

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 23, 2023

CLAIM NO. 201972795

JACKIE WILDER
and JOHNNIE L. TURNER

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

JRL COAL INC.
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Jackie Wilder (“Wilder”) seeks review of the March 18, 2023, Opinion and Order of Hon. Chris Davis, Administrative Law Judge (“ALJ”), dismissing his claim for an alleged work injury resulting from cumulative trauma occurring while in the employ of JRL Coal Inc. (“JRL”). The ALJ relied upon the opinions of Dr. Christopher Stephens in dismissing Wilder’s claim.

On appeal, Wilder asserts “[t]he Board is authorized to correct a mistake of law even if the Petitioner may not be able to request correction on its own behalf.” Wilder complains the ALJ erred by relying upon Dr. Stephens’ opinions asserting the evidence clearly indicates he sustained an injury due to cumulative trauma occurring while working for JRL. Next, Wilder asserts there is no dispute he is entitled to at least the three-multiplier in accordance with the law in effect on the last date of his employment since his injury caused him to be unable to perform his past duties.

BACKGROUND

Wilder’s Form 101 alleges he sustained a July 11, 2019, injury while in the course and scope of his employment with JRL. He described the injury as “sudden onset of pain in the lower back with left lower extremity pain, numbness and weakness.” The cause of the injury is “cumulative, NOC” and the body part injured is “low back area (Inc: Lumbar and Lumbo-sacral).”

Wilder testified at an October 6, 2021, deposition and at the February 7, 2023, hearing. Wilder’s deposition reveals he was born February 8, 1973, has a high school diploma, and two years of college which he identified as auto diesel technology school at Southeast Community College. Wilder did not obtain the certification as an auto diesel mechanic but does have a Class A CDL license. He explained why he filed a workers’ compensation claim alleging a July 11, 2019, injury:

Q: Have you ever filed a workers’ compensation claim in the past?

A: Yes.

Q: When?

A: After my accident on July 11th.

Q: What year?

A: 2019.

Q: What happened on July 11th, 2019?

A: Do what, now?

Q: What happened on July 11th, 2019?

A: I was at work and my back locked up.

Q: What were you doing?

A: Driving a rock truck.

Q: Had you run over a rough road? Did you have a flat tire? I mean, what happened?

A: It was on a rough road, and I was loaded.

Q: Did you report this incident?

A: Yes, I did.

Q: To whom?

A: My loader man. I hollered at him on the CB and then he got the superintendent and all [sic] them to come to me.

Q: Did you finish out your shift?

A: No, I did not.

Q: Did you receive any medical treatment?

A: Yes, I did.

Q: With whom?

A: Harlan Hospital.

Q: Harlan ARH?

A: Yes.

Wilder last worked on July 11, 2019, at Cawood or Lenarue in Harlan County. He recounted the treatment he has received since that date:

A: Since July the 11th I've had therapy. I've had injections. I've had a little bit of everything, but nothing helps. I've seen other doctors, also.

Q: Now, what part or parts of your body did you injure in that accident?

A: Lower back.

Q: Now, have you ever received any Unemployment [sic] benefits?

A: Not since the surgery or nothing, or the back injury or anything.

Wilder worked for JRL from March 6, 2017, through July 11, 2019. During that period, he worked as a rock truck driver, performed mechanical work, and operated a bulldozer. The rock truck and the bulldozer he operated had enclosed cabs with heating, air conditioning, and air ride seats. Wilder estimated that during the period he was employed by JRL he spent approximately half his time operating a rock truck and the other half operating a D9 bulldozer. Prior to being hired by JRL, Wilder was required to undergo a physical examination which was performed by Dr. Abdul Dahhan. Wilder had no work restrictions at the time he began working for JRL. He denied experiencing any other injuries while working for JRL other than the July 11, 2019, injury. He described the nature of the mechanic work he sporadically performed for JRL as follows:

Q: Now, tell me the things that you would have to help the mechanic with?

A: Well, just like changing – I would help change oil. I would help change tracks, rollers, hydraulic lines, lights. Just whatever needs to be done, you know, because I had the knowledge to do that, too.

