

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 21, 2020

CLAIM NO. 201367697

WILLIAM E. STILWELL

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

KENTUCKY STATE UNIVERSITY  
DR. MATTHEW TUTT  
and HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**STIVERS, Member.** William E. Stilwell (“Stilwell”) seeks review of the September 17, 2019, Opinion and Order of Hon. John B. Coleman, Administrative Law Judge (“ALJ”) upon reopening. The ALJ denied his claim for increased benefits due to an alleged worsening of his condition resulting from a September 16, 2013, injury he sustained while in the employ of Kentucky State University (“KSU”). The ALJ also

resolved a medical fee dispute concerning the compensability of lumbar surgery at the L4-5 level in favor of KSU. Stilwell also appeals from the October 18, 2019, Order denying his petition for reconsideration.

On appeal, Stilwell argues the ALJ erroneously rejected the opinions of Dr. Matthew Tutt. Stilwell contends the ALJ misinterpreted Dr. Tutt's testimony in finding Dr. Tutt was unable to relate the L4-5 surgery to the original work injury of September 16, 2013. Stilwell also argues the ALJ erred in relying on Dr. Timothy Kriss's opinions since his opinions were based upon a "faulty history" when he refuted Dr. Kimberly Terry's opinions set forth in her medical records review report.

### **BACKGROUND**

In a February 19, 2016, Opinion, Award, and Order the ALJ found, based on Dr. Frank Burke's opinion, Stilwell "developed radiculopathy from a herniated nucleus pulposus in the lumbar spine at L5-S1 as a result of his [September 16, 2013] leg injury which caused him to have altered gait." The ALJ also relied upon Dr. Burke's opinion in finding the lumbar injury resulted in a 12% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides)." However, the ALJ was convinced by the opinion of Dr. Philip Corbett that the leg injury merited a 2% impairment rating pursuant to the AMA Guides. Thus, pursuant to the combined values charts of the AMA Guides, Stilwell had a 14% impairment rating as a result of the September 16, 2013, injury. The ALJ was also convinced by Dr. Corbett's opinion that KRS 342.730(1)(c)1 was not applicable.

Stilwell appealed to this Board which affirmed the ALJ on all issues raised on appeal except one. The ALJ's finding KSU was entitled to a credit for salary paid while Stilwell was receiving temporary total disability ("TTD") benefits was vacated. The claim was remanded to the ALJ to determine whether KSU was entitled to the credit for salary continuation benefits. By opinion dated November 22, 2017, the Court of Appeals affirmed the Board on all issues.

In a June 12, 2018, Order on Remand, the ALJ found there was lack of proof that the salary continuation benefits were paid in lieu of TTD benefits and KSU was not allowed a credit for the payment of salary continuation benefits. No appeal was taken from this order.

On July 25, 2017, Stilwell filed a motion to reopen, asserting his condition had worsened since the February 19, 2016, award. He noted that on May 11, 2017, Dr. Tutt recommended additional back surgery. However, KSU refused to pay for the surgery because it was not related to his work injury. Stilwell requested an order reopening the claim in order to seek TTD benefits and an increase in permanent disability benefits.

On July 27, 2017, KSU filed a medical fee dispute concerning the request for pre-authorization of the lumbar surgery consisting of a right L4-5 micro-decompression to be performed by Dr. Tutt. KSU relied upon the medical records review of Dr. Terry, a board certified neurosurgeon. KSU also filed a motion to join Dr. Tutt as a party to the proceedings.

On June 27, 2018, the ALJ sustained the motion to reopen and set a proof schedule. On June 28, 2018, the ALJ entered an order sustaining the motion to join Dr. Tutt as a party to the reopening proceedings.

Stilwell introduced Dr. Terry's medical records review, the medical records of Georgetown Community Hospital and St. Joseph Hospital, Dr. Tutt's records, and Dr. Burke's supplemental report. Stilwell also deposed Dr. Tutt. KSU introduced Dr. Kriss' medical report.

The June 11, 2019, Benefit Review Conference Order and Memorandum identified the following contested issues: benefits per KRS 342.730, medical dispute, TTD (MMI date), and application of the Guides. Under "Other" is written: "Increased benefits under KRS 342.125 and extent thereof. Whether Dr. Kriss' report is substantial evidence? Defendant's proof extended through hearing."

