Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 27, 2014

CLAIM NOS. 201397272 & 201300941

BOBBY BISHOP PETITIONER

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

TECO COAL CORPORATION
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Bobby Bishop appeals from the January 21, 2014 Opinion, Award and Order and the February 21, 2014 Order on Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). In the Opinion, Award and Order, the ALJ awarded permanent partial disability benefits and medical benefits for Bishop's left knee

injury, but dismissed his cumulative trauma injury claim. The dismissal was reaffirmed by the Order on Reconsideration. Bishop now appeals, arguing the ALJ erred in dismissing his cumulative trauma claim as barred by the statute of repose. Neither party has appealed the ALJ's award with respect to the knee injury. For the reasons set forth herein, we affirm.

Bishop has worked in the coal mining industry, primarily as a heavy equipment operator, for over twenty-six years. He began working for the Respondent, Teco Coal Corporation ("Teco"), in 2000. His job as a heavy equipment operator was strenuous and involved heavy lifting, frequent climbing, and continuous vibration.

Bishop's cumulative trauma claim alleged an injury to his cervical spine. He could not recall exactly when he began to experience neck pain, but testified he sought treatment with Dr. Thad Manning in October, 2009. He underwent fusion surgery, performed by Dr. Leon Ravvin, in December, 2009. Bishop was off work until February 18, 2010. Though he continued to have pain and stiffness in his neck after surgery, he returned to work. He continued to work until June 20, 2013, when he was laid off, although Bishop believed he would have been physically unable to continue working much longer.

Dr. Manning's records indicate Bishop first complained of neck pain on November 4, 2009. A cervical MRI dated November 17, 2009 revealed a left paracentral disc herniation and moderate to severe canal stenosis, as well as multilevel degenerative changes. Bishop was referred to Dr. Ravvin for surgery, but returned to Dr. Manning on March 26, 2010 with continued complaints of neck pain. Dr. Manning's office notes document complaints of neck pain from 2011 through August 12, 2013.

Dr. David Muffly performed an independent medical evaluation ("IME") which consisted of a physical examination and medical records review. He noted a cervical disc herniation requiring cervical fusion related to cumulative trauma associated with a thirteen-year history of heavy equipment operation. He assessed a 25% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") for the cervical spine condition, which he opined was related to Bishop's work activities as a heavy equipment operator.

Dr. John Vaughn also performed an IME. He diagnosed a herniated cervical disc, status post-fusion. He opined Bishop's neck condition was most likely caused by normal aging, but did not believe his work from the time of

the fusion surgery in 2009 to the end of his employment in 2013 caused any additional injury. To support this conclusion, he pointed to the lack of objective permanent change in the neck condition since 2009. Dr. Vaughn also assessed a 25% whole person impairment pursuant to the AMA Guides, adding his impairment rating would have been the same at the time Bishop reached maximum medical improvement following surgery.

Relying on Dr. Muffly's opinion, the ALJ first concluded Bishop suffered a work-related injury to his cervical spine. However, he was also convinced by Dr. Vaughn that "the entirety of the … impairment of 25% resulted from the fusion surgery of 2009 with no additional impairment caused by his subsequent employment with [Teco]." The ALJ then concluded Bishop's claim was barred by the statute of repose found at KRS 342.185(1), reasoning:

> [T]he evidence clearly shows [Bishop] experienced temporary total and permanent partial disability with his fusion surgery in December 2009. The entirety of the 25% impairment which he continues to have, came into existence at that time. He believed the condition to be related to his work, but did not pursue a medical opinion at that time. Since the work activities which produced the impairment and disability occurred prior to December 2009 and the work activities following

> that time failed to lead to additional impairment or disability, {Bishop's] claim expired by virtue of the statute of repose before his period of limitations began to run pursuant to Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601 (Ky. 2006). Additionally, since [Bishop] did not incur any additional impairment for the condition during the two years prior to the filing of his claim he simply does not have a cervical impairment on which an award of benefits can be based pursuant to Kentucky Family Prac. v. Leach, 237 S.W.3d 530 (Ky. 2007).

Bishop filed a petition for reconsideration, which was denied. In the one-page petition, he asserted the ALJ misinterpreted Kentucky case law and requested him "to reconsider his position and consider the neck injury as a cumulative trauma claim that is not barred by the statute of repose." In the Order denying the petition, the ALJ restated the relevant facts and reaffirmed his reasoning with respect to the statute of repose.

On appeal, Bishop does not directly contest the reasoning underlying the ALJ's application of the statute of repose. Instead, he argues the statute of repose was not preserved as an issue for determination, and was therefore waived by Teco. Alternatively, he believes Teco is barred by the doctrine of equitable estoppel from asserting a statute of repose defense.

We disagree with Bishop that the statute of repose was not preserved as an issue for determination. The Benefit Review Conference ("BRC") Order lists "statute of limitations" with respect to the cervical injury as a contested issue. The applicable provision, KRS 342.185, has been interpreted as both a statute of limitations and a statute of repose. Manalapan Mining Company, Inc. v. Lunsford, 204 S.W.3d 601, 605 (Ky. 2006). Furthermore, Bishop discussed the issue in his brief before the ALJ, citing a prior Board opinion in Richard Dunn v. Bledsoe Coal Corporation, 2012-00156 (March 29, 2013). In Dunn, a factually similar case, KRS 342.185 operated as a statute of repose to bar the claim. Clearly, even if not considered preserved by the BRC Order, the issue was tried by consent of both parties. We are convinced the issue was properly before the ALJ.

Turning to the issue of equitable estoppel, we do not believe this issue has been properly preserved for appellate review. In his brief to this Board, Bishop points to conversations with a claims adjuster at HealthSmart Casualty Claim Solutions, Teco's insurance carrier, as evidence the company insisted his neck condition was not work-related. Records indicate Bishop spoke with the adjuster prior to his surgery, and expressed

his belief his neck pain may relate to a 2008 workers' compensation claim for a low back injury, although he also indicated it could be due to the vibrations incident to operating heavy equipment. The adjuster instructed Bishop to use his private health insurance for his neck and shoulder condition because the 2008 claim involved only a low back injury.

The ALJ summarized the records submitted from HealthSmart in the January 21, 2014 Opinion and Order. Despite this evidence being on the record, Bishop did not identify equitable estoppel as a contested issue at the BRC or raise it in his brief to the ALJ. Nor did Bishop request further findings of fact concerning equitable estoppel in his petition for reconsideration. *See* Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327, 330 (Ky. App. 2000) (a petition for reconsideration must be filed in order to preserve an issue for further appellate review). As such, Bishop may not raise the issue of equitable estoppel for the first time in his brief to this Board.

For the foregoing reasons, the January 21, 2014 Opinion, Award and Order and the February 21, 2014 Order on Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON RANDY G CLARK
POB 1529
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT:

HON SARAH MCGUIRE
P O BOX 351
PIKEVILLE, KY 41502

ADMINISTRATIVE LAW JUDGE:

HON JOHN B COLEMAN
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601