OPINION ENTERED: May 17, 2013

CLAIM NO. 201200467

CDR OPERATIONS, INC. PETITIONER

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

RONNIE HALE
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. CDR Operations, Inc. ("CDR") appeals from the December 17, 2012, opinion and order and the January 14, 2013, order ruling on both CDR's and Ronnie Hale's ("Hale") petition for reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the December 17, 2012, opinion and order, the ALJ found Hale sustained a "cumulative trauma to his neck and back and also to both

upper extremities and his left lower extremity and his right lower extremity as a result of working for a long period of time in the operation of heavy machinery and in the mines.” The ALJ determined Hale's cumulative trauma injury manifested on February 7, 2012, and awarded permanent total disability ("PTD") benefits and medical benefits. Both parties filed petitions for reconsideration. In its petition for reconsideration, CDR asserted the "overwhelming medical testimony would indicate no objective harmful change in the human organism as a consequence of Plaintiff's brief three-month employment by CDR Operations." CDR's petition for reconsideration was overruled.[1] On appeal, CDR asserts the evidence fails to support a cumulative trauma injury during Hale's "brief employment" with CDR.

The Form 101 alleges Hale sustained a cumulative trauma injury to his neck and back which manifested on February 7, 2012.

The Form 104 attached to the Form 101 indicates Hale worked as a "dozer operator" from the 1980's through February 7, 2012. The Form 104 indicates Hale worked at CDR in Hazard, Kentucky from November 11, 2011, through

[1] Hale's petition for reconsideration, which pertained to a computation error, was sustained and the award was amended.

February 7, 2012. Before that, Hale worked as a dozer operator for Ikerd Bandy in Somerset, Kentucky from 2001 through November, 2011. In his June 20, 2012, deposition, Hale testified as follows:

> Q: Now, why did you stop working at Icard [sic]?
>
> A: Because CDR bought the company out.
>
> Q: I see. So CDR bought out the company and then CDR ceased operation?
>
> A: Yes.
>
> Q: Do you know who owned Icard [sic]?
>
> A: Frank Icard [sic].
>
> Q: And who owns CDR?
>
> A: I have no idea.
>
> Q: But it's not the same company?
>
> A: No.

As the record includes no additional information regarding the alleged buyout of Ikerd by CDR outside of statements by counsel in briefs, including the transfer of any liabilities and whether the workers' compensation insurance carrier stayed the same during the alleged buyout, for the purposes of this appeal Hale was employed by CDR from November 11, 2011, through February 7, 2012.

The September 6, 2012, benefit review conference ("BRC") order lists the following contested issues: "extent/duration; notice & occurrence/causation; exclusion of any active or non-work related conditions; credit for any unemployment benefits; whether plaintiff sustained an injury; TTD & meds; multipliers."

On September 28, 2012, Hale filed a "Motion to Amend Application to Conform to the Evidence and Plaintiff's Position Statement." Hale amended his Form 101 to include cumulative trauma to his "knees, right foot, and white-knuckle syndrome/chronic vibration injury." Hale acknowledged there is no impairment rating in the record for his right foot and white-knuckle syndrome.

Concerning the issue of whether Hale sustained an "injury" as defined by KRS 342.0011(1), the ALJ determined as follows:

> KRS 342.0011(1) defines “injury” to mean any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines “objective medical findings” to mean information gained through direct observation and testing of the patient applying objective or standardized methods.

> I saw and heard the plaintiff Mr. Hale testify at the final hearing. He was a credible and convincing live witness. Based upon the totality of the evidence, including the plaintiff's sworn testimony and the medical reports and deposition of Dr. Madden, which I found to be very persuasive, I make the factual determination that Mr. Hale sustained cumulative trauma to his neck and back and also to both upper extremities and his left lower extremity and his right lower extremity as a result of working for a long period of time in the operation of heavy machinery and in the mines. I make the factual determination that there is sufficient reliable probative evidence in the record to support the finding that Mr. Hale's permanent impairment and occupational disability occurred during his lifetime of employment in the operation of heavy equipment and in the coal mines, and that his painful conditions manifested themselves on or about February 7, 2012, when he was employed by CDR Operations, Inc.
>
> This case is like unto [sic] *Southern Kentucky Concrete Contractors, Inc. v. Campbell*, 662 S.W.2d 221 (Ky.App.1983). Mr. Campbell was employed by Southern Kentucky at the time his back pain manifested itself. Mr. Campbell had worked for many years doing heavy labor, primarily as a concrete worker for a number of companies. The Workers' Compensation Board found that there was sufficient reliable probative evidence in the record to show that Mr. Campbell suffered a permanent total occupational disability that occurred over his lifetime of employment as a manual laborer and that this condition manifested itself while he was employed by Southern Kentucky Concrete. The

> Board’s opinion was affirmed by the Court of Appeals of Kentucky.

