are not compensable. In order to be compensable, an injury must cause a harmful change in the human organism. WHAS notes Drs. Sivamohan and Bilkey concluded Derby did not have an actual injury on September 15, 2015. Instead, Derby's symptoms worsened markedly on that date. WHAS notes Dr. Bilkey described Derby as having:

...a structural abnormality in his neck with that foraminal stenosis that basically trapped the nerve root, and that was okay so long as he didn't tug at that nerve root, but the nature of the work duties carrying the camera would pull down the arm, and that would then pull on the nerve root, and if it's at all tethered or trapped in the neck, it would irritate it. And then I think the lifting and the positioning of the camera if indeed it's held at the shoulder or the lifting of it as it's held up to the head, if he on top of that is looking up for reasons, let's say bend forward to work on equipment, then has to look up for some reason, that would further aggravated it. So I think the physical activities of his job basically physically tugged on and irritated the nerve root.

WHAS believes Dr. Bilkey's use of the words, "symptoms", "irritate", and "aggravate" only describe temporary exacerbations, not a harmful change in the human organism. It also notes Dr. Bilkey appeared to waver between a finding of just "symptoms" and an acceleration of degeneration. WHAS further contends Dr. Bilkey was unaware of Derby's prior injuries, or his job duties. For this reason, his

opinion as to causation is largely incomplete and cannot constitute substantial evidence.

Derby bore the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is 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). 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 proof in this claim contained differing medical opinions addressing the cause of Derby's conditions. Based upon the totality of the lay and medical evidence, the ALJ concluded Derby sustained injuries to his cervical spine and shoulder, and that the underlying work activities necessitated the surgery. We find substantial evidence supports the ALJ's determination.

Dr. Bilkey reviewed Dr. Vemuri's medical records and the IME reports of Drs. Best and Moskal. In his September 21, 2016 supplemental report, Dr. Bilkey disagreed with Dr. Best's diagnosis and opinion on causation. Dr. Bilkey also disagreed with Dr. Moskal, who had stated the cervical condition was not work-related based upon the new onset of symptoms almost three months after Derby stopped working. Thus, Dr. Bilkey was clearly aware of the purportedly "new"

symptoms, although he may not have considered the deposition testimony Dr. Richardson. After reviewing the evidence, and the ALJ's decision, we cannot conclude Dr. Bilkey had a history so inaccurate or incomplete as to render his opinion unreliable.

Further, Dr. Bilkey unequivocally stated Derby's complaints are related to his work, and concluded there was no prior active impairment. The Court in Finley v. DBM Technologies, 2017 S.W.3d 261 (Ky. App. 2007) held that, to be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the work injury. The burden of proving the existence of a pre-existing condition falls upon the employer. Because differing medical opinions were presented, it cannot be said the evidence here compels a finding that Derby had a prior active impairment. Likewise, the evidence does not compel a finding that any subsequent event produced the need for the cervical fusion.

While WHAS disagrees with the ALJ's finding of a permanent injury, substantial evidence supports the ALJ's conclusion. Drs. Bilkey and Barefoot found permanent injuries to the cervical spine and shoulder and assigned impairment ratings for those conditions. Dr. Richardson stated the cervical condition was dormant prior to the work injury. Dr. Bilkey stated the work activities accelerated the development of the degenerative process and made it symptomatic. He concluded the condition in the cervical spine was brought into disabling reality as a result of carrying the photographic equipment.

Finally, the ALJ was convinced Dr. Bilkey had a sufficient understanding of Derby's job duties. We note the duties of a television cameraman are not outside the understanding of the common person. While WHAS may disagree, the ALJ was well within her role as fact-finder in reaching that determination. We are without authority to usurp the ALJ's authority and reach a different conclusion.

While WHAS has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. As such, the ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the October 26, 2018 Opinion, Award and Order and the November 26, 2018 Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON. WALTER E. HARDING
400 WEST MARKET ST. STE 2300
LOUISVILLE, KY 40202

LMS

COUNSEL FOR RESPONDENT:

HON. CHED JENNINGS
401 WEST MAIN ST. STE 1910
LOUISVILLE, KY 40202

LMS

ADMINISTRATIVE LAW JUDGE:

HON. STEPHANIE L. KINNEY
ADMINISTRATIVE LAW JUDGE
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601

LMS