OPINION ENTERED: JUNE 12, 2012

CLAIM NO. 201100658 & 201100544

ENTERPRISE MINING COMPANY, LLC PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

OSCAR RITCHIE
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

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

SMITH, Member. Enterprise Mining Company ("Enterprise") appeals from the January 5, 2012 Opinion and Award and the January 30, 2012 order on reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"). The ALJ concluded Oscar Ritchie ("Ritchie") ias totally occupationally disabled as a result of cumulative trauma injury to his back. Although Ritchie had filed a hearing

loss claim as well, the only issues on appeal concern the cumulative trauma injury to the back.

Ritchie, now age 57, resides with his wife in Emmalena, Kentucky. He completed 10th grade and has no GED. He has been a heavy equipment operator for over 30 years. He began working for Enterprise in 2008. On April 11, 2011, Ritchie filed a Form 101 "Application for Resolution of Injury Claim", alleging a cumulative trauma injury to his back and neck. On May 2, 2011, Ritchie filed a Form 103 "Application for Resolution of Hearing Loss Claim", alleging he became aware of a cumulative hearing loss injury on April 22, 2011, due to exposure to noise at his job site. The ALJ consolidated the claims by order of May 26, 2011.

In support of his claim, Ritchie submitted the report of Dr. Robert Johnson. Ritchie provided a history that he had no single injury, but over the years developed neck and back pain. Dr. Johnson noted the following chief complaints:

> Mr. Ritchie states that his pain is mostly on the right side. He indicates the right paraspinal muscles at the lumbosacral joint. He states it goes all the way down with numbness and pain. It feels about the same all the way down to the right ankle and all five toes as well.
>
> This feels like a drawing and pain/numbness.

> The left side is involved with similar symptoms, but not as intense. Mr. Ritchie states, "It ain't as bad."
>
> Mr. Ritchie describes that his neck starts to stiffen. He states that his chiropractor said that he can get rid of it ones [sic] or twice a week. He continues to do so. The chiropractor reportedly stated, "I can keep you on the equipment, but I can't heal you." This went on for a year and a half or two before today.
>
> Mr. Ritchie states that Dr. Williams was treating his back also. He would manipulate it, use heat and stretching up until 1/31/11. That was when the pain prevented Mr. Ritchie from working any longer. He states he was disabled mostly by low back pain and leg pain, right greater than left.

Ritchie stated his symptoms started from one to two years prior to January 31, 2011. He had similar symptoms 5 to 6 years before then. Ritchie also told Dr. Johnson that, approximately a year and a half before he retired, "Dr. Bean said the equipment was causing his pain. Dr. Bean suggested getting off the equipment while he could still get around. However, Mr. Ritchie states he kept working another year and a half doing his usual job."

Dr. Johnson conducted a detailed physical examination of the back, neck, and left shoulder. He diagnosed Ritchie's condition as follows:

In my opinion, Mr. Ritchie’s condition is in the nature of cumulative trauma. In my experience, cumulative trauma is more diffuse whereas an acute injury is more localized. Mr. Ritchie’s findings tend to support this. In my opinion, Mr. Ritchie’s antalgic gait on the right and his tension testing, plus the definite muscle guarding, are consistent with the abnormal lumbar MRI. This validates an objective injury to his back. Based on the evidence at hand, I am placing him in DRE Category II. If electro diagnostic testing should demonstrate radiculopathy, I will be glad to take this under consideration and almost certainly put him in a DRE Category III for his back.

Regarding Mr. Ritchie's neck complaints, the absence of medical records or appropriate testing regarding the neck prevents me from rating this any higher than DRE Category I. In my opinion, Mr. Ritchie's symptoms are honest. His complaints should be acknowledged. With further evaluation, his neck might be ratable. If such occurs, I will gladly take it under consideration and amend this report, if appropriate.

Mr. Ritchie has complaints regarding his left shoulder. There are minor discrepancies between the right and left. However, both upper extremities reveal decreased internal rotation. Mr. Ritchie states that they have become stiff. Considering his work history, it is my opinion that there is a selective ratability for his loss of mobility. As I noted regarding his neck, if further evaluation is performed, it is possible that a greater WPI would be

> assigned. Should that occur, I will be happy to take any findings under consideration and amend my report, if appropriate.
>
> The predominance of the area distal to the ribcage on the right side, in terms of pain, is not understood by myself. It could be an accommodation to the identified abnormalities. It could also be something that has not been identified at all. In addition to electro diagnostic studies, a medical evaluation in my opinion is warranted.

