Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 29, 2015

CLAIM NO. 201400342 & 201400339

ARCH COAL, INC. PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

GREG VANOVER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Arch Coal, Inc. ("Arch") seeks review of the December 1, 2014, Opinion and Order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") determining the specific work-related injuries for Greg Vanover ("Vanover") for which Arch must provide medical benefits. Arch also appeals from the December 30, 2014, Order amending the Opinion and Order to reflect it is only responsible for

providing past and future medical benefits for treatment of Vanover's neck, shoulders, low back, and knees.[1]

On appeal, Arch asserts as follows:

> KRS 342.020(1) provides for the payment of medical for the cure and relief from the cure and relief from the effects of an injury. Respondent filed a claim for injuries as a result of cumulative trauma to his back, knees, shoulders, wrists. ALJ Rudloff's award of past and future medical for the neck exceeds Respondent's claim for benefits.
>
> . . .
>
> The petitioner respectfully submits that ALJ Rudloff's award of both past and future medical for the neck is in error and must be reversed based on Respondent's claim for benefits.

On February 10, 2014, Vanover filed a Form 101 (Claim No. 2014-00342) alleging cumulative trauma injuries to his back, knees, shoulders, and wrists occurring on November 7, 2013, while in the employ of Arch. On that same day, Vanover filed a Form 103 (Claim No. 2014-00339) alleging a work-related hearing loss claim against Arch with his last date of exposure being November 7, 2013.

[1] In his December 1, 2014, Opinion and Order, the ALJ ordered Arch to be responsible for the treatment of Vanover's neck, shoulders, both upper extremities, lower back, and knees.

By Order dated March 28, 2014, the ALJ consolidated the claims and directed all pleadings to be filed under Claim No. 2014-00342.

Attached to Vanover's Form 101 is a medical statement signed by Dr. Dale Williams on December 19, 2013. Dr. Williams' diagnosed "[c]ervicalgia with degeneration severe at C5 C6, C6 C7 with radiculitis in bilateral upper extremities. Lumbalgia with severe degeneration and radiculitis bilateral lower extremities." After noting Vanover's age and years of experience in the coal mining industry, Dr. Williams stated:

> [Vanover] has severe degeneration of cervical and lumbar regions which is consistent with the accumulative damages caused by the occupational hazard of heavy equipment operating and the coal industry.

On May 22, 2014, Vanover introduced the Form 107 prepared by Dr. Arthur Hughes dated March 26, 2014. Dr. Hughes diagnosed the following:

> 1. Neck pain with suspected radiculopathy.
>
> 2. Right shoulder pain and limitation of motion.
>
> 3. Left shoulder pain and limitation of motion.
>
> 4. Right carpal tunnel syndrome.
>
> 5. Left carpal tunnel syndrome.

6. Lower back pain with radiculopathy.

7. Right knee pain.

8. Left knee pain.

With respect to causation, Dr. Hughes stated Vanover had worked in strip mining for twenty-five years operating heavy equipment resulting in repetitive jarring, bouncing, and jostling which caused cumulative trauma to multiple areas of the body and resulting in pain and limitation of function. Under the heading "causal relationship," he stated Vanover had been operating heavy equipment in strip mining for twenty-five years and in recent years developed multiple areas of pain and limitation of function "including neck, both shoulders, both hands, lower back, and both knees." Based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Hughes assessed a 5% impairment rating for neck pain with radiculopathy, a 4% impairment rating for right shoulder pain and limitation of motion, a 4% impairment rating for left shoulder pain and limitation of motion, no impairment for carpal tunnel syndrome in either hand, and a 5% for lower back pain with radicular symptoms. He assessed no impairment for pain in either knee. Dr. Hughes provided

the following note under the grid containing his various impairment ratings:

> The listed body parts include back, knees, shoulders, wrists, and these areas have impairments which combine for a total permanent partial impairment of the whole person of 13%. If we include neck pain with radicular symptoms, which is a consequence of repetitive trauma as well, as detailed above, the impairment would be 17% whole person permanent partial impairment.

Significantly, Arch did not object to this report.

On May 27, 2014, the university evaluation report of Drs. Raleigh O. Jones and Abby B. Mattingly was introduced which stated audiograms and other testing established a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. Drs. Jones and Mattingly concluded Vanover's hearing loss is related to repetitive exposure to hazardous noise over an extended period of employment. Pursuant to the AMA Guides, they assessed no impairment rating. The only restriction placed upon Vanover was the use of hearing protection.

