Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 12, 2016

CLAIM NOS. 201300439 & 201300438

CDR MINERALS PETITIONER

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

RANDY RICHIE
HON. WILLIAM J RUDLOFF,
FORMER ADMINISTRATIVE LAW JUDGE
AND HON JEANIE OWEN MILLER
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. CDR Minerals ("CDR") appeals from the October 23, 2015 Amended Opinion and Order on Remand rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), and the March 15, 2016 Order rendered by Hon. Jeanie Owen Miller ("ALJ Miller"). On remand, the ALJ found Randy Richie ("Richie") permanently totally disabled.

On appeal, CDR argues the evidence does not support the occurrence of an injury as defined in KRS 342.0011(1), that all of Richie's impairment is attributable to pre-existing active conditions, and that the ALJ erred in finding Richie permanently totally disabled. For the reasons set forth herein, we affirm.

Richie filed claim number 2013-00438 on March 23, 2013 alleging injuries to his low back, right hip and right leg on January 8, 2012 as a result of cumulative trauma. He acknowledged filing first reports of injury in claim numbers 2007-95154, 2002-97151 and 2011-75266, though no formal claims were filed.

In our previous decision, we summarized the evidence as follows:

> Richie testified by deposition and at the hearing. He was born on July 27, 1955 and is a high school graduate and certified miner. During his entire adult life, he has worked as a heavy equipment operator, most recently for CDR as a grader operator at mine sites. In 2001, Richie was injured when the blade of a grader he was operating struck a tree and he was whipped forward, striking the windshield. He missed nine weeks of work. Since the time of the 2001 injury to the present, Richie's back pain periodically flares up and he takes over-the-counter pain medication for relief. Similarly, his right hip has been hurting since the 2001 injury, and also periodically

causes pain. Until the time of his layoff from CDR in January, 2012, Richie experienced low back and right hip pain while working.

Dr. Arthur L. Hughes examined Richie on April 24, 2013. He reviewed the July 21, 2005, October 18, 2005 and July 30, 2009 notes of Dr. Mitchell Wicker. These reports concerned treatment for conditions unrelated to the alleged work injuries. Dr. Hughes also reviewed Dr. Williams' January 30, 2013 report regarding Richie's low back pain with radiculitis into the right hip and leg.

At the examination, Richie gave a history of forty years working as a heavy equipment operator. He reported the 2001 grader accident which resulted in severe low back pain, though it was unclear whether Dr. Hughes was aware the accident required Richie to miss nine weeks of work. Dr. Hughes noted:

> He continues to have lower back pain extending into the right hip and he also has pain behind the right knee, which is of recent origin. He has had right shoulder pain for the past three years.

Dr. Hughes diagnosed low back pain; bilateral hip pain, right worse than left; right knee pain; and right shoulder pain. Regarding causation, he opined as follows:

> Within reasonable medical probability, the plaintiff's multiple pains and restricted motion of joints is a consequence of his 40 years

> as a heavy equipment operator causing repetitive injury to multiple areas of the body. These have accumulated over a period of years.

Dr. Hughes further opined Richie had no prior active impairment, explaining his impairments were the consequence of accumulated trauma over many years of operating heavy equipment and are not due to any specific injury. He assessed an 8% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), consisting of 5% for the low back, 2% for the right hip and 1% for the right knee. Dr. Hughes assigned a lifting restriction of ten pounds regularly and twenty-five pounds occasionally, and recommended he sit or stand for only "brief" periods of time. He additionally cautioned Richie against repetitive bending and twisting of the lumbar spine, and forward flexing at the waist.

During a deposition on July 3, 2013, Dr. Hughes was informed the 2001 accident resulted in nine weeks of missed work, and acknowledged the injury was more substantial than he initially believed. Dr. Hughes was also presented with and reviewed Dr. Williams' intake note indicating an onset of low back and hip symptoms in 2002. Based upon the 2001 accident, a 2007 low back incident, and ongoing symptoms following the 2001 injury, Dr. Hughes agreed Richie would have had an impairment rating under the AMA Guides. Consequently, he conceded the 5% impairment he assigned for Richie's low back may have been in existence as early as 2002. Furthermore, because

the rating for the hip was based upon range of motion, Dr. Hughes did not know what Richie's impairment rating would have been following the 2001 injury. It could have been more or less than the 2% he assigned based upon his examination. Finally, Dr. Hughes acknowledged the 1% rating for the knee is based solely on pain and there is no objective substantiation of the condition, particularly since Richie's range of motion of the knee was normal.