Wilder discussed the events of July 11, 2019, and his prior problems:

Q: Now, we were also talking before we went off the record about any specific injuries. You said on July 11th, 2019, that your back locked up. Is that correct?

A: Yes.

Q: Did you have any other specific injuries while you worked there?

A: Yeah.

Q: Okay. Tell me about that.

A: Prior to the – I had the back surgery in 2019.

Q: When in 2019?

A: February the – I think it was around the 20th, 21st.

Q: Who performed that surgery?

A: Dr. Paul Johnson.

Q: What hospital?

A: Parkwest.

Q: I'm sorry, what was that?

A: Parkwest in Knoxville, Tennessee.

Q: And what led you to undergo surgery?

A: I was going numb and stuff in my left leg and my lower back, and I was doing that while I was working.

Q: Can you pinpoint any specific event in which the pain in your leg occurred?

A: No, I cannot. I know it started in 2018.

Q: But came on without any specific ...

A: Yeah.

Q: ... jarring or jolting, anything that you can recall?

A: Yeah. No – no specific thing.

Q: And just to the best of your knowledge – and I'm not – I know you're not a doctor, and neither are we. What type of surgery did you undergo?

A: I don't know. I've got – all I know, I've got two rods, four screws, and two bone infusions between L4 and L5.

Q: So, you had a fusion.

A: A fusion, yes. I've got two.

Following the February 2019 surgery, Wilder returned to work at JRL in April 2019 with no work restrictions and working 63 hours weekly. During that time, he only operated a rock truck. His private health insurance carrier paid for the February 2019 surgery.

Wilder believed an accident report was completed after the July 11, 2019, event.

Except when he worked for Nami Resources, Wilder denied experiencing any other work injuries while working for previous employers listed on his Form 104 and attachment. He described the injuries he sustained while working for Nami Resources:

Q: Any injuries?

A: Yes.

Q: What happened?

A: I cut off my left pinky finger.

Q: Is that the only injury you sustained while working there?

A: No, I cut muscle right at the elbow plumb through to the bone.

Q: On your left side, as well?

A: Left side, as well.

Q: Okay. Are you right or left-handed?

A: I'm right.

Wilder estimated his back locked up on July 11, 2019, "Probably about nine or ten o'clock that morning." His shift began at 6:00 a.m. Wilder described his work activities on that day as follows:

Q: Refuse to the – to the refuse place, hauling coal, what were you doing?

A: No, I was hauling rock and dirt.

Q: Okay.

A: I was actually stripping the coal.

Q: Okay. Now, when this occurred, did you get on the radio and tell anyone or ...

A: Yes, I hollered at my loader man.

Q: Who was that?

A: Bobby – oh, what was his name. I can't remember his last name. Bobby Couch.

Wilder described the "locking up" sensation he experienced on July 19, 2019:

Q: Okay. Now, what were you experiencing? Describe the locking-up sensation for me.

A: Well, I was just driving in the rock truck, and it's like just everything just seized up. I couldn't lean forward.

All I could do is just move my foot to stop the truck, and that was it. I mean, I couldn't move. I couldn't twist. I couldn't do nothing.

Q: Did it seize up straight?

A: Do what?

Q: Did it seize up straight?

A: Yeah.

Q: Did you get out of the truck on your own?

A: No.

Q: How'd you get out?

A: Well, when the superintendent and the boss, everything, got there, they put – took the strap off the door to open up real wide. They helped me out. And they put a loader bucket right up to the catwalk. I stepped in the loader bucket and then they put me straight to the ground. But they had to pull me up out of the truck.

Wilder's supervisor took him to Harlan Appalachian Regional Hospital where he was treated and released. Since July 11, 2019, his treatment has consisted of injections in the lower back and therapy. The last injection occurred in May or June of 2021 administered by the London Pain Clinic. The injections may provide two to three days of relief. He is seen at the London Pain Clinic once a month. Wilder currently takes two to three Hydrocodone, two Tizanidine, and Gabapentin twice daily. After the alleged injury, Wilder was seen approximately five times by Dr. Carter Cassidy at the University of Kentucky Medical Center ("UK Medical Center"). Wilder last saw Dr. Cassidy in 2021 and has no future scheduled appointments with him.