Stilwell testified at the July 24, 2019, hearing that he did not return to work at KSU and currently works at Petco. He believed he was unable to perform the tasks associated with his former work at KSU. He earns \$11.25 an hour at Petco which is approximately one-half of what he earned at KSU.

Stilwell returned for treatment by Dr. Tutt in May 2017 because his symptoms worsened which he described as severe low back pain extending down his right leg to the top of his right foot. Stilwell testified Dr. Tutt performed the second surgery in approximately May 2015 from which he never fully recovered.<sup>1</sup> Since the May 2015 surgery, his condition worsened to the extent he was unable to walk or

---

<sup>1</sup> The records reveal Dr. Phillip Tibbs performed the first surgery consisting of a right L5-S1 lumbar microdiscectomy on November 3, 2014. The second surgery performed by Dr. Tutt on March 3, 2015, consisted of right L5-S1 redo compression for diagnosis of right L5-S1 lateral recess stenosis, status post right L5-S1 discectomy.

properly bathe himself. As a result, Dr. Tutt performed another surgery in December 2017 which was helpful. He is now able to walk without a cane and has no pain down his leg. He can sit or stand for longer than twenty minutes; however, his back is always painful. Stilwell began engaging in yoga which temporarily relieves his symptoms. His symptoms worsen when he drives or sits for long periods of time. Walking on uneven terrain also aggravates his symptoms.

Stilwell did not work between the December 20, 2015, hearing in the original proceedings through May 2017 when he returned to Dr. Tutt. He also did not work between July 15, 2017, and December 12, 2017, when he underwent surgery. Stilwell believed he was unable to work between December 12, 2017, and March 2018. He began working for Petco in January 2019. During the period he was not employed, he returned to the University of Kentucky and obtained another Master's Degree in "watershed and stream restoration, science graduate certificate."<sup>2</sup> He finished his class work at the end of 2018. The job at Petco is the only job Stilwell has performed since the 2016 decision. He is not currently attending classes. Stilwell takes Gabapentin for his back problems. He underwent physical therapy for a couple of weeks following the December 2017 surgery. He last saw Dr. Tutt in March 2018.

In finding Stilwell failed to establish by objective evidence a worsening of his impairment or disability due to the September 16, 2013, work injury and the treatment of Stilwell's back at the L4-5 level is non-compensable, the ALJ set forth the following analysis and conclusions:

---

<sup>2</sup> He clarified he has a Bachelor of Science Degree in Forestry, a Master's Degree in Aquatic Science, and an undergraduate certificate.

A claimant moving for reopening has the burden of showing that the decrease of wage earning capacity (increased impairment) is due to the effects of the injury in order for an award to be increased. Peabody Coal Company v. Gossett, 819 S.W.2d 33 (Ky. 1991). Therefore, the plaintiff must be able to show that his surgery of December 2017 and subsequent increase in impairment rating is the result of the work injury. The plaintiff had previously undergone two back surgeries at the L5-S1 level, which were previously found to be compensable and related to the plaintiff's lower extremity injury. In the original proceedings, the ALJ was persuaded by the opinion of Dr. Burke that the plaintiff's altered gait caused from his lower extremity injury resulted in the herniated disc at L5-S1. Therefore, the plaintiff's lumbar discectomy and subsequent re-exploratory right L5 foraminotomy without discectomy were related to the original lower extremity injury. The parties then reopened due to a proposed L4-L5 laminotomy recommendation by Dr. Tutt, the surgeon who performed the second of the aforementioned surgeries.

Since the surgery that prompted this reopening is at a different level from the prior surgeries, the causal relationship of the December 2017 surgery and subsequent increased impairment rating are not readily apparent to a layperson such as the ALJ. Therefore, the issue of causation is solely within the province of a medical expert. Elizabethtown Sportswear v. Stice, Ky. App., 720 SW2d 732, 733 (1986) and Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., Ky., 618 SW2d 184 (1981). The issue of whether the December 2017 L4-L5 surgery must be decided based strictly on the medical evidence presented by the parties.