On appeal, CDR argues the evidence fails to "establish that any injury occurred while Mr. Hale was employed at CDR."

As the December 17, 2012, opinion and order indicates, the ALJ relied upon Hale's testimony and the medical reports and deposition of Dr. Jared Madden in determining Hale sustained a cumulative trauma injury as a result of a lifetime of employment in the operation of heavy equipment in the coal mines that manifested "on or about February 7, 2012." Our duty on appeal is to determine whether this evidence comprises substantial evidence supporting this determination. *See* Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In his deposition, Hale testified his birthday is October 26, 1948. While at CDR, he was a heavy equipment operator and his job was operating a "D11 dozer" and removing the "spoil" from the top of the coal. He was laid off by CDR on February 7, 2012, because the job at the Redbird Mine was over.

Hale testified he had upper back, lower back, and neck problems before he started working for CDR and was on medication for those problems. Hale had previously injured

his neck and upper back in a motorcycle accident for which he was hospitalized for six weeks. Hale testified as follows:

> Q: After your accident with your motorcycle, which was a while back, did you have any continuing treatment for your back and your mid [sic] back?
>
> A: No.
>
> Q: When did it start giving you a lot of problems, 15 years ago?
>
> A: Yes.

Hale began having lower back problems in November 2008 after an automobile accident. He also "somewhat" reinjured his neck. Hale acknowledged the medical records indicate he sustained a compression fracture at L1, for which Dr. Salva performed surgery.[2] Hale was receiving treatment for low back problems before the November 2008 accident. Hale explained, "I just had normal back pain is what I thought." He was given Cortisone injections and other medication.

Hale also testified at the December 12, 2012, hearing. Hale has performed coal mining jobs for approximately 32 years, and his jobs included running "a dozer, excavator, and loader." The most physically

[2] Although Hale testified the surgery was performed by Dr. Sava, the records of Dr. David Hays reveal the surgeon's name is Dr. Salva.

demanding job was operating the dozer which he performed for 30 years. He testified concerning his job duties at CDR as follows:

> Q: What sort of terrain were you working on, Ronnie?
>
> A: I mostly broke down the shot after the- the dynamite was put off in the- they call it in the shot.
>
> Q: All right. So you come in after they shoot up the overburden so that you can get it set up so that an inloader could take it, put it in a truck, and get rid of it, correct?
>
> A: Yes.
>
> Q: All right. How does that shot break up the- the rock and sand and all that sort of stuff?
>
> A: Most of the time it leaves pretty big boulders.
>
> Q: How do you manage that with a D11?
>
> A: I have to push them out of the way to- for- so the smaller material, the loader can get to [sic]. I push all big stuff out of the way.
>
> Q: Now, you said that they would be big boulders. Tell me what big means to you as a D11 operator.
>
> A: I have pushed the size of this room here.
>
> Q: All right. So you will get this terrain blowed up, you're coming in and moving the big stuff out of the way so the loader can pick the little up.

> A: Yes.
>
> Q: Fair statement?
>
> A: Yes.
>
> Q: All right. Now, when you're crossing these rocks out there, do you have a lot of jarring and bouncing as you do that job?
>
> A: Yes.
>
> Q: How does it feel when you're backing over one of those and all of the sudden the back of the dozer gives way and you hit solid again?
>
> A: It- it hurts.
>
> Q: Where?
>
> A: My back and neck and shoulders.

Hale testified that he saw a doctor for his back problems during his 32-year employment as a heavy equipment operator in the coal mines, but no doctor advised him to quit his job. Hale testified as follows:

> Q: The first doctor, I believe, that told you that you had a work-related problem that was caused by the years of operation of heavy equipment was Dr. Madden; is that correct?
>
> A: Yes.

