Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 21, 2013

CLAIM NO. 201200911

BARRY EUGENE FLEMING PETITIONER

VS. **APPEAL FROM HON. ALLISON EMERSON JONES, ADMINISTRATIVE LAW JUDGE**

PANTHER MINING, LLC
and HON. ALLISON EMERSON JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Barry Eugene Fleming ("Fleming") appeals from the February 15, 2013, opinion and order and the March 26, 2013, order denying Fleming's petition for reconsideration rendered by Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ"). In the February 15, 2013, opinion and order, the ALJ dismissed Fleming's cumulative

trauma claim against Panther Mining, LLC ("Panther") as non-compensable.

The July 13, 2012, Form 101 alleges Fleming was injured on July 12, 2011, while employed as an underground coal miner at Panther.[1] Fleming alleged the following injuries: "I had to perform work activity that subjected my low back and upper extremities to cumulative trauma disorder, rendering me unable to do my job at the time." The attached Form 104 indicates Fleming worked for Panther from March 2009 to July 11, 2011.

Also attached to the Form 101 is Dr. Robert Hoskins' Form 107-I and a Form 107-I Addendum, both generated after an examination of Fleming on July 6, 2012. In the Form 107, Dr. Hoskins diagnosed the following:

> 1. Lumbosacral sprain/strain
> 2. Electrophysiologically verified bilateral S1 radiculopathies
> 3. L4-5 facet hypertrophy- severe
> 4. L5-S1 grade I spondylolisthesis, annular disc bulging, & severe degenerative disc disease
> 5. Left carpal tunnel syndrome
> 6. Electrophysiologically verified right median neuropathy at the wrist

Dr. Hoskins assessed a 17% whole person impairment pursuant to the 5th Edition of the American

[1] In his deposition, Fleming refers to Panther as "Black Mountain Resources."

Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), and concerning causation, opined as follows:

> Mr. Fleming's lumbar & median nerve impairments are due to years of cumulative trauma/repetitive strain associated with the physical job demands encountered through his employment as a mechanic and coal miner. 50% of the impairment assigned below is attributed to his work as a mechanic with the remaining 50% apportioned to his work as a coal miner.

The December 4, 2012, benefit review conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; average weekly wage; injury as defined by the ACT; and exclusion for pre-existing disability/impairment. Under "other matters," the handwriting of the ALJ is wholly illegible.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence, which is evidence sufficient to convince reasonable people, in support of each element. Id. This evidence has been likened to evidence that would

survive a defendant's motion for a directed verdict. Id.

When 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). 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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

On appeal, Fleming first argues the ALJ erred by finding Fleming "failed to provide proof of causation via his witness, Dr. Hoskins, sufficient to overcome proof to the contrary delivered by Dr. Snider."

In the February 15, 2013, opinion and order, the ALJ made the following findings of fact and conclusions of law:

> **The ALJ finds that Fleming has not sustained his burden of proving to the ALJ's satisfaction that his work at Panther Mining is the cause in fact of his cumulative trauma upper extremity and back injuries.**
>
> In so finding, the ALJ has carefully scrutinized Dr. Snider [sic]

and Dr. Hoskins' reports as well as Fleming's treatment records before and after his employment with Panther Mining. On the balance, the ALJ finds Dr. Snider more persuasive with respect to causation than Dr. Hoskins.

It is clear from Dr. Baker's records that Fleming had active upper extremity symptoms prior to working for Panther. Dr. Baker does not address this fact. Additionally, totally absent from Dr. Baker's report, is a meaningful explanation regarding how Fleming's particular duties at Panther Mining caused or exacerbated his upper extremity condition. He merely states that the physical demands of his employment as a coal miner are responsible for fifty percent of his upper extremity impairment rating without an explanation of the specific work-based mechanism of injury. Dr. Snider's opinion is that he cannot find anything that he "can specifically point to that may have been caused by [Fleming's] work at Black Mountain."