Dr. Johnson concluded Ritchie's condition was work-related and assigned an 8% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Johnson placed restrictions of no heavy jarring or turning when looking back over his left shoulder. He further stated Ritchie's left shoulder should be protected from working above shoulder height, with no lifting over 10 pounds. In Dr. Johnson's opinion, these restrictions would prevent Ritchie from engaging in substantial gainful employment.

Ritchie submitted the medical report of James R. Bean, M.D., who he saw on July 27, 2010. Ritchie provided a history of low back pain and occasional numbness to his thighs occurring when operating heavy equipment, standing or walking. Dr. Bean diagnosed chronic degenerative lumbar

disc disease primarily at L4-5. Noting Ritchie was not a surgical candidate, Dr. Bean concluded physical therapy would have little long-term effect and his current medication was probably the most appropriate.

Ritchie submitted a one page report form dated April 2, 2011 from Dr. Chaney. Dr. Chaney indicated Ritchie could work “no hours” per work-day. Ritchie could stand 1 to 2 hours and sit 1 to 2 hours during the day. Dr. Chaney restricted Ritchie to lifting no more than 10 pounds frequently and 20 pounds occasionally. Ritchie was to only occasionally bend, manipulate with the right or left hand, squat, crawl, climb or reach above shoulder level. Dr. Chaney indicated Ritchie should frequently elevate his legs during an 8 hour day and was permanently disabled from work.

Ritchie submitted the medical records and reports from Daniel Williams, D.C. In a one page report dated April 1, 2011 filed with Ritchie’s Form 101, Dr. Williams stated “Mr. Ritchie has been exposed to work conditions for 30+ yrs. that has caused degenerative changes that are “chronic and limiting”.

In an open letter dated September 22, 2011, Dr. Williams stated that, since August 12, 2011, (the day after the functional capacity evaluation) Ritchie had been to the

office for treatment 6 times due to flare-ups caused by the evaluation. In a letter dated October 21, 2011, Dr. Williams stated:

> I have evaluated and treated Mr. Ritchie several times since his visit to the workers' compensation doctor and he is gradually showing improvement and getting some relief from his pain. As I observe him on each visit [sic] is clear that his improvement is due to the treatment he receives and the amount of activity he attempts. As long as his activity is kept to a minimum he feels much better and is able to enjoy some relief from his pain. If he attempts to increase his activity level by working around the house or just regular activities of daily living he again experiences an increase in his pain and has to stop whatever activity he is attempting.

Dr. Williams recommended chiropractic treatment at least once weekly until Ritchie’s condition stabilized. Thereafter, he could seek chiropractic treatment on a "prn" basis.

Enterprise submitted the functional capacity evaluation (“FCE”) performed by Rick Pounds on August 11, 2011. Mr. Pounds noted that, at the time Ritchie went off work, he was a "loader operator", defined as a medium physical demand level job. From the strength testing performed, Ritchie met or exceeded the physical demands for the essential functions for work as a loader operator as

defined by the U.S. Department of Labor.

Enterprise submitted the report of John Vaughan, M.D., who conducted an independent medical examination ("IME") on July 26, 2011. Ritchie provided a history of over 30 years working as a heavy equipment operator. Ritchie also recalled always having some back pain throughout his adult life, made worse by his job duties. When his pain symptoms worsened, he sought treatment with Dr. Chaney approximately 2 ½ years previous.

Dr. Vaughan noted Ritchie complained of right-sided lower back pain with radiation into his right leg. Ritchie also had occasional bouts of numbness in his legs and fingers.

Dr. Vaughan conducted a physical examination and reviewed the MRI of June 21, 2010. His impression was:

> This is a 56-year-old man with symptoms predominantly of right-sided lower back pain. My diagnosis would be chronic lumbar strain and lumbar spondylosis of a mild moderate degree (age-related degenerative changes). I would attribute the chronic lumbar strain to work activities and the lumbar spondylosis due to the natural aging process.

Dr. Vaughan placed Ritchie in DRE Lumbar Category II and assigned a 5% impairment pursuant to the AMA Guides. He noted Ritchie "did not have any cervical complaints and

full range of motion of his neck, so I believe we would have no impairment rating regarding his neck."

Dr. Vaughan further stated:

> Frankly, I would attribute the impairment rating and need for restrictions due to the cumulative effect of all of his work activities working in the coal mines and heavy equipment operating since 1975. I would say in all medical probability if examined prior to his employment with Enterprise Coal he would probably have a mild decreased range of motion of his back, and tenderness of his back. I believe in all medical probability he had a 5% impairment rating prior to his employment with Enterprise Coal.