Hale introduced a Form 107 completed by Dr. Jared Wilson Madden, D.O., dated June 26, 2012. Hale also introduced an amended Form 107 completed by Dr. Madden also

dated June 26, 2012. Both forms are based on Dr. Madden's examination of Hale on May 17, 2012. In the amended Form 107, Dr. Madden set forth the following diagnoses: low back pain, lumbar degenerative disc disease, lumbar radiculopathy, chronic pain syndrome due to trauma, pain in thoracic spine, neck pain, cervical radiculopathy, white knuckle syndrome/chronic vibration injury, osteoarthrosis left knee, osteoarthrosis right foot, somatic dysfunction of the cervical, thoracic, and lumbar spine, hemorrhoids, hearing loss/tinnitus. Dr. Madden opined as follows:

> The patient is suffering from the effects of over thirty years of cumulative workplace trauma. The patient's degenerative disc and joint disease, as well as the cervical disc herniation, are a direct result of repetitive, heavy lifting trauma on concrete. The patient's symptoms and available diagnostics/treatment support a cumulative trauma scenario consistent with the reported workplace environment. Furthermore, the patient is suffering from hemorrhoids and white knuckle syndrome related to chronic vibration injury. He is suffering from significant hearing loss due to years of load [sic] engine noises with no protection. Mr. Hale has not responded well to traditional conservative treatment methods prescribed. The patient continues to suffer from chronic, radicular low back pain that is consistent with and directly due to the workplace injury as described. The patient now suffers from somatic dysfunction of the cervical, thoracic, and lumbar spine that will continue to

restrict his ability to work as a heavy laborer in the future. It was [sic] also cause episodic problems with routine activities of daily living during pain exacerbations which are commonly associated with chronic, radicular neck and low back pain. Mr. Hale suffered cumulative workplace trauma over the course of many years, resulting in a cervical and lumbar disc disorder with radiculopathy that is consistent with the abnormal findings on physical exam. This injury, though not one that must require surgical intervention, has not been completely resolved by the traditional conservative treatment methods prescribed. The patient continues to suffer from chronic, radicular cervical and lumbar pain that is consistent with and directly due to the workplace injury as described. The patient also now suffers from compensatory somatic dysfunction of the thoracic region that will continue to restrict his ability to work as a heavy machine operator in the future. It will also cause episodic problems with routine activities of daily living during pain exacerbations which are commonly associated with chronic, radicular spinal problems. He has problems with practically all activities of daily living due to his knee pain and restricted range of motion. Chronic osteoarthritic degenerative changes work [sic] certainly exacerbated by cumulative, repetitive pedal motion driving a bulldozer. The patient is suffering from situational stress due to the financial problems related to unemployment. He indicates that he is willing and motivated to return to work but cannot perform heavy lifting/manual labor. He is suffering some reported emotional stress that is consistent with the development of chronic pain

> syndrome such as mood disorder and sleep disturbance. The patient has failed conservative treatment to this point but additional pain management intervention might be helpful. Procedures such [sic] a MILD/minimally invasive lumbar decompression, pain pumps, or spinal cord stimulators should be considered.

Regarding an impairment rating, Dr. Madden opined as follows:

> DRE Lumbar III 11%, page 384, Table 15-3.
>
> Based on DRE Cervical Category III 15%, page 392, table 15-5.
>
> Table 17-10 on page 537 suggest that knee impairment related to moderate restriction of flexion results in an 8% whole person impairment. Page 544, table 17-31 suggests that significant osteoarthritis (ie. a chronic condition that was exacerbated by cumulative injury at work) would also result in an 8-10% WPI. I feel as though an 8% WPI would be appropriate and supported by two different lines of thought.

Dr. Madden further opined as follows:

> *I believe the below impairment was exacerbated by cumulative workplace trauma but it was not included in the WPI rating but should be deferred to the appropriate specialist for confirmation, listed below is my best estimate of the probable impairment*. Hearing impairment and Tinnitus 13% WPI, see example 11-3 page 251 for explanation, with additional 5% for tinnitus section 11.2a page 246.

> *I believe the below impairment was exacerbated by cumulative workplace trauma but it was not included in the WPI rating.*
> Class 1 Colorectal Impairment due to Internal Hemorrhoids 9%, page 128, Table 6-4.
>
> Combined values charge page 604 (15% + 11% + 8% = 30% WPI)

Dr. Madden believed Hale does not retain the physical capacity to return to the type of work he was performing at the time of the injury.