Vanover's June 26, 2014, deposition was introduced by Arch. Vanover testified he last worked on

November 7, 2013, at Camp Creek.[2] He provided a history of his work in the coal industry and the jobs he performed during that time. He testified concerning the medical care he received after being laid off. During his deposition, Vanover was asked to provide all of the problems which he believed were work-related. Concerning his neck problems, the following exchange took place between Vanover and Arch's counsel:

> Q: Alright. Any other problems that you think are related to your work?
>
> A: My neck.
>
> Q: What problem do you have with your neck?
>
> A: I get whiplash or a stiff neck real easy.
>
> Q: And where do you note the pain or the stiffness in your neck?
>
> A: Where do I know it?
>
> Q: Where do you notice it? Is it at the base, right there where it goes across your shoulders, or is it higher or...
>
> A: Right above between my shoulder blades is where it starts from.
>
> Q: Okay. And where does it go from that point?
>
> A: Well, when something happens, I can't do this or I can't do that.
>
> Q: Can't turn your head?

[2] Vanover's deposition was filed in the record on July 27, 2014.

> A: No.
>
> Q: When did you start having problems being able to turn your head?
>
> A: Well, I know where it started at, but I don't actually know the date. I know it started when I worked at Chavies down there, four or five year [sic] ago, four year [sic] ago.
>
> Q: Okay. Now, before you were laid off did anybody do a work-up or take any x-rays of your neck or cervical spine?
>
> A: No, ma'am.
>
> Q: Now, you've had x-rays taken since that time at Primary Care?
>
> A: Yes.
>
> Q: Other than receiving medication through Primary Care, have you received any other treatment for your complaints of pain, any type of physical therapy, any type of injections, anything like that?
>
> A: No, ma'am.

After discussing his neck problems, Vanover identified his wrist problems as being work-related.

On July 3, 2014, Arch filed the independent medical evaluation report of Dr. Gregory Snider. Dr. Snider received an accident/treatment history from Vanover and also reviewed Dr. Hughes' Form 107 and Dr. Williams' medical statement. As a result of his physical examination and review of various medical records and imaging studies, Dr. Snider diagnosed "low back pain" and "arthralgias and

myalgias." He noted Vanover had undergone two prior evaluations for lower back pain with findings consistent with small disc protrusions or bulges. Vanover continued to work without any defined functional deficit. He noted more widespread complaints of neck, shoulder, wrist, and knee pain surfaced after his layoff. Imaging studies revealed either normal findings or degenerative changes consistent with Vanover's age. Dr. Snider found no consistent evidence of a neurologic deficit. He concluded "[i]n short, I do not see any convincing objective findings consistent with a 'cumulative trauma' condition related to Mr. Vanover's work." Dr. Snider stated the AMA Guides indicated that complaints of pain were insufficient for assessing impairment. He stated that findings of common developmental changes or degenerative change consistent with age are inadequate for assessing impairment. He noted the imaging studies have shown either normal or age-consistent findings. In addition, Dr. Snider found no evidence of severe degenerative change as suggested by Dr. Williams. Therefore, Dr. Snider did not find any objective evidence of a ratable cumulative trauma condition related to Vanover's work.

The July 7, 2014, Benefit Review Conference Order and Memorandum ("BRC") reflects the contested issues were:

"work-relatedness/causation; benefits per KRS 342; credit for unemployment and WARN; 'injury' as defined by the Act; TTD (overpayment/underpayment); pre-existing active; and medical benefits." Under "Other" was indicated "permanent total disability."

Dr. Snider's July 3, 2014, deposition was introduced by Arch.[3] Dr. Snider was asked to provide Vanover's complaints and testified, in relevant part, as follows:

> A: . . .
>
> He complained of some back pain. He complained of knee pain, left worse than right. He rated it about three to four over ten. He reported having decreased range of motion in his knees.
>
> He complained of shoulder weakness and occasional pain on both sides. He complained of what he described as a crick in his neck and arm numbness and tingling, seemingly not one side more than the other, just generalized arm tingling.

The following exchange took place between Arch's counsel and Dr. Snider:

> Q: Now, Doctor, what did your examination reveal? And we'll start with the cervical spine.
>
> A: Just looking at his neck did not reveal any obvious abnormality. He did not have tenderness, spasms or trigger

[3] Dr. Snider's deposition was filed in the record on July 17, 2014.

> points. He had minimal generalized diminishment of range of motion, but no significant or focal functional decrease in range of motion in his neck.
>
> He had diminished – but not absent -– reflexes. He did not appear to have subjectively diminished sensation in the right distal ulnar nerve distribution, so that would be in the right little finger and part of the ring finger distal to the wrist.
>
> He did not have any weakness, although on exertion he complained of shoulder pain.
>
> Q: And Doctor, could you find any pathological basis for his diminished findings relative to the fingers?
>
> A: Well, of course, all I can do is write down the findings. He did seem to have a consistently diminished sensation –- that's sharp/dull discrimination -- in the right little finger and part of the ring finger, but that did not appear to be related to a cervical spine problem.
>
> That would be most consistent with an ulnar nerve irritation in the wrist.