Dr. Vaughan assigned restrictions of no lifting more than 40 pounds and no repetitive bending and twisting of the back. He would continue the use of over-the-counter anti-inflammatory medications. However, he did not believe ongoing physician or chiropractic appointments were medically necessary. Dr. Vaughan believed Ritchie was capable of work activities within the assigned restrictions.

The ALJ provided extensive analysis, findings of fact and conclusions of law in her Opinion and Award. Relevant portions are as follows:

> The contested issues will be discussed in the order that is most reasonable to this ALJ.

1. The facts as stipulated by the parties.

2. Notice.

In a workers' compensation claim alleging a cumulative trauma injury, notice is required and the statute of limitations begins to run when a worker "discovers that a physically disabling injury has been sustained and knows that it is caused by work." Alcan Foil Products vs. Huff, 2 SW 3d 96 (Ky. 1999); Special Fund vs. Clark, 998 SW2d 487 (Ky. 1999). The manifestation date is not necessarily controlled by the date of last employment. In Special Fund vs. Clark, supra, the Supreme Court modified Alcan to a degree, holding that an employee is entitled to recover benefits for that portion of disability which occurred in the two years preceding the filing of the claim.

KRS 342.185(1) mandates notice of an accident must be provided to the employer "as soon as practicable after the happening thereof." Cumulative or gradual trauma injuries must be distinguished from acute trauma injuries in which a single traumatic event causes the injury. In Hill vs. Sextet Min. Corp., 65 SW3d 503, 507 (Ky. 2001) the Supreme Court stated:

Implicit in the finding of a gradual injury was a finding that no one instance of workplace trauma, including those specifically alleged and those of which the employer was notified, caused an injury of appreciable proportion.

The event triggering Plaintiff's obligation to provide the Defendant/employer notice in cumulative or gradual injury claims was different from the triggering event in acute

trauma cases. In cumulative trauma injuries, the date on which the obligation to give notice is triggered is the date on which there is a "manifestation of disability." Special Fund vs. Clark, 998 SW2d 487, 490 (Ky. 1999). In Special Fund vs. Clark, supra, the Supreme Court of Kentucky defined "a manifestation of disability" 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.
> Id. at 490.

While a worker may report a cumulative or gradual trauma injury to the employer before he or she is required to do so, the worker "is not required to self-diagnose the cause of a harmful change as being a work-related gradual injury for the purpose of giving notice." American Printing House for the Blind ex rel. Mutual Ins. Corp. of America vs. Brown, 142 SW3d 145, 148 (Ky. 2004). Indeed, a worker is not expected to provide notice to the employer of a cumulative or gradual trauma injury until he or she is informed by a *physician* of a diagnosis of the injury *and* that the injury is work-related. Id. In American Printing House for the Blind ex rel. Mutual Ins. Corp. of America, supra, the Supreme Court of Kentucky instructed as follows regarding the notice requirements for cumulative or gradual injuries:

> In *Alcan Foil Products v. Huff, supra* at 99 and 101, we noted that "the entitlement to workers' compensation benefits stems from the fact that an occupational injury has been sustained" and that it "begins when a work-related injury is sustained, regardless of whether it is occupationally disabling." Nonetheless, because gradual injuries often occur imperceptibly, we reaffirmed the principle that a rule of discovery governs the notice and limitations requirements for such injuries. ***We determined that the obligation to give notice and the period of limitations for a gradual injury are triggered by a worker's knowledge of the harmful change and its cause rather than by the specific incidents of trauma that caused it.*** Id. at 148. (Emphasis added).

Here, the Plaintiff admitted being told my Dr. Williams and/or Dr. Chaney sometime after June or August 2010 that his work activities were probably contributing to his neck and back pain. However, Plaintiff testified he did not remember exactly the date(s) of those discussion(s). His motivation was to continue to work. He was caught up in the fact that Dr. Williams had told him that his chiropractic treatments would “keep him on the loader” for the next couple of years.

The Defendant/employer relies heavily upon the fact that Plaintiff admits he was told that the end-loader operator job was contributing to his back and neck pain by his treating

physician around mid-2010, but did not report that until April of 2011 – after he had taken a voluntary lay-off. The Defendant/employer claims that was sufficient information to trigger the two-prong notice requirement per American Printing House for the Blind ex rel. Mutual Ins. Corp. of America, supra.