Dr. Hughes was questioned as follows regarding the impairment rating:

> Q. Okay. Turning back to the impairment rating you've assessed in this case, and you've already agreed that the five percent to the lumbar spine, within reasonable medical probability, would have been in existence as early as 2001, 2002 because of his persistent low back pain; is that correct, sir?
>
> A. Yes, that's correct.
>
> Q. The two percent attributable to the hip, right hip, that likewise may have been in existence as early 2001, 2002 because of his prior accident; is that correct?
>
> A. That's correct.
>
> Q. And the one percent that is due to knee pain, that really is not supported by

> any objective findings; is that correct?
>
> A. That's correct.
>
> Dr. Daniel D. Primm evaluated Richie on July 26, 2013, and also received a history of the 2001 accident. Dr. Primm observed that Dr. Wicker's notes document continued low back pain and right leg pain, as well as a 2002 MRI revealing a bulging disc. Dr. Primm concluded Richie's physical examination was essentially normal for a fifty-eight year old man, and found no evidence of lumbar radiculopathy or myelopathy. He placed Richie in DRE Category I with no objective signs of injury, and found no impairment of the knees, hips or lumbar spine pursuant to the AMA Guides.

The ALJ relied upon Dr. Hughes' April 24, 2013 report to find Richie had no pre-existing active impairment or occupational disability prior to January 8, 2012, and to find he sustained an 8% impairment rating as a result of cumulative trauma injuries. Relying primarily upon Dr. Hughes' report, the ALJ determined Richie was permanently totally disabled.

The Board issued an opinion on March 12, 2014 affirming in part, vacating in part and remanding. The Board found the ALJ insufficiently explained the extent of Richie's injuries and did not demonstrate he had considered Dr. Hughes' deposition testimony, thus precluding

meaningful review of the award of permanent total disability benefits. Therefore, the Board remanded for additional fact finding.

The ALJ rendered his Amended Opinion and Order on Remand on October 23, 2015, summarizing the deposition testimony of Dr. Hughes and again finding Richie permanently totally disabled. Relying on Richie's testimony and Dr. Hughes' report, the ALJ determined Richie sustained serious permanent injury to his back due to cumulative trauma in his employment with CDR. The ALJ found Richie did not suffer any pre-existing occupational disability before January 8, 2012. He further determined Richie sustained repetitive injuries to his right knee, low back and right shoulder as a result of years of working for CDR as a heavy equipment operator. The ALJ accepted the 8% impairment rating assessed by Dr. Hughes and made the following findings relevant to this appeal:

> . . . . On cross-examination of Dr. Hughes by the defense attorney, Dr. Hughes' [sic] admitted that Mr. Richie's low back complaints <u>may have been</u> in existence as early as 2002 and that his right hip complaints <u>may have been</u> in existence as early as 2001 or 2002. I emphasize that since *Rogers v. Sullivan*, 410 S.W.2d 624 (Ky. 1966), the law has clearly required a physician's opinion to be based upon reasonable medical probability as

> contrasted with possibility, which is not adequate. Clearly, statements by Dr. Hughes phrased in terms may and may have been are not competent medical evidence. See also *Gilbreath v. Perkins*, 461 S.W.2d 360 (Ky.1970) and *Seaton v. Rosenberg*, 573 S.W.2d 333 (Ky.1978).
>
> The case at bar is very similar to the facts in *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky.2001), where work-related trauma caused a dormant degenerative condition to become disabling and to result in a functional impairment and the trauma is the proximate cause of the harmful change and hence the harmful change comes within the definition of an injury. I make the factual determination based upon Mr. Richie's credible and convincing testimony and the medical evidence from Dr. Hughes that Mr. Richie's work-related trauma while employed by the defendant caused a dormant degenerative condition to become disabling and to result in a functional impairment and that that trauma is the proximate cause of the harmful change and hence the harmful change comes within the definition of an injury.

CDR filed a petition for reconsideration making essentially the same arguments it raises on appeal. By order dated March 15, 2016, ALJ Miller denied the petition, noting she had no authority to re-interpret the evidence upon reconsideration.

On appeal, CDR argues the evidence does not support the occurrence of an injury as defined in KRS

342.0011(1). It contends there is no objective evidence indicating Richie suffered injuries to his right shoulder, right knee or left hip because the diagnoses related to these body parts are based solely on subjective complaints. Further, Dr. Hughes assigned no impairment for the right shoulder and admitted the 1% rating assigned for the knee was based solely on subjective complaints of pain. CDR argues the entirety of the impairment rating assessed for the low back and right hip is due to pre-existing active conditions. CDR contends it met its burden of conclusively proving the low back and hip problems are non-work-related pre-existing active conditions. It interprets Dr. Hughes' testimony as establishing the impairment would have been in existence at least as early as 2001 or 2002 because of Richie's persistent low back pain. Further, Dr. Hughes' report and qualifying deposition testimony indicate no medical findings exist to establish an injury to the right shoulder, right knee or left hip.