Based on Dr. Densler's records, it appears that Fleming had some back symptoms prior to working at Panther Mining. It is also apparent from a review of Dr. Snider's deposition that Fleming's back condition worsened after he began working at Panther Mining. This does not mean, however, that Fleming's work at Panther Mining is the cause of that worsening. As Dr. Snider explained in his deposition in response to a question by Fleming's counsel:

> Q: And within the realm of reasonable medical probability, do you think those severe changes, as well as partially the other changes perhaps on the MRI

> report, would be due to cumulative trauma over several years of work, whether or not it's mechanic work or coal mining work or any other type of significant work?
>
> A: It's within a spectrum of possibility. As I've said, I see people that have done these manual labor jobs, and when I get an x-ray, I'm expecting to see a train wreck, and turn out that I don't see what I expect, it's a lot less. Then I see people who have done sedentary work whose joints are wrecked. So there is a large spectrum in the population. It's difficult to say where he would be if he had, say. [sic] Become a physician or an attorney. It is possible that the lifelong accumulation of activity, both work related and not work related could contribute to the appearance of this MRI. That is possible.

Dr. Hoskins' opinion again fails to adequately explain how Fleming's work at Panther Mining caused his back impairment. He states only that "Fleming's lumbar impairment is due to years of cumulative trauma / repetitive strain associated with the physical job demands encountered through his work employment as a mechanic and coal miner." He then attributes 50% of his lumbar impairment to Fleming's work as a coal miner. Problematic, however, is that Fleming worked as a coal miner for approximately seventeen years only two of which were with Panther Mining. Dr.

> Hoskins does not explain how the two years Fleming worked at Panther should be factored into the causation analysis. Furthermore, he does not explain with any specificity how Fleming's work at Panther caused or contributed to his lumbar impairment.
>
> Unlike an acute injury claim, there is no single event to point to as causing a cumulative trauma injury. This makes a medical explanation on the causation issue particularly important if the claimant is to sustain his or her burden. As Dr. Snider notes, even individuals that do not engage in strenuous work sometimes have significant degenerative changes. This suggests factors other than work can cause such changes. Given these realities, a persuasive medical opinion would address the specific type of work that the evaluator maintains caused the impairment and provide a reasoned explanation on how that work caused or contributed to the cumulative trauma at issue. In this case, however, Dr. Hoskins' report lacks a credible or persuasive analysis. He simply denotes that the cumulative changes were caused by the "physical job demands." While this might be enough to state a *prima facie* claim for relief, it is not sufficient to persuade the fact finder in the face of an [sic] contradictory opinion.
>
> In sum, the ALJ was not persuaded that Fleming's lower back and upper extremity impairments were caused in whole or in part by his work at Panther Mining.

It is clear the ALJ relied upon Dr. Snider's opinions in finding Fleming had not sustained his burden of

establishing his cumulative trauma injuries were caused in whole or in part by his work at Panther. The record contains an independent medical examination ("IME") report by Dr. Snider dated October 8, 2012. In this report, under "records reviewed," Dr. Snider opined as follows:

> At present, I cannot say within a reasonable degree of medical probability that Mr. Fleming has any evidence of cumulative trauma due to his employment at Black Mountain Resources. There is a report of spondylolisthesis, a condition which is present in 3% of adults. I have not seen any documentation of imaging studies that suggest that is an unstable or symptomatic condition. Findings of carpal tunnel syndrome could be consistent with 19 years of mechanic work.

Regarding impairment, Dr. Snider opined as follows:

> According to the AMA Guides, 5th Edition: For low back pain without radiculopathy Mr. Fleming would, in theory, fit into DRE Lumbar Category II, somewhere between 5 and 8% WPI. I do not see any evidence for ratable impairment for carpal tunnel complaints. Motor testing appears grossly normal and pinprick testing reveals diminishment in a glove-like (not median nerve) distribution. Two-point discrimination suggests more of an ulnar nerve pattern, also inconsistent with median neuropathy. As above, at present, I cannot apportion any of this to 'cumulative' trauma without additional review of records and imaging studies.