However, Plaintiff also testified he did not know the doctors believed he should not go back to work because of the effects of the work activity until April, 2011. The two-prong test as discussed in American Printing House for the Blind ex rel. Mutual Ins. Corp. of America, supra had not triggered the notice requirement because the Plaintiff was not aware of the work activities being the cause of his inability to return to work until the doctors informed him in April, 2011. In Special Fund vs. Clark, supra, the Supreme Court modified Alcan to a degree, holding that an employee is entitled to recover benefits for that portion of disability which occurred in the two years preceding the filing of the claim.

Of importance to this fact-finder is the obvious uncertainty of what the Plaintiff knew and when he knew it. Indeed, the Plaintiff could not testify exactly when he began treatment for his cumulative trauma. Importantly, he does not remember the doctor(s) ever telling him to quit working as an end loader operator the mines until April 2011. He had the intention to keep working even though he was laid off. That was until his doctors instructed him not to return to work.

In the case of Brummitt vs. Southeastern Kentucky Rehabilitation

Industries 156 SW3d 276 (Ky. 2005) the Kentucky Supreme Court noted:

> [T]his manifestation of disability date is a fact intensive determination by the fact finder based upon the particular circumstances in each case.... [A]n ALJ is authorized to conclude, if supported by evidence of record, that a disability could manifest on the date the claimant seeks treatment and is informed on that occasion that her condition is related to her work.

However, the Brummitt, supra, case, as well as the subsequent case of Johnson vs. Bluegrass Cooperage, 2006-SC-0340-WC (Ky. 2007), requires the ALJ to apply the holding in Special Fund vs. Clark, 998 SW2d 487 (Ky. 1999) and "consider the effect of work performed within the two-year period before each claim was filed." This ALJ is charged thereby with determining: (1) whether the claimant sustained repetitive or cumulative trauma from work performed within the two-year period before the application was filed; (2) and whether it caused a harmful change in his lumbar and cervical spines; and (3) whether such a change entitled him to any benefits.

Apparently, the results of the MRI and subsequent neurosurgical consultation did not result in either surgery or the recommendation that he cease working. It wasn't until April 2011 (right before notice was given) that Drs. Williams and Chaney recommended he cease work. There was no evidence from the Defendant/employer to rebut the Plaintiff's testimony. This

is particularly true concerning the Defendant/employer's unsupported claim that the Defendant/employer was prejudiced by the alleged untimely notice.

Plaintiff formally filed his claim in the Department of Workers Claims on May 2, 2011, within a few weeks of learning about the doctors' recommendation that he not return to work in the mines. Well within the two years of the date the Plaintiff last worked and was last subjected to the cumulative trauma. Reviewing the entire record it becomes apparent to this fact-finder that Plaintiff gave notice and filed his claim as soon as practical after the manifestation of disability of his cumulative trauma. After considering all of the evidence I find that: (1) the Plaintiff sustained repetitive or cumulative trauma from work performed within the two-year period before the application was filed; (2) and that it caused a harmful change in his cervical spine, lumbar spine and hearing ability; (3) that the harmful change entitles him to benefits; and (4) that Plaintiff gave due and timely notice to the Defendant/employer regarding the above-stated causation. For these findings I rely upon the testimony of the Plaintiff, the written notice to the Defendant/employer and the medical evidence including opinions of Dr. Williams and Dr. Chaney and to a lesser extent Dr. Johnson and Dr. Vaughan.

3. Work-relatedness/causation.

When the causal relationship between an injury and a medical condition is not apparent to the lay person, the issue of causation is solely within the province of a medical expert.

Elizabethtown Sportswear vs. Stice, 720 SW2d 732, 733 (Ky. 1986); Mengel vs. Hawaiian Tropic Northwest and Central Distributors, Inc., 618 SW2d 184 (Ky. 1981). As discussed above, I find that there is a causal relationship between the cumulative trauma sustained by Plaintiff over the 30 plus years in the mines as an end loader operator and particularly the last two years of daily trauma. While I find the opinions of the treating physicians generally more persuasive than the evaluating physician in this case [sic]. However, even the Defendant/employer's evaluating physician, Dr. Vaughan, opined that Plaintiff's back condition was probably related to his many years as an end-loader operator. Therefore, I rely on Dr. Williams, Dr. Chaney and Dr. Johnson in determining that Plaintiff's medical condition is related to the cumulative trauma and injuries he sustained while working for the Defendant/employer.

. . . .