Initially, the plaintiff points out that Dr. Terry denied the compensability of the surgery based upon reasonableness and necessity rather than causation. In fact, the utilization review report from Dr. Terry indicated that her records review had noted post-operative changes at the L4-L5 level, which she considered compensable and related to the original injury. Dr. Terry explained the MRI study demonstrated facet arthropathy and fibrosis at L4-L5 due to the prior surgery that contributed to foraminal narrowing. As such,

the records would support that the current request for surgery is a result of the post-operative changes noted on imaging, which would be considered a sequela of the original injury. The ALJ notes that this review is also set forth in the Lexington Clinic MRI report of November 3, 2017 wherein the radiologist interpreted the L4-L5 level as showing an annular tear or post-surgical changes. However, Dr. Kriss points out that Dr. Terry misinterpreted the lumbar MRI scan. He noted that the radiologist interpreted the L4-L5 level incorrectly, as the plaintiff had never had surgery at the L4-L5 level. The ALJ finds this point persuasive, as showing Dr. Terry to have a faulty history, which may be disregarded under Osborne v. Pepsi-Cola, 816 S.W. 2d 643 (Ky. 1991).

Dr. Kriss went on to explain that the original decision by the ALJ and the original opinion of Dr. Burke were that the herniated disc at the L5-S1 level was the result of the plaintiff's altered gait following his lower extremity injury. Dr. Kriss pointed out that the plaintiff no longer had the altered gait as of April 6, 2015 and therefore the original causal link between the L5-S1 level and the original work injury no longer exists. It can then be concluded that the L4-L5 level would only be compensable if it is somehow related to the L5-S1 herniation or subsequent surgeries. Dr. Kriss disagreed with this causal connection, but instead indicated the plaintiff suffered from naturally occurring degenerative processes. He also pointed out that the current condition was described as idiopathic in the plaintiff's medical records. Most importantly, the treating surgeon was asked whether the L4-L5 surgery was a consequence of the prior surgeries. He replied, "It's just a matter of definitions I think I have a hard time with. I'd say it's within a degree of medical possibility, but I don't think it's most -- it's all, you know, more than 50/50 related to the previous surgery he had at 5-1." Additionally, he described originally thinking the plaintiff was having additional impingement at the L5-S1 level. He felt the L5-S1 level might have collapsed and even become auto-fused thus affecting the adjacent level at L4-5. He explained that he sent the plaintiff for standing x-rays and updated MRI. The diagnostic studies revealed that was not his problem. In short, the testimony of the treating physician indicates that the most recent surgery is possibly related, but not probably related to the original

surgeries. This testimony is not persuasive testimony to convince the undersigned that the new condition is related to the work injury. On the other hand, Dr. Burke does relate the new level of injury to the original work injury and the surgical treatment at the L5-S1 level. He felt the surgical treatment at the L5-S1 level resulted in increased mechanical stress at the L4-5 level and contributed to the progress of pathology at L4-5. However, the testimony of Dr. Tutt does not support this conclusion. Dr. Tutt's testimony indicates that he considered that a possibility and obtained the standing x-rays and MRI indicating that was not the case. Therefore, I do not find the opinion of Dr. Burke to be persuasive on the issue of causation in this reopening.

After reviewing the entirety of the evidence in this claim, I am compelled to find the plaintiff has failed to show by objective evidence, a worsening of his impairment rating or impairment (disability) as the result of the effects of the work injury of September 16, 2013.

Additionally, the defendant filed a medical dispute regarding the treatment, including surgery at the L4-5 level. The treating physician, Dr. Matthew Tutt, was unable to relate the surgery at L4-5 to the original work injury or to the effects of the previous L5-S1 surgeries within the realm of reasonable medical probability. Therefore, I find the plaintiff failed to meet his burden on causation this issue. Therefore, the medical expenses associated with treatment of the L4-L5 level of the lumbar spine are not compensable under KRS 342.020.

Stilwell filed a petition for reconsideration making the same arguments he now makes on appeal. In the October 18, 2019, Order denying Stilwell's petition for reconsideration, the ALJ responded with the following:

This matter is before the ALJ on the plaintiff's petition for reconsideration. The plaintiff argues the ALJ committed patent error when he dismissed the plaintiff's claim for increased benefits under KRS 342.125. In the decision dated September 17, 2019, the ALJ concluded that the plaintiff's L4 – 5 disc herniation and surgery were not proven to be related to the compensable L5 – S1 lumbar spine injury or his lower extremity injury which

made up the original claim. The plaintiff points to three statements in the decision which he feels constitute patent error.