In his deposition, Dr. Madden testified that before November 2011, it "would be fair to say" Hale had an active lumbar spine condition due to the compression fracture he sustained in the automobile accident. Although Dr. Madden testified the ongoing symptomatology caused by the compression fracture would warrant the assessment of an impairment rating; he did not assess an impairment. He testified as follows:

> Q: With reference to a compression fracture itself causing ongoing symptomatology, that in and of itself would warrant the assessment of an impairment rating for the lumbar spine; is that correct?
>
> A: I would think so, yes.
>
> Q: Did you consider that, sir, in assessing the impairment rating referable to this man's lumbar spine?

A: No. I had no reports of any previous impairment applied to that previous motor vehicle accident.

Q: So you have no way then of knowing what his previous impairment was, not having known that information before.

A: No, sir.

Dr. Madden also testified as follows regarding Hale's cervical spine problems:

Q: With reference to the neck problems, assume for the purposes of this question that a CT scan of his neck taken before November of 2011 showed some protrusions and was accompanied by complaints of upper extremity weakness. Would that not have qualified this gentleman for a DRE Category III based upon the presence of, say, loss of muscle strength and radiculopathy in the upper extremities?

A: That's correct.

Q: Okay. So in all probability, he would have had an impairment rating for the cervical spine prior to November of 2011.

A: If that imaging was done before, yes. I think that's correct.

Q: And that is within a reasonable degree of medical probability?

A: Yes, sir.

Dr. Madden further testified as follows:

Q: Okay. Were you aware that he had been on Klonopin, Oxycodone, Percocet

> for approximately ten or 15 years before November of 2011-
>
> A: I don't think I had a-
>
> Q: - for his various back and cervical pain?
>
> A: No. I think he mentioned that he had been on prescription medications. But we didn't discuss a detailed history as far as the length of time he had been on them.
>
> Q: That would again be significant in establishing that he had a preexisting active cervical and lumbar condition.
>
> A: Yes.

Dr. Madden testified as follows regarding the hearing loss impairment rating:

> Q: Okay. Let me ask you this. I know you assessed him, at least in your previous report, an impairment based on hearing loss. But as I understand it, you did not perform any specific audiological tests.
>
> A: No, sir. And I had no- no medical records from those hearing tests-
>
> Q: Okay.
>
> A: - for review either.
>
> Q: So that was kind of just- the impairment rating you assessed based on that was I guess an estimate.
>
> A: And I believe it's a factor, but without objective diagnostics I couldn't apply an impairment rating.

Q: Okay.

Dr. Madden acknowledged the impairment rating assessed for Hale's hemorrhoids was "speculative," as it was based on Hale's complaints and not an examination.

Dr. Madden believed Hale is occupationally disabled from "heavy equipment operation and/or heavy manual labor." Dr. Madden did not believe Hale was capable of "substantial gainful employment" as defined by the Social Security Administration. He testified it would be very difficult for him to assess an impairment rating for a pre-existing active condition. Dr. Madden testified as follows:

> Q: Dr. Madden, you have listened to Mr. Carlos eloquently set out all of these accidents that has [sic] occurred prior to employment with CDR. This man returned to work and worked for 30 years. What does that tell you as a physician about this gentleman?
>
> A: Well, it makes me believe that he's not necessarily a malingerer. There was no indication of that. I believe that he did make a legitimate effort to try to continue to labor for quite some time, despite a cumulative history of increasing trauma and impairment. So he seems like a hard worker. And he wanted to continue to work, but I just don't think his body was willing to let him.

CDR filed the medical records of Dr. David Hays which date back to 1999. On August 5, 2002, Dr. Hays noted Hale had cervical pain. On December 12, 2008, Dr. Hays noted low back pain. On December 15, 2008, Dr. Hays noted the following: "Evidently was involved in MVA in Sept. and resulted in some protubal fx and Dr. Salva has released him and how he's having pain because he runs a dozer. States sometimes it's a constant sharp pain and other times not." On March 22, 2010, Dr. Hays wrote: "Chronic pain to C-spine, now having pain to low back since falling off of bulldozer last wk." He also noted Hale was still experiencing "cervical spine stiffness."