4. Benefits per KRS 342.730.

The evidence is contradictory on this issue. The Plaintiff argues he is permanently and totally disabled as defined by the Act. The Defendant/employer argues his occupational disability is only partial if there is any at all. A vocational report by Dana Ward was submitted by the Defendant/employer in addition to a FCE. Importantly, both parties presented medical restrictions and limitations that would directly impact the plaintiff's vocational opportunities. Both presented medical opinions regarding the impairment as well as the restrictions and limitations on Plaintiff's physical activities. After reviewing all of the evidence in this case, I find Plaintiff now suffers from

a permanent total occupational disability. In making this finding I rely on upon the testimony of the Plaintiff, the medical opinions of Dr. Williams, Dr. Chaney and Dr. Johnson. I did not find the conclusion of the vocational evaluator persuasive to the degree that she did not consider the restrictions and limitations placed on Plaintiff's activities by his treating physicians. Nor did she consider the testimony of the Plaintiff with regard to his restrictions and limitations.

Permanent total disability is defined in KRS 342.0011(11)(c) 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. Hill vs. Sextet Mining Corp., 65 SW3d 503 (Ky. 2001).

"Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. Ira A. Watson Department Store vs. Hamilton, 34 SW2d 48 (Ky. 2000).

In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, educational level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A.

Watson Department Store vs. Hamilton, supra.

In applying the factors set out in Ira Watson, supra, it is apparent that Plaintiff's vocational factors infer his total and permanent disability. Those factors I have considered are: his age, 57 which is an older worker and his educational level – which technically is tenth grade, but clearly he has a lower than normal functioning on many vocational activities such as math. His primary work experience however has been in the very labor intensive job of operating heavy equipment in a coal mining setting. In his physical condition, he is unable to perform any job including a sedentary job on a regular and sustained basis.

I find the Plaintiff's testimony credible. I observed him closely at the hearing and he was forthcoming in his responses to counsel's questioning. He seemed to have some difficulty hearing or understanding some questions of counsel. This is not an individual who simply does not want to work. His work history speaks for itself – his [sic] has a proven record of work.

Simply to apply the restrictions of Dr. Williams, Dr. Chaney and Dr. Johnson and further accept the Plaintiff's testimony as true - the Plaintiff could not return to any work on a regular and sustained basis.

With his physical restrictions the vocational and medical factors all leads this fact-finder to conclude that the plaintiff suffers from a permanent and total occupational disability.

Enterprise filed a petition for reconsideration, arguing the ALJ applied an incorrect legal standard in determining the manifestation date, including addition of an element not present in either case law or the statute. Enterprise further argued the ALJ included elements of a statute of limitations defense in her analysis and relied on holdings in statute of limitations cases. Enterprise argued that facts not contained in the opinion confirm notice was not provided in accordance with the correct legal standard. Enterprise contended Ritchie knew he was having work-related neck and back pain for years prior to making his claim and notifying the employer. Enterprise identified portions of Ritchie's testimony which it argued established he knew his neck and back pain were caused by his work. Enterprise also took issue with the ALJ's decision not to adopt the opinion of the vocational evaluator and argued the ALJ's statements regarding the evaluator were inaccurate.

The ALJ provided as follows in her order on reconsideration rendered January 31, 2012:

> The Defendant/employer avers an error regarding the legal standard to be applied to the notice of a cumulative trauma injury. It argues the undersigned erred by placing an "additional element which is not present in either case law precedent or the statute". The Defendant/employer avers the undersigned incorrectly

injected that a physician informing the Plaintiff that he should not return to work because of the gradual injury, as a “element that was inconsistent with the triggering the notice requirement.” In reviewing the Opinion and Award I find no error in relying on the evidence regarding what the Plaintiff knew and when he knew it as a basis for determining what constituted the manifestation of the Plaintiff’s disability. The Plaintiff’s knowledge is key to the determination of when the Plaintiff’s duty to notify the employer arises. Central to the “discovery” rule in these cumulative trauma cases is the causative factor of the work activity and its link to the Plaintiff’s “physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.” See that portion of the Opinion and Award where it states:

> In Special Fund vs. Clark, supra, the Supreme Court of Kentucky defined "a manifestation of disability" 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.
> Id. at 490…
>
> The Defendant/employer relies heavily upon the fact that Plaintiff admits he was told the end-loader operator job was contributing to his back and neck pain by his treating physician around mid-2010, but did not report that until April of 2011 – after he had taken a voluntary lay-off. The Defendant/employer claims that was sufficient information to trigger the two-prong notice requirement per American Printing House for the Blind ex rel., Mutual Ins. Corp. of America, supra.
>
> However, Plaintiff also testified he did not know the doctors believed he should not go back to work because of the effects of the work activity until April 2011. The two-prong test as discussed in American Printing House for the Blind ex rel., Mutual Ins. Corp. of America, supra had not triggered the notice requirement because the Plaintiff was not aware of the work activities being the cause of his inability to return to work until the doctors informed him in April, 2011.