First, the plaintiff argues that it was error for the ALJ to adopt Dr. Kriss's opinion which criticized the opinion of the utilization review physician on the issue of causation. In the decision, the ALJ explained that he did not find the opinion of Dr. Terry to be persuasive, in part, due to the opinion of Dr. Kriss, who pointed to faulty reasoning in the utilization review physician's [sic] determining the L4 – 5 surgery to be related to the prior L5 – S1 surgery. The ALJ continues to be persuaded by the opinion of Dr. Kriss in that regard. Additionally, the ALJ points out that Dr. Terry simply performed a utilization review for a determination of reasonableness and necessity and concluded that the surgery was not reasonable and necessary. However, I am not persuaded by Dr. Terry's opinion in regards to causation.

Next, the plaintiff asserts the ALJ should have relied on the direct and natural consequence rule set forth in Addington Res. Inc. v. Perkins, 947 S.W. 2d 421 (Ky. App. 1997). The rule states that a subsequent injury is compensable as a direct and natural result of a compensable primary injury, whether it is an aggravation of the original injury or a new and distinct injury. Essentially, this is the same standard required in KRS 342.125 as the plaintiff must show that his worsening in impairment or disability is causally related to the original compensable injury. In this instance, the ALJ considered that argument but was more persuaded by the opinion of Dr. Kriss that the herniation at L4 – 5 and surgery was not related to the prior L5 – S1 or lower extremity injuries. As such, the ALJ simply found the plaintiff failed to meet his burden of proof on causation of the increased impairment or disability.

Next, the plaintiff argues the ALJ should have adopted the opinion of Dr. Burke who opined that the L4 – 5 condition was the result of an aggravation from additional mechanical stress due to the L5 – S1 original injury. However, the ALJ explained in the decision that Dr. Burke's opinion was not persuasive in that regard. He pointed to the opinion of Dr. Kriss and the reluctance of the treating surgeon to relate the plaintiff's L4– 5 condition to the prior injury or treatment.

After considering the arguments set forth by the plaintiff in the petition for reconsideration, the ALJ finds each to be a re-argument of the evidence already considered by the ALJ. As such, the petition for reconsideration is DENIED.

In a two-pronged argument, Stilwell first argues Dr. Tutt's testimony demonstrates that his problem at L4-5 necessitating surgery is connected to the two prior surgeries at L5-S1. Stilwell maintains Dr. Tutt's testimony establishes that within the realm of medical probability the two prior surgeries at L5-S1 affected the L4-5 level. Stilwell posits Dr. Tutt's statement that one could say the surgeries at L5 contributed to the change at L4-5 is consistent with Dr. Terry's opinion. Stilwell also contends: "Furthermore, Dr. Tutt further met Stilwell's burden of proof when he stated that the changes at L4-L5 were a little quick for a guy Stilwell's age and one could say the surgery at L5-S1 contributed to the changes at L4-5."

Stilwell also cites to Dr. Burke's opinion that pre-existing, dormant, age-related changes found at L4-5 on the February 9, 2015, MRI "were aggravated by additional mechanical stress from the L5-S1 injuries and resultant surgeries to the extent surgical intervention was necessary."

In the second prong, Stilwell insists the ALJ erred in accepting Dr. Kriss' incorrect assertion that Dr. Terry believed Stilwell underwent prior surgery at L4-5. Stilwell asserts Dr. Terry understood his two prior back surgeries involved the L5-S1 level, as she noted in her report that he was status post right L5-S1 discectomy on November 3, 2014, and underwent surgical intervention on March 3, 2015, to include L5-S1 facetectomy. Consequently, Stilwell argues that, when Dr. Terry concluded the post-operative changes at the L4-5 level were related to the original

injury, she was reporting the post-operative changes at L4-5 were due to the two prior surgeries at L5-S1. Stilwell argues Dr. Kriss was patently incorrect when inferring Dr. Terry believed one of the two prior surgeries was at L4-5. Stilwell asserts since Dr. Kriss' opinion was based on an inaccurate history, his opinions do not constitute substantial evidence upon which the ALJ could rely. Thus, the ALJ erred in dismissing his claim on reopening.

### ANALYSIS

In a motion to reopen, "the party seeking to increase an award has the burden of proving that there has been a change of condition resulting from the original compensable injury." Griffith v. Blair, 430 S.W.2d 337, 338 (Ky. 1968)(citing KRS 342.125; Jude v. Cabbage, Ky., 251 S.W.2d 584). Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). Kentucky law holds that if the party with the burden of proof before the ALJ was unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). In Wolf Creek Collieries v. Crum, the Court of Appeals stated:

The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming,

upon consideration of the entire record, as to have compelled a finding in his favor.