Dr. Snider was also deposed on October 25, 2012, and testified as follows on causation:

> Q: Doctor, if we're looking from a causative standpoint in trying to determine whether or not Mr. Fleming's diagnoses and current problems are related in whole or in part to his two-and-a-half years of mining, and looking at these treatment records and his complaints of pain prior to his ceasing his employment with Black Mountain, what would be your opinion within a reasonable degree of medical probability and/or certainty as to whether or not his work at Black Mountain was a causative factor in his diagnosis and impairment?
>
> A: If one sets aside the, basically, effect that it might have on his symptoms, for example, intolerance to manual labor activity, from a purely objective standpoint, no, I don't see anything that I can specifically point to that may have been caused by his work at Black Mountain.

The ALJ has sole discretion to pick and choose among the evidence. As fact-finder, the ALJ 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 Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). She may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness

or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Additionally, 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).

Fleming's argument that Dr. Snider needed to assert what caused Fleming's injuries versus what did not cause his injuries is erroneous. Dr. Snider's opinions on causation- i.e. Fleming's work at Panther did not cause his alleged cumulative trauma injuries- are sufficient and constitute substantial evidence in support of the ALJ's determination to dismiss Fleming's claim for failure to prove causation for his alleged low back and upper extremity cumulative trauma injuries. The evidence certainly does not compel a different result than what was reached by the ALJ; thus, this determination will not be disturbed.

Fleming's next argument on appeal is that the ALJ erred by finding Fleming had to put forth proof as to whether he suffered impairment during his actual employment with Panther Mining.

While in claims for hearing loss, KRS 342.7305 causes liability to fall on the last employer, this is not the case with non-hearing loss cumulative trauma claims. In Southern Kentucky Concrete Contractors, Inc. v. Horace W. Campbell, 662 S.W.2d 221, 222 (Ky. App. 1983), the claimant's pre-existing condition was found to be attributable to "his hard manual labor" with multiple employers over the years of his work life. It was determined that the last employer– Southern Kentucky Concrete – could not be held liable to the extent the claimant's condition was work-related and pre-existed his employment at Southern Kentucky Concrete. Thus, the Court remanded the matter with the following directions:

> We are therefore of the opinion that this case should be remanded to the Workers' Compensation Board with directions to determine the percentage of Campbell's disability attributable to the work performed by him while employed by Southern, and Southern is to be liable to that extent. Absent evidence to the contrary, Southern shall be liable for that percentage of Campbell's disability which is equal to the percentage of Campbell's worklife spent with Southern. The remainder of his disability is the responsibility of the Special Fund.

Id. at 222-223.

Pursuant to the above language, the ALJ correctly required Fleming to introduce proof establishing

how Fleming's two years at Panther "should be factored into the causation analysis." Simply because Fleming was last employed by Panther does not impose all or even a portion of the liability for Fleming's alleged impairment on Panther. In order to impose liability on Panther, there must be evidence establishing Fleming's work activities performed during his employment with Panther caused or contributed to his overall permanent condition, producing some degree of harmful change to the human organism.

The record contains Dr. Hoskins' July 6, 2012, Form 107-I in which he assessed a 17% impairment rating pursuant to the 5th Edition of the AMA Guides. In this same report, Dr. Hoskins apportioned 50% of this impairment rating to Fleming's work as a coal miner. As noted by the ALJ in the February 15, 2013, opinion and order, "Fleming worked as a coal miner for approximately seventeen years only two of which were with Panther Mining." Thus, Dr. Hoskins' blanket opinions were rejected by the ALJ, as they failed to offer any guidance as to how Fleming's employment at Panther factored into the issue of causation. Without further explanation from Dr. Hoskins, the ALJ was free to reject his opinions. The ALJ's causation analysis was consistent with the law on cumulative trauma claims.

Finally, Fleming asserts the ALJ erred by relying on Dr. Snider's opinions regarding Fleming's alleged upper extremity injuries rather than Dr. Hoskins'. Fleming asserts as follows:

> In her decision, the administrative law judge proclaimed that Dr. Snider's testimony regarding the causation of both Fleming's lumbar and upper extremity impairments was more persuasive than the causation testimony of Dr. Hoskins. This was curious indeed since Dr. Snider did not address the question of the causation of Fleming's upper extremity impairment, which Dr. Hoskins had testified was due to carpal tunnel syndrome. In fact, Dr. Snider testified that he was not sure whether or not Fleming had carpal tunnel syndrome. Dr. Snider questioned the correctness of Dr. Hoskins' bilateral carpal tunnel syndrome ratings due to Dr. Snider's 'suspicion' that Dr. Gutti's electrodiagnostic tests results were not accurate.