The first doctor to advise Wilder that his back problems are work-related was Dr. Martin Radwa sometime after July 11, 2019. Wilder then told the safety director, Joe Daniels, that a doctor had informed him his back problems are work-related. He described his current back symptoms:

A: I just hurt a lot in my back if I stand a lot or sit a lot. I have a lot of tingling sometimes up around the shoulders, I don't know if it's, you know, coming from the back. And then my left leg will go numb and then just start aching and hurting real bad, standing or sitting or anything.

Q: Okay. So, you said you have pain in your back if you stand or sit a lot?

A: Yes.

Q: How long can you stand or sit?

A: Thirty minutes standing or sitting, either one. I can't walk long distances, either.

Q: How far can you walk?

A: Probably not even a quarter mile.

Q: How often do you have the numbness in your legs?

A: Every day.

Q: Is it constant or does it come and go?

A: It comes and goes.

Q: Can you tell if it's when you're sitting or when you're in a recumbent position? I mean, when do you – when do you have it?

A: When I'm standing. Sometimes when I'm sitting.

Wilder also described the symptoms he experienced prior to undergoing the February 2019 back surgery:

A: Tingling in my left leg. I would be walking like through Walmart or somewhere and then my leg would just give out and I would fall. I'd have to sit down for a few minutes. And then I was hurting in my lower back, in the hip area and the lower back.

Q: Did the surgery help with those problems?

A: It helped for a little while and then it all come back.

Q: And when did they all come back?

A: After I – after July the 11th.

Wilder wears a back brace and exercises once daily. He cannot ride 4-wheelers or engage in woodworking tasks he previously performed. He offered the following testimony regarding the physical effects of operating a rock truck and bulldozer:

Q: Would you describe what bouncing, if any, that you underwent when you would drive these rock trucks, and particularly on the day that – in July that you – the last day that you worked?

A: There was like potholes and stuff in the road. Yes, I was bouncing up and down on that air ride seat. Sometimes it would bottom out. You know what I'm talking about?

Q: Now, this wasn't a paved road?

A: No, this was ...

Q: Describe the conditions.

A: This was a muddy, rocky road. I mean, it wasn't smooth like blacktop or nothing.

Q: And how much weight would be in the truck?

A: I was hauling a hundred and twenty ton.

Q: So, can you describe more what it would be like when you'd be in this truck and you'd be driving it?

A: Well, you're probably about eight foot off the ground. You've got a hundred and twenty ton in the back of your truck. And when you hit a bump, it just don't ride like a car. You bounce up and down with the weight of that truck hitting them holes and everything. And, of course, you're going to be bouncing up and down in that truck.

Q: And for how many minutes or hours would you be doing that in, say, an eight-hour day?

A: All day. You do it all day long.

...

Q: And for how many years did you work for that company, three?

A: Two. Two year [sic]. Almost three year [sic], yeah.

Q: And on a daily basis would you be driving a rock truck or a dozer that would cause you to bounce like that?

A: Yes, every day.

Q: Now, how much of the time were you driving the rock truck and how much the dozer?

A: Well, the dozer and rock truck was half and half. But when I had the surgery, I was just [sic] rock truck.

Q: Alright.

A: Prior to the surgery I was more or less both.

Q: Okay. How would the dozer cause bouncing, if it did ...

A: Just running.

Q: ... and jarring?

A: Just running over rocks and everything in the road. I mean, a dozer ain't got tires. It's just tracks. It's just metal hitting rocks. And there is no give to a dozer.

Q: And how, if it did, did that cause jarring in your back?

A: Just the rough ride of it. I mean, you ride over a bump and when you roll over it, you would hit solid. There wasn't no give. I mean ...

Q: And was that on a hourly ...

A: That was on a hourly, daily basis.

Wilder operated a rock truck and a bulldozer prior to working for JRL. He testified operating both pieces of equipment entails being "bounced around every single day." He estimated he had operated a rock truck and bulldozer for approximately 18 years prior to working for JRL.

At the hearing, Wilder reaffirmed the accuracy of his deposition testimony. He again testified he drove a coal truck over surface mines for approximately 18 years prior to working for JRL. He recounted the effects of driving over surface mines:

Q: When you start driving over in surface mining, what's it like to drive in a surface mine?