Id. at 735.

In the October 18, 2019, Order, the ALJ accurately characterized Dr. Tutt's testimony as a reluctance to relate Stilwell's condition to his prior injury or treatment. During his October 29, 2018, deposition, Dr. Tutt testified Dr. Tibbs performed the first surgery at the L5-S1 level. Dr. Tutt recounted his previous treatment noting he performed an additional decompression at L5-S1 in 2015. In 2017, Dr. Tutt became concerned after reviewing the MRI film because Stilwell had become "tighter at the L4-5 level." He explained this meant there was a worsening stenosis "mostly in the lateral recesses, out on the sides where the L5 nerve roots would come by, maybe a little worse on the right than the left." When asked if the tightening was a result of the previous surgeries, Dr. Tutt offered the following:

A: I don't think it can be clearly said, the fact it's, you know, as if he'd had a fusion at the 5-1 level, but I do think two decompressive surgeries at L5-S1, one could make the argument that that level collapses, stiffens, and then translates up the spine. I'd say it's reasonably possible that it affected it, but, you know, I also kind of was treating this L4-5 level as a new problem, you know.

Q: Is it more probable than not that the tightening was caused by the prior surgeries?

A: I think I'd prefer to say it's within the realm of medical probability that it affected it. I guess I'd have a hard time saying it's – I think that it's a combination of both. I think there's arthritic changes of his lumbar spine and that that L5-S1 level issue in the past could also have contributed to it. I really would have a hard time saying more probable than not.

Q: Okay. Is it a natural consequence of the prior surgeries?

A: Like I said, I think it's – it can play a role, the prior surgeries, but it's – you know, it's also – I mean, what stenosis is at this L4-5 level is thickening of the joints and thickening of the ligament. You know, that's a natural aging process of the spine, some people worse than others. The question here I guess is whether or not his problems at 5-1 made that happen sooner than later.

I believe that in everybody that's going to occur over time. The question is did he have some additional stiffness at L5-S1 that translated to that 4-5 level. I think it's – to some degree it's possible because he had previous surgery at 5-1. But, again, his 5-1 is not fused; he still has some motion to that segment and, you know, I could see the argument being made either way.

Q: Okay. Well, I guess what I'm asking within a reasonable degree of medical probability, though, is it a consequence of the prior surgeries?

A: It's just a matter of definitions I think I have a hard time with. I'd say it's within a degree of medical possibility, but I don't think it's most – it's all, you know, more than 50/50 related to the previous surgery he had at 5-1.

Dr. Tutt testified that in comparing the 2015 MRI with the November 3, 2017, MRI, the stenosis at the L4-5 level had worsened. With respect to the effect of the two surgeries on Stilwell's condition at the L4-5 level, Dr. Tutt offered the following testimony:

Q: And what did you mean by that?

A: Well, at – where do you see at L4-5? The other concern in my thought was that he was starting to get impingement at L5-S1 because he'd had two surgeries there; you start to collapse your disc space and then you start to pinch your nerve out in the foramina, the exiting nerve root.

And this goes back to what we say, like, maybe that level was starting to become collapsed and even autofused; thus, it could affect the adjacent level, but – so

we sent him for some standing x-rays as well as that updated MRI.

And looking at the updated MRI I guess my comments after it is that, no, that wasn't his problem; I thought he was developing some tightness on the nerve at the L4-5 segment, the segment above, because that's kind of how those two issues my thought process changed from maybe he's pinching the L5 nerve root as it exits the spine at L5-S1 to versus up above.

And the updated MRI, which I believe was higher quality too – the clinic MRI is typically a better quality than some of these open or outside MRIs – in addition to the x-rays, led me to feel that his problem was the next level up.

Dr. Tutt indicated when he performed the L5-S1 surgery, the L4-5 level did not concern him explaining as follows:

Q: What did you mean by that?

A: That he'd had two previous surgeries at the 5-1 level and now it looks like he's starting to get tight at the L4-5 level.

Q: Are the two related?

A: I think one can say that collapse at the 5-1 level led to some stenosis at the level before, but there's also some underlying degenerative changes going on here.

...

Q: But I mean was he symptomatic at those levels before the surgeries?

A: I don't believe so, no.

Q: And he is symptomatic now after those surgeries; is that correct?