I found that the fact that the doctor informed Plaintiff he should not go back to work significant evidence in determining when Plaintiff discovered he had sustained a work injury.

Plaintiff's symptoms were known to him to be made worse by his work activities, but I interpreted his testimony as meaning he didn't know he had sustained a work **injury** until the doctors informed him he could not go back to work.

The Defendant/employer argues the undersigned failed to discuss the exchange of information between the Plaintiff and Dr. Chaney and Dr. Bean. However, the interaction between Dr. Chaney and the Plaintiff was taken into consideration and mentioned specifically on page 9, 10 and 14 of the Opinion and Award. Dr. Bean's findings are discussed on pages 10 and 11. Dr. Vaughn's report and specifically his restrictions and limitations were considered and discussed on page 22 of the Opinion and Award. The Defendant/employer also argues that the undersigned erred in relying on the holdings in Brummitt vs. Southeastern Kentucky Rehabilitation Industries, 156 SW3d 276 (Ky. 2005) because it is a case dealing with the statute of limitations in a gradual injury case, not notice. The case of American Printing House for the Blind, supra, however, equates the issue of notice with the statute of limitations in gradual injury cases, specifically as it relates to a "worker's knowledge of the harmful change and its cause rather than by the specific incidents of trauma." (See Opinion and Award, p. 25).

The record has been reviewed, considered and reconsidered upon the filing of this Petition for Reconsideration. I find that there is substantial evidence in the form of the Plaintiff's testimony to determine that he gave due and timely notice to the

> employer upon learning that he had sustained an injury due to his work activities.
>
> The Plaintiff responded by noting the holding in an unpublished case, Rudd Equipment Company vs. Fletcher, No. 2008-CA-000958-WC (December 12, 2008). It is cited not for any legal authority, but for the analysis provided on this specific question. I find the Court of Appeals' analysis does provide additional support for the undersigned's conclusions.
>
> As to the Defendant/employer's argument regarding extent and duration, I find it is a re-argument of the merits of the case and no patent error appears on the face of the Opinion and Award. For all of the above-stated reasons, the Defendant/employer's Petition for Reconsideration is **DENIED**.

On appeal, Enterprise again argues the ALJ applied the wrong legal standard in determining whether due and timely notice of an injury was provided pursuant to KRS 342.185(1). Enterprise contends the ALJ cited cases and legal standards pertaining only to a statute of limitations defense which was not an issue in this claim. Enterprise notes the ALJ concluded the two prong test of American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004) had not triggered the notice requirement "because the plaintiff was not aware of the work activities being the cause of his inability to return to work until the doctors informed him in April 2011." Enterprise further notes the ALJ stated "an

employee is entitled to recover benefits for that portion of disability which occurred in the two years preceding the filing of the claim." Enterprise notes the ALJ cited holdings in Brummit v. Southeastern Kentucky Rehabilitation Industries, 156 S.W.3d 276 (Ky. 2005) and Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999) and applied the three prong test in Clark which is applicable to a statute of limitations defense.

Enterprise also argues the ALJ erroneously used the date Ritchie was informed that he should not return to work as the manifestation date. Enterprise notes the correct notice standard was stated in Hill v. Sextet Mining Corp., 65 S.W.3d 503, 508 (Ky. 2001). There, the Supreme Court stated the claimant must give notice only when a physician informs him of the fact he had sustained a work-related gradual injury. Enterprise argues the fact that Ritchie continued to work has no bearing on the notice defense. Enterprise notes the court stated in Alcan Foil Products vs. Huff, 2 SW 3d 96 (Ky. 1999) that a worker's ability to perform his usual occupation is not dispositive of whether he has sustained an occupational disability. Enterprise notes the Court stated in Hill vs. Sextet Mining Corp., 65 SW 3d 503 (Ky. 2001) that the effect of multiple physicians informing the claimant he needed to quit his employment was

irrelevant to the manifestation date. Enterprise acknowledges there is no statutory timeframe for the notice requirement and the ALJ has the sole discretion to determine whether notice was given as soon as practicable.

Enterprise argues the ALJ provided an incorrect analysis of the manifestation date itself. Instead of deciding when Ritchie was informed his condition was work related the ALJ chose a later date because it was when Ritchie was told to stop working.