CDR filed the medical record from Lake Cumberland Regional Hospital pertaining to Hale’s September 29, 2008, motor vehicle accident.

CDR also filed medical records from St. Joseph, London regarding the September 29, 2008, motor vehicle accident. CDR filed the July 27, 2012, report of Dr. Daniel D. Primm generated after conducting an examination of Hale. In that report, Dr. Primm provided the following diagnoses:

> 1) Chronic neck and low back pain symptoms following multiple injuries, including MVAs and one or more work-related injuries in the past. 2) No evidence of cumulative trauma by

> history or by exam or review of medical records following his four [sic] months of work at his most recent employment.

Dr. Primm opined as follows:

> I can find nothing that in my mind would link this man's chronic neck and back pain symptoms spanning a 20+ year history to his brief work at his most recent employment. I think it is clear from his medical records, as well as from his history, that these symptoms have been chronic in nature. I do not feel the brief employment most recently would, from a physiologic standpoint, have been capable of producing any permanent changes to his back, neck, or to the human organism. I disagree with Dr. Madden's conclusions, and I do not feel those conclusions are correct. Dr. Madden seems to have completely ignored this man's history of significant trauma and rather have chosen to attribute all of his aches and pains to his work. At this point in time, I do not feel this man would require any treatment, further diagnostic testing, or medication as a result of his work with the CDR Coal Company.

CDR introduced Dr. Primm’s August 21, 2012, addendum in which he assessed a 0% impairment rating as a result of Hale's employment with CDR.

CDR also introduced Dr. Primm’s October 29, 2012, supplemental report in which he stated, in part, as follows:

> Based on everything that I received in his history, I really do not think there is any relationship between his current symptoms, including any

> symptoms he is not reporting regarding 'white knuckle syndrome/chronic vibration injury,' and his very short employment as an equipment operator with the CDR company. In terms of medical probability, I think it is not even possible that his brief employment would have caused or aggravated any of his chronic conditions on a permanent basis.

CDR introduced Dr. Gregory Snider's October 26, 2012, report in which he opined as follows: "In short, I have seen no reference to any evidence that Mr. Hale has suffered any sort of cumulative trauma condition to his neck, back, knees, hands, hemorrhoids or any other body part."

CDR introduced Dr. Snider’s supplemental report, dated November 8, 2012, in which he opined as follows:

> It is my opinion that Mr. Hale has conditions of his spine, namely compression fractures at three levels, that render him intolerant to operation of a bulldozer. There is no evidence that bulldozer operation has caused any significant anatomic change in these levels or that he has other degenerative changes in advance of what one would expect based on his age of 64 years and a history of serious motorcycle and automobile accidents.
>
> In short, I do not see any evidence that Mr. Hale has suffered a cumulative trauma condition to his neck, back, knees, hands, hemorrhoids, or any other body part.

A cumulative trauma injury must be distinguished from an acute trauma injury where a single traumatic event causes the injury. In Randall Co. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery with regard to cumulative trauma injury holding the date of injury is "when the disabling reality of the injuries becomes manifest." (emphasis added). In Special Fund v. Clark, 998 S.W.2d 487, 490 (Ky. 1999), the Supreme Court of Kentucky defined "manifestation" in a cumulative trauma injury claim as follows:

> In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

In other words, a cumulative trauma injury manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma injury. *See* American Printing House for the Blind v.

Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness.

In cumulative trauma claims, the date upon which the obligation to give notice is triggered by the date of manifestation. Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). Pursuant to KRS 342.185(1), a claimant has two years "after the date of accident" or following the suspension of payment of income benefits to file a claim. The Court of Appeals, in the case of Randall Co./Randall Div. of Textron, Inc. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), stated as follows regarding the clocking of the statute of limitations in the case of a cumulative trauma claim:

> We therefore conclude that in cases where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest.

However, the holding of Pendland, supra, is tempered by the holding of Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601, 605 (Ky. 2006) in which the Kentucky Supreme Court determined the two-year period in KRS 342.185(1) operates as both a period of limitations and repose for gradual injuries and "such a claim may expire before the worker is aware of the injury." For instance, in the case

sub judice, assuming Hale sustained a cumulative trauma, he would have two years from the date he last worked in the mines as a heavy equipment operator or two years from the date voluntary TTD benefits ceased to file a claim, regardless of whether the date of manifestation has occurred and he is aware of the cumulative trauma injury. It does not appear the statute of repose is an issue in the case *sub judice* as Hale worked continuously in the mines as a heavy equipment operator. When he was laid off at CDR on February 7, 2012, he filed his claim on April 16, 2012, well within both the two year statute of limitations and repose.