A: Yeah, and what I mean when I say that is that when I did the 5-1 surgery, 4-5 didn't concern me. The findings at that level on MRI didn't concern me.

Dr. Tutt believed there was confusion on the part of Dr. Kriss explaining

as follows:

Q: And was there anything that Dr. Kriss was confused about, in your opinion, regarding your surgeries?

A: Yeah, he stated he was – he didn't understand, I think on the follow-up MRI, the surgery looked like it was being – had been done on the left but his symptoms were more on the right. And I think, you know, the clarification there is that Mr. Stilwell underwent a minimally invasive L4-5 laminectomy; that can be performed from a left or a right-sided approach. I tend to perform it from a left-sided approach because I'm a right-handed surgeon.

And the technique is to come in from the left, clean out the left side first, then look across the spinal canal and clean out the right side. And a lot of us that do that type of surgery will actually say you get as good if not better look at the other side doing that approach. You can look right across, clean out, you know, any compression on the L5 nerve roots on both sides.

So, yes, the incision and the bony work will look like it was more done on the left, but the decompression was done on both sides. And you can see that if you look at the pre and post-ops MRIs with respect to the entire spinal canal.

Significantly, Dr. Tutt did not identify any other aspect of his treatment about which Dr. Kriss may have been confused. Dr. Tutt again demonstrated his reluctance to opine the previous surgeries at the L5-S1 level had caused Stilwell's symptoms at the L4-5 level necessitating the 2017 surgery. His testimony is as follows:

Q: ... Before 2017 you only diagnosed and treated him for L5-S1 complaints, correct?

A: Correct.

Q: And I think you actually testified earlier that when you did that – his second surgery, your first surgery on him, that you had no concerns about the L4-5 level in 2015.

A: Correct.

Q: Have you looked at the differences yourself on the 2015 MRI compared to the November 2017 MRI?

A: I did at the – after reviewing the November '17 MRI.

Q: Okay. And I'm not going to say there weren't other changes. It looked like it was the same radiologist at Lexington Clinic had looked at it –

A: Yeah.

Q: -- both times and he kind of made some distinctions, I think protrusion versus enhancement the second time?

A: At the 5-1 level.

Q: At the L4-5 level.

A: L4-5 level, okay.

Q: Yeah, this is comparing the L4-5. At that point in November 2017, November 3<sup>rd</sup>, 2017, the MRI, the radiologist characterized his central canal stenosis as moderate.

A: Uh-huh.

Q: Back in 2015, more than two-and-a-half years prior, it was mild.

A: Yeah.

Q: Can that happen just based on age and with time –

A: It can.

Q: -- in somebody that has arthritis?

A: It can.

Q: Okay, so even if they hadn't had surgery before, you could see those type of changes on MRI?

A: For a guy his age, I think it's a little quick to see changes, and that's where I – you know, the question of whether or not 5-1 contributed comes in.

Q: But you can't say that –

A: Can't say either way.

Q: -- it did or did not?

A: No. I'd say it's – you know, one could say it contributed to it, but it's – I don't think anybody has a way of knowing for sure.

...

Q: At that time, though, you weren't concerned with tightness of the L5 nerve root at the L4-5 level.

A: Correct.

Q: Got it. All right. To your knowledge did he have any symptoms that you would have identified to be at the L4-5 level prior to when you saw him again in February 2017?

A: I can't say for sure. I mean, you know, how much of that – I can't recall whether it sounded more like L5 or S1

...

...

Q: And can a person be more prone to degeneration based on their genetics or a small spinal canal, those types of things?

A: Yes. I think, you know, a lot of times when you say someone has degenerative disc disease, it's not a term I like, but that's another way of saying that someone's more prone to collapse of the disc space, thickening of the joints, rupture of the discs.

Q: Okay. And the stenosis, can it develop spontaneously or without trauma I guess?

A: Yeah, it's a natural aging process at the spine.

The above testimony amply supports the ALJ's conclusion that Dr. Tutt was unable to relate the surgery at L5 to the original work injury or to the effects of the previous L5-S1 surgeries. As such, we cannot conclude Dr. Tutt's testimony was

incorrectly interpreted by the ALJ in his October 18, 2019, Order as a “reluctance to relate Stilwell’s L4-5 condition to the prior injury or treatment.” Thus, we find no merit in Stilwell’s contention Dr. Tutt established a causal relationship between Stilwell’s injury at L5-S1 and the 2017 surgery at the L4-5 level. The ALJ’s finding regarding Dr. Tutt’s reluctance to attribute Stilwell’s problems at the L4-5 level necessitating surgery in 2017 to the September 16, 2013, low back injury is supported by substantial evidence.

