

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-000935-WC

FORD MOTOR COMPANY (LAP)

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-13-78332

SHAWN MILLIRON; HON. OTTO DANIEL  
WOLFF, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Ford Motor Company (LAP) appeals from an Opinion of the Workers' Compensation Board Affirming in Part, Vacating in Part and Remanding an Opinion, Order and Award rendered by Hon. Otto D. Wolff, IV, Administrative Law Judge ("ALJ"). Ford argues that the Board erred in its findings on

impairment and apportionment, that its decision is not consistent with the *AMA Guides*, and that the ALJ's decision is not based on substantial evidence. Ford also maintains that the Board erred in affirming the ALJ's finding that Shawn Milliron reached maximum medical improvement ("MMI") on December 1, 2013. For the reasons stated below, we find no error and AFFIRM the Opinion of the Workers' Compensation Board.

In 1992, Shawn Milliron began employment with Ford at a Minnesota production plant. In 1997, he sustained a work-related neck injury. As a result of the injury, he underwent a laminectomy and cervical fusion. After the fusion surgery, Milliron's treating surgeon, Dr. Sunny Kim, assigned an impairment rating of 23.5%. According to the record, this rating was not based on the *AMA Guides*. Milliron's subsequent workers' compensation claim was settled based on a 24% impairment rating.

Thereafter, Milliron returned to full-duty employment at Ford with no restrictions. Over the years that followed, Milliron treated residual neck pain with over-the-counter medications and chiropractic treatments.

In 2011, the Minnesota plant closed and Milliron was transferred to Kentucky. Two years later, on May 7, 2013, Milliron experienced a popping sensation and immediate neck pain when he yanked hard on a cable to release a part off of a rack. Milliron sought treatment at Ford's in-house medical facility, where he was prescribed physical therapy and placed on light duty. Milliron was

later treated by orthopedic surgeon Dr. Matthew Phillips, who referred Milliron to pain management specialist Dr. Gary Reasor.

Dr. Reasor ordered a cervical MRI, which was conducted on March 21, 2014. He diagnosed multiple degenerative changes with stenotic lesions at the C3-4 spine. Dr. Reasor referred Milliron to neurosurgeon Dr. Kimathi Doss. Dr. Reasor opined that if Dr. Doss did not recommend surgery, Dr. Reasor would characterize Milliron as having reached MMI as of April 24, 2014.

Milliron was then seen by Dr. Doss, who recommended against surgical intervention and ordered a myelogram. In July 2014, Dr. Reasor listed Milliron's current diagnosis as cervical spine stenosis and cervical radiculopathy.

After the May 7, 2013 injury, Milliron was placed on light duty. Over the following 18 months, he worked sporadically through December 6, 2014, due to the lack of positions within his restrictions. Milliron would later testify that he still experiences significant pain in his cervical spine on a daily basis, with frequent, intense headaches. He takes four prescription medications per day to control the pain, and is currently restricted from overhead work, repetitive movement of the neck, bending and lifting over five pounds, and the use of vibratory tools.

Milliron filed an independent medical evaluation ("IME") compiled by Dr. Warren Bilkey. Dr. Bilkey diagnosed a cervical strain on May 7, 2013, superimposed on a prior history of C4-5 decompression and fusion surgery. He attributed each of these ailments to the 2013 work injury. Dr. Bilkey assessed a

28% impairment rating for Milliron's cervical condition pursuant to the *AMA Guides*. He went on to acknowledge that a portion of the current impairment is attributable to Milliron's 1997 injury, but expressed difficulty in determining the exact percentage because Dr. Kim's 1997 impairment rating was not assessed pursuant to the *AMA Guides*. While noting that the *AMA Guides* do not provide guidance under this circumstance, Dr. Bilkey opined that the "most reasonable medically common sense method" was to apportion one-third of the impairment to the 2013 injury. Accordingly, Dr. Bilkey assigned a 9% impairment rating to the 2013 cervical injury.

Other IMEs were conducted in 2013 and 2015. The former was conducted by Dr. John Guarnashelli, who determined that Milliron's 2013 injury was primarily a soft tissue injury. As of August 22, 2013, he did not believe that Milliron was at MMI. The 2015 IME was conducted by Dr. Timir Banerjee, who concluded that the 2013 injury was merely a temporary aggravation of a pre-existing active condition. Accordingly, he assigned no impairment rating for the 2013 injury, and opined that Dr. Bilkey's report was not sufficient to apportion one-third of the current impairment to the 2013 injury. Finally, Milliron alleged a workplace safety violation arising from his claim that no action was taken on his complaint that a rack was sticking. Ford manager Lisa Odom testified that she was aware of complaints about the rack, but did not know if Milliron had made any of those complaints.

The matter proceeded before the ALJ, who concluded that the 2013 injury aggravated Milliron's cervical condition resulting in a permanent injury. After noting the difficulty in assessing the matter because the prior injury was not considered under the *AMA Guides*, the ALJ found Dr. Bilkey's report persuasive and adopted the 9% impairment rating.