A: It's like – the roads are like running over a bunch of potholes in the road. Your seat's bouncing up and down. It's – I ride seat [sic] and sometimes the seat bottoms out. It's like falling on the ground and hitting your hind end on the floor. It's solid and it just runs right --- straight up your spine.

Q: And how often would that happen during a day?

A: Everyday. I mean, everyday, every hour.

Q: And that started when you – 18 years ago?

A: Yeah.

Q: Would there be – sometimes it'd be worse? What's the worst it'd be like?

A: Really, it wasn't no worse. That's about the extent of it. I mean, it's just like running – just like you'd lay out a bunch of curb stops in the road and you just run over top of them every day. I mean, there's no give up there.

Q: What problems did that cause with your back?

A: Just soreness in [sic] everyday and just hurting everyday. Time you get out of the truck at the end of the shift, you're hurting so bad you can hardly walk.

Q: And what happened on the – well, let me ask you that. Did that get worse over the period of 18 years, say the last two, three years?

A: Yes.

Q: You had more pain?

A: I had more pain.

Q: Describe the pain.

A: It's numbing pain in the lower back and pain going down the left leg, making the left leg go numb and giving out on me.

Q: How did you treat that?

A: Taking muscle relaxers and hydrocodone for pain and then other than laying on a hard floor and put my feet up in a chair. Only relief I could get.

Wilder reiterated what occurred on July 11, 2019. At the hospital, he was examined, given pain medication, and told to return to the doctor who performed his back surgery. When he returned to Dr. Paul Johnson, the surgeon who performed his back surgery, “nothing was done.” Subsequently, his family physician referred him to UK Medical Center where, once again, “nothing” was done.

Wilder believes he is unable to return to any type of full-time employment because he cannot operate a rock truck or bulldozer and cannot sit for

40 hours a week. Driving a truck would further injure his back. He estimated his daily pain level is 9 to 10 on a scale of 1 to 10. He takes Hydrocodone and Gabapentin prescribed by Commonwealth Pain & Spine. He is unable to rest at night and sitting or standing for long periods of time cause discomfort. Pain interferes with his ability to concentrate. The London Pain Clinic has proposed epidural injections at the L4 and L5 region. The prior injections provided 45 days of pain relief.

Wilder estimated he was off work approximately two months after undergoing the February 2019 fusion surgery. He returned to work operating the rock truck without restrictions. Wilder believes his leg and low back problems started in 2018. Of the 18 years he operated a rock truck and bulldozer prior to his JRL employment, 6 of those years were spent operating a bulldozer with the remainder operating a rock truck. According to Wilder, operating a bulldozer is 10 times worse than operating a rock truck.

The February 7, 2022, Benefit Review Conference Order and Memorandum reflects the following contested issues: “benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, and TTD.” Under the heading “Other” the following is listed: “manifestation date, compensability of medical bills not submitted as of the BRC, correct use of the AMA Guides.”

After summarizing the evidence, the ALJ provided the following Findings of Facts and Conclusions of Law in support of his decision *verbatim*:

...

In analyzing this claim, I have reviewed all of the evidence in this claim, as summarized above. I have

read the parties briefs. Nothing in this Opinion should be construed as disbelieving Mr. Wilder or finding he is not credible. However, this is a cumulative trauma allegation and as a matter of law he is not qualified to make a diagnosis regarding it nor provide a causation statement. Regardless, not only does there exist sufficient evidence to dismiss this claim I feel the evidence is, to me, overwhelming that it be dismissed.

Mr. Wilder had a L4-5 fusion in February 2019. Neither that surgery nor the underlying condition causing it has even been alleged to be work-related. He did not provide notice of it and did not seek workers' compensation benefits for it. He was told sometime in 2019 by his general practitioner that his low back problems were work-related. Then, approximately two months after returning to work, and five months after his surgery, he developed low back pain so severe special measures were needed to extricate him from his truck. He alleges, in essence, that this is wholly unrelated to his surgery but to a new cumulative trauma injury.