Enterprise contends the ALJ's findings of fact in relation to the manifestation date and whether notice was provided are inaccurate. Enterprise argues applying the facts to the correct legal standard yields a different result. Enterprise contends the evidence indicates Ritchie's initial visit with Dr. Williams occurred on August 23, 2010, when he was seen for back pain and numbness. He was treated by Dr. Bean on July 27, 2010, at which time Dr. Bean noted Ritchie's back pain with numbness in his legs occurred more when operating heavy equipment. Dr. Bean diagnosed chronic progressive degenerative lumbar disc disease on that date. Finally, Enterprise notes Ritchie first saw Dr. George Chaney on June 21, 2010 and was diagnosed with a herniated disc.

During his deposition, Ritchie made clear statements regarding the cause of the diagnoses provided to him by his treating physicians. Enterprise points to Ritchie's acknowledgment that Dr. Williams probably told him at the first visit the back and neck pain were related to his employment. Enterprise notes Ritchie further testified Dr. Chaney told him his neck and back pain resulted from his work. Additionally, Enterprise notes Ritchie acknowledged Dr. Bean told him the pain in his neck and back were due to work. Enterprise argues the evidence confirms Ritchie was told by a physician that his complaints and diagnoses were caused by his employment no later than July 27, 2010. Thus, it argues the date of manifestation must be July 27, 2010. Enterprise asserts it is uncontroverted, Ritchie did not provide notice of his work-related injury until the claim was filed. Enterprise notes the ALJ found notice was due and timely after the manifestation of disability in April 2011 when Ritchie was told not to return to work in the mines.

Enterprise also argues the ALJ's finding of a permanent total disability is not supported by substantial evidence. Enterprise believes the ALJ mischaracterized and misapplied facts in reaching her determination. Enterprise notes the ALJ stated the vocational evaluator was not reliable because

“she did not consider the restrictions and limitations placed on plaintiff's activities by his treating physician.” Enterprise asserts the vocational evaluator clearly indicated she reviewed the treating physician’s notes and restrictions, Ritchie's job description and the evaluating physician’s report. Enterprise argues the ALJ failed to give the FCE or Dr. Vaughan’s conclusions any probative weight. The FCE found Ritchie met or exceeded the physical demands of the essential functions as a loader operator as defined by the U.S. Department of Labor and the employer's job descriptions. Enterprise notes the ALJ failed to state any reason why the FCE was not probative. Further, Enterprise contends the ALJ failed to discuss, give credence to, or explain why Dr. Vaughan’s opinion was not used in the analysis regarding permanent total disability.

We begin our analysis by noting KRS 342.185(1) requires notice of an accident to be given to the employer as soon as practicable after the accident. Implicit in the finding of a gradual injury is a finding no single instance of workplace trauma caused an injury of appreciable proportion. Hill v. Sextet Mining Corp., *supra*. For that reason, in cumulative trauma claims, the date triggering the obligation to give notice is the “manifestation of disability,” which is the date a worker first learns he has

sustained a gradual injury and knows it is due to his work. Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999). In an unbroken line of cases from Hill v. Sextet Mining Corp., *supra*, forward, our Appellate Courts have determined in claims involving cumulative trauma, a worker is not required to give notice until he is first informed by a "physician" that his condition is work-related. An employee is not prohibited from giving notice of a gradual injury at an earlier date if he suspects the associated symptoms are the product of work activities. American Printing House for the Blind v. Brown, *supra*.

Enterprise's arguments on appeal essentially turn on two questions. First, does the July 27, 2010 report of Dr. Bean compel a finding Ritchie was informed he had a work-related injury at that time? Second, does Ritchie's testimony compel a finding either Dr. Bean, Williams or Chaney informed him he had a work-related injury? We believe the answer to both questions is no.

Enterprise believes the only reasonable interpretation of the record is that since Ritchie experienced back and neck pain at work and believed his work caused the symptoms, he had knowledge his alleged neck and low back injuries were caused by his work. However, the mere fact that a claimant experiences symptoms at work does not necessarily mean the

work activity caused a harmful change. Dr. Bean's report refers to Ritchie experiencing pain which "occurs more when operating heavy equipment or with standing or walking." The report does not indicate the cause of the condition producing the pain nor does Dr. Bean indicate Ritchie was informed his diagnosis is the result of work activity. A reasonable understanding of this phrase is that Dr. Bean was merely stating the times when Ritchie notices his symptoms. It reasonably cannot be argued Dr. Bean was stating the mere act of standing or walking also caused Ritchie's injury, as one would have to believe if Enterprise's view of the sentence were adopted.