As a result, the ALJ awarded temporary total disability ("TTD") benefits from June 20, 2013, through December 1, 2014, when Dr. Bilkey determined that Milliron was at MMI. The ALJ went on to deny Milliron's claim of a safety violation after determining that the rack would not be reasonably likely to cause serious physical harm.

Milliron and Ford each petitioned for reconsideration. Milliron requested reconsideration of the denial of his safety violation claim, and an analysis as to whether he is permanently totally disabled ("PTD"). Ford challenged the ALJ's method of apportionment and the date of MMI. In addressing these matters, the ALJ acknowledged that the original petition failed to address the issue of PTD. Relying on *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000), the ALJ determined that Milliron is not permanently totally disabled. The ALJ went on to note that Milliron simply sat in the break room from the date of injury until June 20, 2013, and concluded therefrom that this activity did not constitute a return to work. As such, the ALJ amended the award of TTD and permanent partial disability ("PPD") benefits to commence on May 7, 2013.

Finally, the ALJ declined to revise his opinion as to the issues of apportionment or the safety penalty.

Thereafter, Ford and Milliron each appealed to the Board. Ford challenged the adoption of Dr. Bilkey's impairment rating, arguing that the rating was not assessed in conformity with the *AMA Guides*. It also argued that the award of TTD benefits was unsupported by substantial evidence. The Board rendered an Opinion on June 3, 2016, finding no error as to the ALJ's adoption of Dr. Bilkey's impairment rating. It reversed and remanded the ALJ's Award, however, for additional analysis of Milliron's entitlement to TTD benefits, and for entry of a new award commencing PPD benefits on the date of injury. This appeal followed.

Ford now argues that the Board erred in affirming portions of the ALJ's Opinion and Award. Ford first contends that the ALJ erred in adopting Dr. Bilkey's assessment that one-third of Milliron's current impairment is attributable to the 2013 injury. Ford notes that Dr. Bilkey and Dr. Banerjee agree that Milliron's current impairment rating is 28%. The issue was how much of that is attributable to the pre-existing 1997 injury and surgeries, versus how much was caused by the 2013 injury at Ford. Dr. Bilkey noted that the 1997 impairment rating was not made in accordance with the *AMA Guides*; therefore, Dr. Bilkey employed what he called "the most reasonable medically common sense method" to assess one-third or 9% to the 2013 injury. Ford maintains that this methodology is in complete contradiction to what is required under the *AMA Guides* and that the

Board erred in failing to so find. Rather, Ford contends that Milliron's purported 1997 impairment rating of 25% should be subtracted from his present impairment rating of 28% to conclude that a 3% impairment is attributable to the 2013 injury.

In considering this matter, the Board recognized that while Dr. Kim produced an impairment rating arising from the 1997 injury, that rating was not made in conformity with the *AMA Guides*. It went on to conclude that the *AMA Guides* do not provide guidance under such circumstances. Our role is to correct the Board only if we perceive that "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The crux of the inquiry on appeal is whether the finding was so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. *Ira. A. Watson Dept. Store* at 52.

As noted by the Board, the proper interpretation of the *AMA Guides* is a medical question which must be left to medical experts. *Kentucky River Enters., Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003). Because the *AMA Guides* does not provide guidance under the facts at bar, Dr. Bilkey assigned an impairment rating for Milliron's prior injury which he subtracted from the current impairment rating. Dr. Bilkey's conclusion is reasonably supported by the record and the law. The issue is not whether Dr. Bilkey could have reached a different conclusion. Rather, the question is whether his opinion constituted substantial evidence upon which the ALJ was free to rely in the exercise of his discretion. *Tokico (USA), Inc. v. Kelly*,

281 S.W.3d 771 (Ky. 2009). Dr. Bilkey's opinion constitutes substantial evidence, and we find no error on this issue.

Ford goes on to argue that the ALJ and the Board erred in finding that Milliron reached MMI on December 1, 2013. Dr. Bilkey opined that Milliron reached MMI as of the date of the December 1, 2013 evaluation. In contrast, Dr. Banderjee determined that Milliron reached MMI on November 1, 2013, and provided the rationale for this date because this was the first time Milliron met with Dr. Phillips and there had been no change in Milliron's status. Ford argues that because Dr. Bilkey merely chose the date of Milliron's MMI to coincide with a medical evaluation, whereas Dr. Banderjee selected a specific date associated with more compelling rationale, only Dr. Banderjee's opinion constituted substantial evidence. Ford maintains that the ALJ erred in finding Milliron's date of MMI to be December 1, 2013, rather than November 1, 2013.

As noted above, the question for our consideration is not whether the evidence would have supported a finding different than that reached by the ALJ. Rather, we must determine if the conclusion reached was supported by substantial evidence of record. *Tokico, supra*. Dr. Bilkey's report constitutes such evidence. The ALJ, as the finder of fact, has the sole authority to determine the quality, character, and substance of the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Where the "medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citation omitted).



Because the ALJ's decision on this issue favored Milliron, we must determine whether there was some evidence of substance to support the ALJ's findings. Dr. Bilkey's evaluation fixing Milliron's date of MMI constitutes such evidence, and accordingly we find no error.

For the foregoing reasons, we AFFIRM the Opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE SHAWN  
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