However, this allegation itself has taken as somewhat winding road. Frankly, it is unclear from the record if his allegation and his impairment rating are based on the L4-5 surgery or some new, equally severe injury, at L5-S1. His treating medical records from UK Medical Center and Parkview Medical, while no doubt recording his low back pain, which I generally accept, also consistently refer to it as being related to his surgery, albeit they say the surgery was work-related. Dr. Cassidy, at UKMC, states there is a degenerative fragment at L5-S1 causing pain but doesn't say that fragment is work-related. Dr. Cassidy also, on December 3, 2020, diagnoses failed low back syndrome, which is a diagnosis associated with a lumbar surgery which does not help.

Dr. Lockstadt, when he first examined Wilder recorded very few findings, other than pain, and no neurological findings. He diagnoses a work-related L5-S1 injury, with surgery, which is inconsistent with the other records stating the surgery was at L4-5. He also states the L5-S1 fragment is not causing obvious nerve root displacement and is just touching the right nerve. But Wilder's right leg symptoms did not begin until 2021, over a year after he left work. Prior to leaving work his symptoms were in

the low back and left leg. It was during Dr. Lockstadt's deposition he began to emphasize the cumulative trauma aspect of this claim and how that can be diagnosed by history and examination, not with diagnostic studies.

It's all inconsistent and at times contradictory.

The only evidence that is consistent and makes sense, to me, is the opinions of Dr. Stephens. Dr. Stephens is clearly aware of the work Wilder did, both the circumstances and how long. He is a highly respected evaluator and his testimony that he has diagnosed cumulative trauma many times, including when his opinion was sought by a defendant, is uncontradicted. He states that Wilder has two of the three factors, obesity and family history, that would lead a degenerative spine condition to become symptomatic. Wilder does not have any degeneration beyond what would be expected of his age and co-morbid factors. Wilder does not have any work-related cumulative trauma injury.

I accept and adopt the opinions of Dr. Stephens. In reliance on the above analysis and with specific reliance on Dr. Stephens this claim is dismissed.

Significantly, no Petition for Reconsideration was filed.

On appeal, Wilder argues he was first told by a nurse in 2019 that his back pain may be work-related and developed as a result of cumulative trauma occurring while performing his regular job. Wilder observes he had no physical problems when Dr. Dahhan performed a pre-employment examination and cleared him to work for JRL. Wilder complains that although the ALJ stated he did not believe Wilder had a work-related cumulative trauma injury, Dr. Harry Lockstadt's deposition testimony reveals his impairment was caused by repetitive trauma. Wilder asserts as follows: "The ALJ showed his preference and bias in this case by stating Dr. Stephens was familiar with strip mining as he once owned land that he leased

out for strip mining (p. 6).” Wilder points out that on cross-examination, Dr. Stephens testified he was unfamiliar with the surface upon which Wilder was working. Dr. Stephens also acknowledged each property can be different and an individual may be greatly impacted by working on a particular surface. He notes Dr. Stephens considered heavy equipment operation to be a high-risk occupation for the development of a cumulative trauma injury. Further, Dr. Stephens acknowledged that many patients working in the coal mining industry get injured but do not complain to the doctor for fear of losing their job. In arguing Dr. Stephens’ testimony is inconsistent, he asserts:

Dr. Stephens [sic] testimony seems to be inconsistent when he states radiologic changes are consistent with an injury, but testified on page 13 when asked if Mr. Wilder operating a truck on a rough road ‘It’s hard to call that an injury ... if he was riding on a bumpy road and he had recently had lumbar fusion surgery, I believe that could be a possible cause of an exacerbation or a temporary worsening of his pain.’ Dr. Stephens felt that the changes on the diagnostic studies were consistent with his age and were not worse than someone you would see in his age group.

Wilder disputes the accuracy of the ALJ’s characterization of Dr. Lockstadt’s testimony, asserting “Dr. Lockstadt clearly testified as to Mr. Wilder’s causation problems was of the opinion he suffered from cumulative trauma from work which was first diagnosed by a nurse in 2018.”

Wilder’s second argument is short and unclear and we set it forth herein *verbatim*:

The Workers’ Compensation Board is authorized to make a correction when the opposite result would be a gross injustice to one of the parties.