From our review of the evidence, it appears the earliest medical record that can be viewed as informing Ritchie he had a work-related cumulative trauma injury was the April 1, 2011 report of Dr. Williams filed with Ritchie's Form 101 on April 11, 2011. Consequently, Ritchie's duty to provide notice was not triggered until he was expressly informed by Dr. Williams his work caused his back injury. Hill v. Sextet, *supra*. While Enterprise points to Dr. Bean's July 27, 2010 record as proof Ritchie knew his work contributed to his back pain, there is no indication in that record Dr. Bean ever informed Ritchie his work produced a cumulative trauma injury.

The ALJ was not bound by Ritchie's statements regarding what he was told by the various physicians. Indeed, the testimony identified by Enterprise consists of statements regarding the relationship between work and pain symptoms rather than whether he was informed of a work-related cumulative trauma injury.

It is undisputed Ritchie provided notice to Enterprise of his work-related injury by filing his Form 101 on April 11, 2011. Hence, in accordance with existing authority, it appears April 1, 2011 was the date of manifestation of Ritchie's disability for which he provided due and timely notice to his employer. American Printing House for the Blind v. Brown, *supra*.

While Enterprise is correct in noting the claim did not involve a statute of limitations defense and discussion of trauma within two years of the filing of the claim was unnecessary, the ALJ correctly observed the manifestation of disability is treated in the same manner in both statute of limitations and notice defenses. The ALJ understood KRS 342.185 requires notice to be given as soon as practicable and that notice in cumulative trauma claims is governed by Special Fund v. Clark, *supra*. The ALJ correctly observed a claimant is not required to self-diagnose the cause of a harmful change and is not expected to give notice until

informed by a physician of the diagnosis of the injury and that the injury is caused by the work activity. Here, the ALJ did not overlook the claimant's testimony, but viewed it as indicating Ritchie was not aware of work-relatedness/causation until April, 2011. The ALJ's finding that Ritchie gave due and timely notice with the filing of his Form 101 is supported by substantial evidence, especially in light of Dr. Williams' April 1, 2011 report.

We find Enterprise's appeal regarding the finding of permanent total disability to be nothing more than a re-argument of the evidence before the ALJ. Enterprise impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence for that of the ALJ. That is not the Board's function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Since Ritchie was successful before the ALJ in proving a permanent total disability, the question on appeal is whether there was substantial evidence to support the ALJ's determination. 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 persons.

Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ, as fact-finder, the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than that reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

So long as the ALJ's rulings with regard to permanent total disability are reasonable under the evidence, they

may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). In making a determination of whether a claimant is totally disabled, the ALJ may rely on the medical testimony, a worker's own testimony regarding his physical condition and ability to labor, or a combination of both. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

The ALJ was well within her role as fact-finder in rejecting the opinions of the vocational evaluator.[1] The vocational evaluator's report, even if uncontradicted, is entitled to no particular weight. Here, the ALJ summarized the report, noting the evaluator, based upon the FCE and Dr. Vaughan's report, concluded Ritchie was physically capable of working in sedentary and light physical demand categories. The ALJ stated she did not find the conclusion of the vocational evaluator persuasive because "she did not consider the restrictions and limitations placed on Plaintiff's activities by his treating physicians" or the "testimony of the Plaintiff with regard to his restrictions and limitations". Enterprise views these statements as indicating the ALJ did not understand the evaluator reviewed those records. Enterprise fails to understand the

[1] The board has failed to find the vocational evaluator's report in either the electronic or hard copy record, although the hearing order dated December 14, 2011 indicates the report was tendered.

ALJ's statement only refers to the evaluator's conclusion that based upon the FCE and Dr. Vaughan's restriction, Ritchie was capable of sedentary or light duty work.

After reviewing the evidence of record, the ALJ applied the appropriate legal standard for determining permanent total disability in accordance with the Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Drs. Williams, Chaney and Johnson assigned significant restrictions. Additionally, the ALJ specifically stated she found Ritchie credible regarding his ability to work post-injury. Taking into account Ritchie's age, education, and past work experience, in conjunction with his post-injury physical status due to the effects of his work-related injury, the ALJ was persuaded Ritchie was permanently totally disabled. Substantial evidence supports that conclusion. For that reason, we cannot say the ALJ's finding Ritchie is entitled to an award of permanent total disability benefits is so unreasonable under the evidence the decision must be reversed as a matter of law.

Accordingly, the January 5, 2012 Opinion and Award and the January 31, 2012 order on petition for reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON KAMP PURDY
300 E MAIN ST STE 400
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON, KY 40741

ADMINISTRATIVE LAW JUDGE:

HON JEANIE OWEN MILLER
PO BOX 2070
OWENSBORO, KY 42302