Dr. Snider addressed the impairment ratings assessed by Dr. Hughes. Concerning Dr. Hughes' 5% impairment rating for Vanover's neck condition, Dr. Snider testified:

> Q: Now, Dr. Hughes has assessed a 17 percent impairment rating, and we'll address each area. He assessed a five percent for the cervical spine, five percent for the lumbar spine.

> Why do you disagree with those assessments?
>
> A: Well, he has –- the five percent for the cervical spine for Dr. Hughes' part it looks like is based pretty solely on the subjective complaints.
>
> The AMA Guides points out that at least for spinal complaints subjective reporting of pain is inadequate for assessing impairment and common developmental or age-related degenerative changes are also inadequate for assessing impairment.
>
> So the only -– for the cervical spine, the findings has been some disc degeneration at C5-6, an age-consistent, common, typical finding, not suggestive of any advanced process.

The July 24, 2014, Hearing Order reflects as follows: "CASE SETTLED: The defendant employer agrees to pay the plaintiff a lump sum of $35,000.00 for CT and HL. Medical to be submitted to ALJ. [plaintiff's] CWP claim is in abeyance."

On September 9, 2014, the ALJ approved separate Forms 110 Agreements as to Compensation for the hearing loss claim and the cumulative trauma injuries claim. The Form 110 relating to Vanover's cumulative trauma injuries claim lists the injuries and body parts affected as back, knees, shoulders, and wrists. It also notes Dr. Williams did not assess an impairment rating, Dr. Hughes assessed a 13% impairment rating, and Dr. Snider assessed a 0%

impairment rating.[4] The agreement states Vanover shall receive a lump sum settlement of $10,000.00 which included $100.00 each as consideration for the waiver of vocational rehabilitation and right to reopen. Vanover did not waive his right to past and future medical benefits.

The December 1, 2014, Opinion and Order contains the following introduction:

> Plaintiff filed a Form 101 on February 10, 2014 alleging that on November 7, 2013, while employed by defendant, he sustained work-related injuries to his back, knees, shoulders and wrists. Plaintiff also filed a Form 103 on February 10, 2014 alleging that on November 7, 2013 he sustained or became disabled due to occupational hearing loss arising out of and in the course of his employment with defendant. Defendant filed two Form 111s on April 28, 2014 denying plaintiff's claims. The Benefit Review Conference was held on July 7, 2014. On July 24, 2014, the parties settled the case, by the terms of which defendant agreed to pay to the plaintiff a lump sum of $35,000.00 for his cumulative trauma and hearing loss claims. The parties agreed that the plaintiff's CWP claim was held in abeyance and that the medical dispute was to be submitted to the Judge for decision. On September 9, 2014, I approved two Form 110s, in one of which the issue of medical expenses is to be submitted to me for decision. The parties waived a Final Hearing and

[4] The 13% impairment rating of Dr. Hughes did not include the 5% impairment rating for the neck condition.

> submitted the medical dispute on the record.

The ALJ also identified the contested issue as follows:

> As noted above, the defendant raised a medical dispute concerning the plaintiff's alleged cumulative trauma injuries and whether the defendant was obligated to pay any medical expenses due to said alleged cumulative trauma.

After summarizing the evidence, the ALJ entered, in relevant part, the following findings of fact and conclusions of law:

> KRS 342.020 requires the employer to pay for cure and relief from the effects of an injury or occupational disease the medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.
>
> . . .
>
> I make the determination that the evidence from the plaintiff Vanover, as covered above, is credible and convincing testimony. I also make the determination that the medical evidence from Dr. Hughes and Dr. Williams, as covered above, is very persuasive and compelling.
>
> . . .
>
> Based upon the credible and convincing lay evidence from the plaintiff, as covered above, and the

> persuasive and compelling medical evidence from Dr. Hughes and Dr. Williams, as covered in detail above, I make the determination that the plaintiff sustained work-related injuries to his neck, both shoulders, both upper extremities, lower back and both knees due to cumulative trauma while employed by the defendant.
>
> Based upon the plaintiff's credible and convincing lay evidence and the persuasive and compelling medical evidence from Dr. Hughes and Dr. Williams, I make the determination that under the decision of the Kentucky Supreme Court in *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky.2007), the plaintiff is entitled to an award of both past and future medical benefits for the aforesaid injuries, and I so rule. I find that in *Mullins v. Mike Catron Construction/Catron Interior Systems, Inc*., 237 S.W.3d 561 (Ky. App. 2007), the Kentucky Court of Appeals noted that the Judge is entitled to exercise his or her discretion in making a determination regarding future medical benefits. I also rely upon the decision of the Kentucky Supreme Court in *Scottsville Manor v. Binion,* 2014 WL 5410292 (Ky. 2014).