In Messer v. Drees, 382 S.W.2d 209 (Ky. 1964), the Court discussed as follows:

When subsequent events indicate that an award was substantially induced by a misconception as in to the cause, nature or extent of disability at the time of the hearing, justice requires further inquiry. Whether it be called a 'mistake' or a 'change in conditions' is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it.

There can be no real dispute that the Petitioner is entitled to at least the 3 multiplier in accordance with the law in effect on the last date of his employment. The Plaintiff's injury caused him to be unable to perform his duties as he did in the past. The Workers' Compensation Board is authorized to make a correction and in this case the Judge erred. The Board in its authority has the ability to remand this case to the ALJ to enter an appropriate finding and award.

ANALYSIS

We begin by observing Wilder did not file a Petition for Reconsideration following the March 18, 2023, Opinion and Order dismissing his claim. In the absence of a Petition for Reconsideration, on questions of fact, the Board is limited to a determination of whether there is any substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, where a Petition for Reconsideration was not filed prior to the Board's review, inadequate, and/or incomplete fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, our sole task on

appeal is to determine whether the ALJ's decision is supported by substantial evidence.

Wilder impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence for that of the ALJ. That is not the Board's function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). As substantial evidence supports the ALJ's decision and Wilder's appeal is nothing more than a re-argument of the evidence before the ALJ, we affirm.

As the claimant in a workers' compensation proceeding, Wilder had the burden of proving each of the essential elements of his cause of action, including causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Wilder was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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).

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).

Dr. Stephens conducted an independent medical evaluation of Wilder on November 16, 2021. In his subsequent report, he set forth the history he obtained from Wilder and the results of his physical examination. His diagnostic impression is chronic lower back pain without evidence of lumbar radiculopathy, status post L4-5 decompression and fusion with poor surgical result. Dr. Stephens opined the medical evidence does not support Wilder's claim for cumulative injury to the lumbar spine, and his "opinion is based upon [Wilder's] pattern of treatment before and after he stopped working, as well as the appearance of his diagnostic studies." Dr. Stephens'

opinion was also influenced by the “relatively short duration of exposure to cumulative microtraumas during [Wilder’s] career as a heavy equipment operator.”

Dr. Stephens believed the onset of lower back symptoms resulting in the February 2019 lumbar fusion surgery “was unrelated to any reported date specific or cumulative traumatic injury at work at the time.” Dr. Stephens noted the majority of patients who undergo lumbar fusion surgery have significant lower back pain which limits their functional capacity. Thus, it is likely Wilder had lumbar degenerative disc disease at L4-5 and L5-S1 associated with spinal stenosis at L4-5. This condition is what prompted Dr. Johnson to recommend lumbar decompression and fusion. However, in Wilder’s case, the level of degenerative change in those lower two lumbar segments is relatively mild. Notably, Dr. Stephens found no radiographic evidence of advanced/accelerated degenerative change in the lumbar spine. Dr. Stephens opined “this is a prerequisite for the diagnosis of a cumulative trauma injury and is not present in Wilder’s case.” Although Wilder’s lumbar spine condition merits an impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, Dr. Stephens concluded the condition is not related to cumulative trauma injury in the workplace. Dr. Stephens elaborated further:

In my experience, it is highly unlikely for patients with relatively brief occupational exposure to even heavy demand occupations to develop the syndrome of cumulative traumatic injury. Mr. Wilder’s radiographs in this case conclusively demonstrate that he does not have advanced degenerative change in his lumbar spine and therefore would not be an exception to the general principle that greater occupational exposure increases one’s risk of the development of spinal cumulative traumatic injury.

Similarly, Wilder's occupational restrictions are unrelated to a cumulative trauma injury. Rather, his restrictions are based on the chronic lower back pain due to the poor surgical result from the lumbar fusion.

After reviewing Dr. Lockstadt's report, Dr. Stephens agreed with his rating methodology. However, he believed Dr. Lockstadt's report is unclear concerning his opinions as to causation and apportionment. Also unclear is whether Dr. Lockstadt believed "Wilder has the syndrome of cumulative traumatic injury to his lumbar spine."