Finally, CDR argues the ALJ erred in finding Richie permanently totally disabled. Again, CDR contends Richie failed to establish he sustained an injury as defined by the Act. Additionally, CDR contends the ALJ's decision is inconsistent. In Section V, Paragraph A, the

ALJ found a low back injury, while in Paragraph D the ALJ determined Richie's diagnoses were bilateral hip pain, right knee pain, low back pain and right shoulder pain. However, the ALJ made no finding as to whether the bilateral hip pain, right knee pain, or right shoulder pain were injuries as defined by the Act. The ALJ appears to have included these conditions in his determination that Richie is permanently totally disabled. CDR concludes inclusion of these conditions was improper, requiring reversal of the finding of permanent total disability.

As the claimant in a workers' compensation proceeding, Richie bore the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

We begin by noting there was some degree of ambiguity in the deposition questions posed to Dr. Hughes regarding pre-existing impairment. As noted by the ALJ, a number of questions were posed as to the possible presence of prior impairment ratings using terms such as “might”, “may” and “may have been”. Even if we assume the 5% rating for the back condition pre-existed the alleged cumulative trauma injury, Dr. Hughes could not say the entirety of the impairment rating he assessed for the right hip injury was pre-existing. CDR submitted no other evidence which would compel a finding of a pre-existing impairment rating for the right hip. In his deposition, Dr. Hughes continued to indicate cumulative trauma over Richie’s entire work history contributed to the conditions. He was questioned regarding apportioning the impairment rating and responded that the early employment contributed very little while the later employment contributed more.

Though CDR focuses its arguments on appeal on the evidence supporting the finding each individual injury, the true issue is the extent of Richie’s occupational disability. In other words, there being an impairment rating attributable to the cumulative trauma injuries, the ALJ could proceed to the determination of whether Richie

was permanently totally disabled. Therefore the determinative issue for our consideration is whether the ALJ erred in finding Richie permanently totally disabled.

There is evidence that ongoing cumulative trauma to Richie's low back, hips, right knee and shoulder made his symptoms worse and produced any occupational disability related to those conditions. Contrary to CDR's assertions, the ALJ specifically found Richie sustained cumulative trauma injuries to his hips, back, right knee and right shoulder. Even if we assume any impairment rating for the low back was pre-existing, as recognized by the ALJ, only pre-existing occupational disability is excluded from an award for permanent total disability. In Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), the Supreme Court explained an exclusion for pre-existing disability from a total disability award must be based upon a finding of occupational disability rather than existence of an impairment rating. Although Richie may have been symptomatic following an incident in 2001, he testified he did not take medication nor did he seek medical treatment for ten years prior to 2012 and he worked dependably until that time. The ALJ could reasonably conclude Richie did not have prior occupational disability.

Permanent total disability is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the Kentucky Supreme Court noted the statute requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. The determination includes consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact, the likelihood that the particular worker would be able to find work consistently under normal employment conditions, whether the individual will be able to work dependably, and whether the worker's physical restrictions will interfere with vocational capabilities. A worker is not required to be homebound in order to be found to be totally occupationally disabled.

The ALJ considered Richie's age, education, work experience, medical conditions and restrictions in finding Richie permanently totally disabled. Dr. Hughes opined Richie does not retain the physical ability to return to his previous work, and restricting him from lifting 10 pounds regularly and repetitive bending and twisting. He also recommended only periods of sitting, which is required in Richie's work as a heavy equipment operator. These restrictions prevent any heavy physical labor employment, the ALJ noted.

Additionally, the ALJ relied upon Richie's credible testimony. Richie testified about his current symptoms and his belief he can longer perform any work due to the effects of his condition. He is 58 years old and has a high school education. He has worked exclusively as a heavy equipment operator his entire adult life. Richie's testimony regarding his post-injury ability to work and his symptoms is substantial evidence, as an injured worker's credible testimony is probative of his ability to labor post-injury. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

These circumstances constitute the requisite substantial evidence to support the ALJ's determination Richie is permanently totally disabled. The ALJ undertook the analysis required under Ira A. Watson and sufficiently articulated the evidence upon which he relied in reaching the conclusion. He acted within his discretion to determine which evidence to rely upon, and it cannot be said his conclusions are so unreasonable as to require reversal.

Accordingly, the October 23 2015, Amended Opinion and Order on Remand rendered by Hon William J. Rudloff, Administrative Law Judge, and the March 15, 2016 Order on Petition for Reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON GUILLERMO A CARLOS
444 W SECOND ST
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON, KY 40741

ADMINISTRATIVE LAW JUDGE:

HON JEANIE OWEN MILLER
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601