The ALJ ordered Arch and its carrier are responsible for any and all past and future medical expenses incurred by Vanover for the "treatment of his neck, both shoulders, both upper extremities, lower back, and both knees."

Arch filed a petition for reconsideration requesting the ALJ reconsider his finding relative to the

upper extremities. It stated Vanover's Form 101 alleged injuries to his back, knees, shoulders, and wrists and did not allege an injury to both upper extremities. Therefore, Arch asserted "any award of medical would exceed [Vanover's] workers' comp claim."

In the December 30, 2014, Order ruling on the petition for reconsideration, the ALJ amended his Opinion and Order as follows:

> It is hereby ADJUDGED and ORDERED that the Opinion and Order Section VI paragraph A be amended to read as follows:
>
> The medical dispute raised in this case is decided in favor of the plaintiff and the plaintiff is entitled to recover from the defendant and its workers' compensation insurer any and all medical expenses, both past and future, incurred by the plaintiff for treatment of neck, shoulders, low back, and knees.

KRS 342.270(1) specifically provides as follows:

> If the parties fail to reach an agreement in regard to compensation under this chapter either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. **When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued**

> **and which are known, or should reasonably be known to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.** (Emphasis added.)

Once an application for benefits is filed by an injured worker, KRS 342.270(1) places a burden upon the worker to join all accrued and known causes of action that may exist against the same employer during the pendency of the claim. CR 15.02 permits a motion to amend the pleadings in order to conform to the evidence to be made by "any party at any time, even after judgment." *See* CR 15.02; Kroger Co. v. Jones, 125 S.W.3d 241 (Ky. 2004); Nucor Corp. v. General Electric Co., 812 S.W.2d 136 (Ky. 1991); Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). CR 15.02 states, in relevant part, as follows:

> Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

The law is clear that an ALJ may consider and decide an issue or claim tried by consent of the parties, even when an issue or claim is never formally incorporated as part of an injured worker's application for benefits. *See* Id., Kroger Co., supra, Nucor Corp., supra, Collins,

supra. The Kentucky Supreme Court directed that to preserve an objection to a deficient pleading is by way of objecting to the introduction of evidence on an unpleaded issue. Nucor at 145. The Court further stated:

> [t]he theory of implied consent does not turn on actual consent but on actual prejudice. The concept of actual prejudice is not related to winning or losing, but to being unable to present a defense which would have been otherwise unavailable.

Id. at 146.

In the case *sub judice*, even though Vanover did not specifically allege a neck injury in his Form 101, the parties tried Vanover's claim for a work-related neck condition by consent. As noted, Vanover introduced Dr. Hughes' Form 107 which reflects he diagnosed a work-related neck injury and assessed an impairment rating. Dr. Hughes specifically noted if an impairment rating for the neck injury is included, Vanover would have a 17% impairment rating.

In the same vein, in his report and deposition, Dr. Snider directly addressed whether Vanover sustained a work-related neck injury. In both his report and in his deposition, Dr. Snider explained the basis for his conclusion Vanover did not have a work-related neck condition or injury. In his deposition, Dr. Snider

specifically rejected Dr. Hughes' impairment rating for the work-related neck condition.

More importantly, when it deposed Vanover, Arch requested him to identify each and every condition which he believed was work-related. In response to Arch's inquiry, Vanover identified his neck condition and provided the basis for his belief he sustained a neck injury. Significantly, at no time did Arch object to the report of Dr. Hughes containing a diagnosis of a work-related neck condition and an impairment rating for the neck condition. Arch specifically introduced proof addressing Dr. Hughes' impairment rating for the work-related neck condition. Thus, Arch was well aware Vanover was asserting a cumulative trauma neck injury and vigorously defended the neck injury claim. Without question, the parties fully litigated the compensability of the work-related neck condition.

The fact the neck was not listed in the Form 110 as a body part affected by the injury is of no import as KRS 342.125(7) directs:

> No statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered as an admission against the interests of any party.

Thus, the failure to list the neck as a body part affected by the work-related injury in the settlement agreement is of no consequence. The ALJ is not bound by any statement contained in the settlement agreement and was permitted to determine Vanover was entitled to past and future medical benefits for a work-related neck condition.

Further, in its petition for reconsideration Arch failed to assert the ALJ had incorrectly awarded medical benefits for a work-related neck injury. Failure to properly bring this alleged error to the attention of the ALJ in its petition for reconsideration and allow the ALJ to address the issue results in the ALJ's award being conclusive and binding as to all questions of fact, including his finding of a work-related permanent neck condition. KRS 342.285(1). Consequently, Arch cannot first raise the issue on the appeal.

Notably, Arch does not take issue with the ALJ’s analysis and fact-finding in determining Vanover has a work-related neck condition for which he is entitled to past and future medical benefits.

Accordingly, the December 1, 2014, Opinion and Order and the December 30, 2014, Order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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