In his January 3, 2023, deposition, Dr. Stephens acknowledged receiving a history from Wilder of working 18 to 19 years as a heavy equipment operator on surface mines. Wilder told him he initially started having back pain in 2018 and eventually underwent lumbar decompression and fusion in February 2019. However, Wilder did not report to Dr. Stephens any date-specific injury "either before his surgery or after his surgery." Dr. Stephens explained the risk factors Wilder possessed for cumulative trauma or degenerative disc disease:

A: Yes. He was positive for two of the three risk factors. His mother had had multiple spinal surgeries, indicating that in his biological mother and his family there's a genetic predisposition for progressive degenerative disk disease. And then also his body mass index is 36.9, placing him in the category of morbidly obese, and that is a known risk factor for progressive symptomatic degenerative disk disease of the spinal column.

Dr. Stephens recounted why he found no evidence of cumulative trauma injuries:

A: I did not. And I base a cumulative trauma exam on multiple factors, with the most relevant factor being the appearance of diagnostic studies. In order to diagnose

cumulative traumatic injury to the spinal column, there must be advanced or accelerated degenerative change for a particular age group, and I did not feel that Mr. Wilder's radiographs were consistent with advanced or accelerated degenerative change.

Dr. Stephens found significant Dr. Lockstadt's failure to set forth in his report a diagnosis of a work-related injury, explaining as follows:

A: I could not, no. There was – I could find – I could not find in his report, and I'll pull that out of my records here, any specific clause where he stated, you know, his opinions on causation or any apportionment between multiple causative factors.¹

Also significant to Dr. Stephens was no radiographic evidence of advanced or accelerated degenerative change which would cause Wilder to be susceptible to cumulative trauma injury. As to whether the events of July 11, 2019, constituted a specific injury, Dr. Stephens testified as follows:

A: I mean, it's hard to call that an injury, you know, but, you know, if he was riding on a bumpy road and he had recently had lumbar fusion surgery, I believe that could be a possible cause of an exacerbation or a temporary worsening of his pain.

Dr. Stephens testified he has diagnosed work-related cumulative trauma in previous cases, explaining:

A: Yes, on multiple occasions. In fact, I have diagnosed cumulative trauma in cases that your firm has sent me on multiple occasions when you're asking me to evaluate for it, so yes. I believe that – some physicians do not believe that cumulative trauma exists as a

¹ Dr. Lockstadt's report reveals a "previous history of new onset pain Work Injury; 3 years ago" and "History is in 2019 he had onset of lower back pain with left lower extremity pain." Dr. Lockstadt's assessment was "central back pain, likely myofascial, and probable symptomatic disc injury disc condition, L5-S1. Left sacroiliac joint arthropathy responsible for the left hip pain, left lower extremity pain." As noted by Dr. Stephens, Dr. Lockstadt did not indicate the onset of lower back pain, numbness, and weakness occurred at work or resulted from any work activities. Similarly, in his report, Dr. Lockstadt did not offer an opinion as to whether Wilder had sustained an acute or cumulative trauma injury while in the employ of JRL.

condition. I do believe it exists, and I believe I've seen it, and I know that I've diagnosed it on multiple occasions.

Regarding his knowledge of the type of work Wilder performed and whether the effects of operating a rock truck or bulldozer on surface mines could result in cumulative trauma, Dr. Stephens offered the following:

A: Yeah, so the short answer's no, and I would qualify that by saying that I know approximately how long he worked as a heavy equipment operator. And though it wasn't, you know, what I would call an insignificant exposure in terms of number of years, it also wasn't a very significant exposure which you would see, you know, at the 25- to 35-year interval, if someone had done it that many years. And I've certainly evaluated many patients with that level of exposure.

...

Q: And with his 18, 19 years in heavy equipment operation, do you know actually the terrain he was operating in?

A: I do not, but I am a native of Eastern Kentucky and I have personally been on surface mines. In fact, I've even leased some land that I used to own in Eastern Kentucky which was mined, and so I have a general understanding of, you know, what the terrain of a surface mine is like, although I'm sure there's a lot of individual differences.

...