After performing an examination, Dr. Snider opined, in his October 8, 2012, IME report, that "there is no gross evidence of median neuropathy (carpal tunnel) on today's exam." He further opined as follows:

> I do not see any evidence for ratable impairment for carpal tunnel complaints. Motor testing appears grossly normal and pinprick testing reveals diminishment in a glove-like (not median nerve) distribution. Two-point discrimination suggests more of an ulnar nerve pattern, also inconsistent with median neuropathy. As above, at present, I cannot apportion

> any of this to 'cumulative' trauma without additional review of records and imaging studies.

Dr. Snider also opined as follows: "At present, I cannot say within a reasonable degree of medical probability that Mr. Fleming has any evidence of cumulative trauma due to his employment at Black Mountain Resources."

In his October 25, 2012, deposition, Dr. Snider testified as follows regarding Fleming's alleged carpal tunnel:

> Just performing a basic exam, there was some evidence of early degenerative joint changes in his fingers, I would say very consistent with the findings one would expect in a 50-something-year-old mechanic. I didn't find any tenderness at any specific spot. He had grossly normal range of motion in his joints of his arms. He had a diminished pinprick in a glove-like distribution in his hands, which is not physiologically consistent with any specific nerve entrapment.
>
> He had a two-point discrimination slightly diminished in all the fingertips of his right hand, again not necessarily consistent with median neuropathy, and it was 10 millimeters in his thumb, index, middle and ring finger of the left hand and then 12 millimeters in the middle finger of the left hand. That's not a pattern consistent with median neuropathy.

Dr. Snider explained further:

> He's got some electrodiagnostic studies that are suggestive of carpal tunnel but with exam findings that are somewhat inconsistent with that. Since he has not worked in a year and a half almost, or over a year at least, there's a reasonable chance that these studies- that these changes could improve, and I have suggested that he undergo another round of that to see what the status is.
>
> I wouldn't give him a rating for it at this point based on the physical exam, especially if the nerve studies show interval improvement.

We acknowledge Dr. Snider's opinions regarding whether Fleming has carpal tunnel syndrome are ambiguous. In his deposition, Dr. Snider opines that electrodiagnostic studies are "suggestive" of carpal tunnel, but his examination findings are "somewhat inconsistent." Indeed, he states in his report and deposition that his exam findings are inconsistent with median neuropathy or carpal tunnel. What is clear from Dr. Snider's opinions is that he "cannot say within a reasonable degree of medical probability that Mr. Fleming has any evidence of cumulative trauma due to his employment at Black Mountain Resources." Thus, Dr. Snider’s opinions can be relied upon for the proposition that any suggestion of carpal tunnel is not due to Fleming’s employment at Panther.

In setting forth these opinions, Dr. Snider is not required, as implied by Fleming in his appeal brief, to provide a different theory of causation regarding Fleming's alleged upper extremity impairment. It was proper for the ALJ to rely upon Dr. Snider's opinions in dismissing Fleming's upper extremity claims for failure to prove causation.

Fleming's arguments regarding Dr. Snider's rejection of Dr. Gutti's electrodiagnostic studies also lack merit. Dr. Snider, in his deposition, stated that he normally does not rely upon Dr. Gutti's electrodiagnostic studies because "[s]he seems to read things that others, when the test is repeated, can't find." The rationale behind Dr. Snider's rejection of Dr. Gutti’s testing affects only the weight the ALJ may give to Dr. Snider's opinions, not whether she can rely on these opinions. Here, the ALJ was free to rely upon Dr. Snider's opinions regarding Fleming's alleged carpal tunnel injury.

The February 15, 2013, opinion and order and the March 26, 2013, order denying Fleming's petition for reconsideration are **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

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