When reviewing a decision on appeal, the function of the Board 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). Thus, in the case *sub judice*, the ALJ’s conclusions concerning the nature of Dr. Tutt’s cannot be disturbed.

In his August 22, 2018, report, Dr. Kriss set forth the surgical treatment Stilwell had undergone, the history provided by Stilwell, and the results of his examination. Dr. Kriss also provided the diagnostic imaging radiology reports reviewed and the diagnostic imaging which he personally reviewed. After setting forth his diagnosis, Dr. Kriss opined the third back surgery performed at the L4-5 level is not causally related, either directly or indirectly, to the September 16, 2013, chainsaw injury. He noted the third surgery was at a completely different anatomic location, and

Dr. Burke's April and October 2015 reports explicitly identified the work-related injury to the low back as disc herniation, radiculopathy, and nerve root compression and surgeries at the L5-S1 level. Dr. Kriss noted Dr. Burke never identified any pathology, nerve root compression, impairment, treatment, need for surgery or injury at the L4-5 level. Dr. Kriss opined the third surgery at L4-5 represents "a different problem, with a different cause, than the lumbar component of the September 16, 2013, injury." He noted Stilwell had recovered from the two surgeries at L5-S1 as Dr. Tutt's April 6, 2015, report demonstrates Stilwell was ambulating well. Further, Stilwell was doing so well that just one month after the second L4-5 surgery, Dr. Tutt discharged him from all neurological care, "with no further neurological follow-up, no restrictions and instructions to return to see Dr. Tutt only as needed." Thus, as of April 6, 2015, the original and sole causal connection between the September 16, 2013, work injury and Stilwell's low back problems and severely altered gait, no longer existed. Consequently, Dr. Kriss concluded as follows:

... and therefore Stilwell spontaneously, atraumatically develops presumptive disc/stenosis (narrowing) problems at the L4/L5 level two years later, in 2017 (3 ½ years post September 16, 2013 work injury), this is not in any way a consequence directly or indirectly of the September 16, 2013 chainsaw work injury.

The spontaneous, atraumatic development of stenosis and degenerative disc pathology at the L4/L5 level in Mr. Stilwell is a consequence of completely naturally occurring degenerative processes of aging: degenerative disc disease, spondylosis, degenerative retro-listhesis, and osteoarthritis (chronic bone spur formation).

This is consistent with the chronic, degenerative radiographic findings at L5/L5.

This is consistent with the fairly common totally natural development of these types of degenerative spinal changes in Mr. Stilwell's age group.

While Stilwell is correct in stating the contrary opinions espoused by Dr. Burke could have been relied upon by the ALJ to support a different outcome in his favor, in light of Dr. Kriss' opinions regarding causation and Dr. Tutt's testimony, the views articulated by Dr. Burke represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). 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, 560 S.W.2d 15 (Ky. 1977).

Further, Dr. Kriss' in-depth report and the opinions expressed therein qualify as substantial evidence that supports the ALJ's finding regarding the lack of a causal connection between Stilwell's problems at the L4-5 level necessitating the December 2017 surgery and the September 16, 2013, injury. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb his decision on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Finally, we find no merit in Stilwell's second argument that Dr. Kriss incorrectly concluded Dr. Terry was mistaken when she concluded the post-operative changes at the L4-5 level were related to the original injury. We note the ALJ adopted Dr. Kriss' opinions in concluding Dr. Terry mistakenly reported the post-operative changes at L4-5 were due to the two prior surgeries performed at L5-S1. Dr. Kriss concluded Dr. Terry had misinterpreted the post-operative January 11, 2017, lumbar MRI scan radiology report. Dr. Kriss went on to explain why he believed Dr. Terry

was mistaken. As is within his discretion, the ALJ adopted Dr. Kriss' explanation as to why Dr. Terry was mistaken. Dr. Kriss believed Dr. Terry appeared to be completely unaware of the fact both of Stilwell's previous decompression surgeries were at the L5-S1 level and not at the L4-5. He also noted Dr. Terry never had the opportunity to review the actual November 13, 2014, and March 3, 2015, operative reports which clearly delineate surgery was not performed at the L4-5 level. Dr. Kriss concluded there was no documentation establishing the L4-5 area was not postoperative and, therefore, not work-related. Dr. Kriss provided the following explanation:

So we have a fundamental misinterpretation of the radiology report by Dr. Terry, and we have Dr. Terry's failure to acknowledge that the L4/L5 level never underwent any surgery regardless of what the January 11, 2017 MRI radiographic findings were. And since Dr. Terry's sole rationale for declaring the December 12, 2017 surgery to be work-related was the (incorrect) fact that Mr. Stilwell had previous surgery at the L4/L5 level, this means that Dr. Terry's determination that the December 12, 2017 lumbar surgery is work-related is in fact completely incorrect; it is exclusively based on the false assumption that Mr. Stilwell already had surgery at the L4/L5 level as of January, 2017, which is simply not the case.

As correctly noted by Stilwell, in her report, Dr. Terry stated Stilwell had undergone two surgeries at the L5-S1 level. Regarding the request for approval of the surgery, Dr. Terry provided the following concerning the two questions posed to her:

**1. Is request for Laminotomy (hemilaminectomy) w/ decompression of nerve root, including partial facetectomy, foraminotomy and/or excision of herniated intervertebral disc, causally & directly related to work injury date 9/16/2013?** The records noted post-

operative changes at L4-5 that are considered compensably related to the original injury. The recent MRI study demonstrated facet arthropathy and fibrosis at L4-5 due to the prior surgery and contributed to foraminal narrowing. As such, the records would support that the current request for surgery is a result of the post-operative changes noted on imaging that would be considered a sequela of the original injury.

**2. Is request for Laminotomy (hemilaminectomy) w/ decompression of nerve root, including partial facetectomy, foraminotomy and/or excision of herniated intervertebral disc, medically necessary?** No. Although there is stenosis present on the interval MRI study of the lumbar spine, the claimant's most recent clinical findings did not identify any specific pain complaints or objection clinical findings regarding an active right L4 or L5 radiculopathy to support proceeding with additional surgical decompression procedures.

Apparently, the ALJ concluded Dr. Tutt's testimony indicating he had no concern about the L4-5 level when he performed the March 3, 2015, "redo" surgery at the L5-S1 level supports Dr. Kriss' belief that Dr. Terry was mistaken about Stilwell's medical history. Dr. Tutt's testimony regarding his lack of concern for the L4-5 area when he performed the 2015 L5-S1 surgery and Dr. Kriss' explanation for his conclusion Dr. Terry had misinterpreted the MRI scan permitted the ALJ to reasonably infer Dr. Terry possessed a faulty history concerning Stilwell's prior medical history. Consequently, the ALJ disregarded her opinions.

Contrary to Stilwell's assertions, Dr. Kriss' opinions constitute substantial evidence upon which the ALJ was free to rely in reaching a decision on the merits. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939)). 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.

Here, the ALJ chose to rely upon Dr. Kriss' opinions over the opinions of Dr. Burke. The ALJ also concluded Dr. Kriss was correct in concluding Dr. Terry had misinterpreted the reports and mistakenly stated there were post-operative changes at the L4-5 level when surgery was actually performed at the L5-S1 level. It was also within the ALJ's discretion, after reviewing Dr. Tutt's testimony, to accept Dr. Kriss' opinions concerning the cause of Stilwell's problems at the L4-5 level and that the 2017 surgery was unrelated to the September 16, 2013, work injury.

Accordingly, the September 17, 2019, Opinion and Order on reopening denying Stilwell's claim for additional income benefits and the October 18, 2019, Order denying his petition for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

HON CHARLES W GORHAM  
3151 BEAUMONT CENTRE CIRCLE STE 202  
LEXINGTON KY 40513

**LMS**

**COUNSEL FOR RESPONDENT:**

HON WHITNEY L LUCAS  
HON CHAD M JACKSON  
201 E MAIN ST STE 730  
LEXINGTON KY 40507

**LMS**

**LMS**

**RESPONDENT:**

DR MATTHEW TUTT  
1401 HARRODSBURG RD STE 540  
LEXINGTON KY 40504

**USPS**

**ADMINISTRATIVE LAW JUDGE:**

HON JOHN B COLEMAN  
MAYO-UNDERWOOD BUILDING  
500 MERO ST 3<sup>RD</sup> FLOOR  
FRANKFORT KY 40601

**LMS**