A: You broke up on the first part of your question, but I believe my answer is yes. I mean, clearly when you're operating heavy equipment on a surface mine there is going to be those things you said. There's going to be vibration, there's going to be bumps or jolts, et cetera, on a daily basis. So I consider heavy equipment operation to be, you know, a high-risk occupation for the development of cumulative traumatic injury.

Dr. Stephens' opinions, expressed in his report and during his deposition testimony, qualify as substantial evidence supporting the ALJ's

determination Wilder did not sustain a cumulative trauma injury while in the employ of JRL. Further, the fact that the record contains conflicting testimony from other medical experts contrary to the ALJ's conclusions does not compel a different result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). As fact-finder, the ALJ is vested with the authority to weigh the medical evidence, and if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App., 2006).

Significantly, we note Dr. Lockstadt's July 12, 2021, report does not establish Wilder sustained an injury due to cumulative trauma occurring while in the employ of JRL, as Dr. Lockstadt did not address the cause of Wilder's lumbar spine condition and the impairment rating attributable to that condition. Similarly, Dr. Lockstadt's deposition testimony does not firmly demonstrate Wilder sustained a work injury. During his deposition, Dr. Lockstadt addressed causation, testifying he believed continuing symptoms were caused by repetitive trauma at work. However, Dr. Lockstadt acknowledged Wilder did not state the specific cause of his initial problems beginning in 2018. Dr. Lockstadt testified:

Q: Dr. Lockstadt, I believe you mentioned in your earlier testimony that Mr. Wilder told you he began having problems with his back in 2018; is that correct?

A: That is correct.

Q: What did he tell you happened in 2018 to cause that problem?

A: I don't recall.

Q: Did he tell you he had a specific injury?

A: Let me look at my records.

Q: Okay.

A: I don't have anything in my records to show he had a specific injury.

At one point during his deposition, Dr. Lockstadt refused to attribute the impairment rating to cumulative trauma or to a specific injury testifying as follows:

A: My understanding was that he had ongoing gradually increasing lower back pain secondary to the cumulative trauma that he was experiencing.

Q: So you did not assess a 23 percent whole person impairment for a specific injury but to cumulative trauma. Is that what you're testifying to?

A: No. I'm testifying his impairment rating per the AMA guidelines would be 23 percent.

Q: Correct, Doctor. I'm trying to figure out what you're attributing that to. Are you attributing it to the effects of cumulative trauma or to a specific injury?

A: I don't know the answer to that question.

Dr. Lockstadt acknowledged he did not have a complete grasp of Wilder's work history of operating heavy machinery in the mining industry.

Q: Did Mr. Wilder tell you what he did in his employment?

A: He did. It was mostly heavy work and operating heavy machinery in the mining industry.

Q: What did he tell you he operated?

A: I don't remember.

Q: Would you have noted that in your report?

A: No.

Q: Would you have filled out – or would the claimant have filled out any kind of preexam paperwork to note what his job had been?

A: Sometimes. Let me check. No, he did not give me anything of significance in his records here.

Q: And you don't recall what he told you?

A: Correct.

Q: Did he tell you how many years he operated heavy equipment?

A: I don't recall.

In summary, Dr. Stephens' opinions set forth in his report and deposition testimony qualify as substantial evidence sufficient to support the ALJ's determination Wilder did not sustain a work injury arising out of cumulative trauma occurring while in the employ of JRL. The fact the record contains conflicting testimony from other medical experts contrary to the ALJ's conclusions does not compel a different result. Copar, Inc. v. Rogers, *supra*. As fact-finder, the ALJ is vested with the authority to weigh the medical evidence, and if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, *supra*.

Moreover, after considering the entire record, the ALJ chose not to rely upon Dr. Lockstadt's opinions in resolving the issue of causation. In light of the contents of Dr. Lockstadt's report and his deposition testimony, we cannot say the ALJ's opinion that Wilder did not sustain a work injury arising from cumulative trauma while in the employ of JRL is so unreasonable under the evidence that it

must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra.

Regarding Wilder's second argument on appeal, albeit ambiguous, it appears Wilder is asserting he is entitled to the three-multiplier. However, since this Board has affirmed the ALJ's dismissal of Wilder's claim for an alleged work-related cumulative trauma injury, this second argument has been rendered moot.

Accordingly, the March 18, 2023, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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