The record reveals February 7, 2012, is the date Hale was laid off from work for reasons unrelated to his alleged injury. This does not comprise a date of manifestation. Therefore, the ALJ's determination Hale sustained a cumulative trauma injury which manifested on February 7, 2012, and the award of PTD benefits must be vacated. On remand, the ALJ must determine the date of manifestation of Hale's alleged cumulative trauma injury. The ALJ must also review the applicable law pertaining to a cumulative trauma injury as set forth herein and make the necessary findings, based on the evidence in the record.

The ALJ also erred in another critical respect. 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), a case misinterpreted by the ALJ in the December 17, 2012, opinion and order, 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.

In Southern Kentucky Concrete, supra, the fact-finder determined "Campbell suffered a permanent, total, occupational disability that occurred during his lifetime of employment as a manual laborer." Similarly, in the case *sub judice*, the ALJ determined "Mr. Hale's permanent impairment and occupational disability occurred during his *lifetime of employment* in the operation of heavy equipment and in the coal mines." (emphasis added). This is certainly consistent with the medical opinions of Dr. Madden upon which the ALJ relied. In the June 26, 2012, amended Form 107, Dr. Madden opined as follows:

> The patient is suffering from the effects of over thirty years of cumulative workplace trauma. The patient's degenerative disc and joint disease, as well as the cervical disc herniation, are a direct result of repetitive, heavy lifting trauma on concrete. The patient's symptoms and available diagnostics/treatment support a cumulative trauma scenario consistent with the reported workplace environment.

In the December 17, 2012, opinion and order, the ALJ put the entirety of Hale’s disability on CDR. However, this determination could only stand if the evidence in the record indicated the last three months at CDR, in and of itself, caused the *entirety* of Hale’s occupational

disability. The evidence does not point to this. Of great significance is the fact *there is no finding in either the December 17, 2012, opinion and order or the January 14, 2013, order ruling on both petitions for reconsideration that Hale had a pre-existing dormant condition that was aroused into disabling reality by the work he performed during the three months at CDR.* In fact, there is no allegation by Hale of any injurious event occurring between November 11, 2012, and February 7, 2012. We acknowledge the ALJ determined Hale "did not have any prior active disability due to other accidents, injuries or conditions." However, this finding clearly does not establish a dormant condition was aroused into disabling reality during Hale's brief employment at CDR. In fact, by finding Hale sustained cumulative trauma over his thirty year history of operating heavy machinery in the mines, the ALJ, by implication specifically rejected the premise Hale's work at CDR resulted in an arousal of a previously dormant non-disabling condition into disability reality. The ALJ is left, then, with analyzing this as a cumulative trauma claim with multiple employers, and Southern Kentucky Concrete, supra, is determinative. As required by Southern Kentucky Concrete, supra, the ALJ must determine what percentage of Hale's impairment, *if any*, is directly

attributable to Hale's three months at CDR. In doing so, the ALJ must cite, in his amended opinion and order, the medical proof that establishes Hale's work at CDR contributed in some degree to the effects of his overall cumulative trauma injury and then, with specificity, denote to what degree it contributed. Simply because Hale was last employed by CDR does not place the entirety of the liability for Hale's alleged permanent and total occupational disability on CDR. There must be evidence of record establishing that Hale's work activities performed during his three months employment with CDR contributed to his overall permanent condition, producing some degree of harmful change to the human organism.

The language in Southern Kentucky Concrete, supra, regarding responsibility of the Special Fund is obviously no longer relevant.

Accordingly, the ALJ's determination Hale sustained a cumulative trauma injury while working for CDR which manifested on February 7, 2012, and the award of PTD benefits as set forth in the December 17, 2012, opinion and order and reaffirmed in the January 14, 2013, order ruling on CDR's petition for reconsideration are **VACATED**. This claim is **REMANDED** for additional findings and rendition of

an amended opinion consistent with the views set forth herein.

ALVEY, CHAIRMAN, CONCURS.

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