# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: April 3, 2015**

CLAIM NO. 201273957

ENTERPRISE MINING CO., LLC AS
INSURED BY AIG PETITIONER

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

ANTHONY STINES;
ENTERPRISE MINING CO., LLC AS
INSURED BY BRICKSTREET;
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**REVERSING IN PART**
**AND REMANDING**

* * * * * *

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

**RECHTER, Member.** Enterprise Mining Company as insured by AIG ("AIG") appeals from the August 14, 2014 Opinion and Order and the September 11, 2014 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff,

Administrative Law Judge ("ALJ") finding Anthony Stines ("Stines") permanently totally disabled. AIG argues it is only responsible for an award of permanent partial disability benefits and the ALJ erred in finding it liable for two-thirds of the liability for the total disability award. We agree and reverse.

Stines filed his application alleging a specific traumatic injury to his neck and left shoulder on August 21, 2012, when he was struck by a falling water line and miner cable. AIG provided Enterprise Mining's workers' compensation coverage at the time of the August 2012 injury. Stines also alleged a cumulative trauma injury to his lumbar spine with a last date of exposure on December 27, 2013. Brickstreet Mutual Insurance ("Brickstreet") provided Enterprise Mining's workers' compensation coverage in 2013.

Stines was employed as an underground coal miner. On August 21, 2012, a water line and a cable fell, striking him on the neck and shoulders. He immediately felt pain and was treated in the emergency room at Whitesburg ARH. He was placed on light duty and sat in an office for one week following the 2012 injury. He then returned to work performing his regular duties and earning the same wages.

However, Stines continued to have pain and tingling in his neck and into his left shoulder and both

hands. For over a year, Stines stated he was able to perform his work without missing any time. However, by December, 2013, Stines testified he was no longer able to continue working due to back pain.[1] His last date of work was December 27, 2013. He acknowledged having low back problems in 2004, but had never missed work because of his back prior to December 2013. According to Stines, the August 2012 injury did not change his low back condition.

Because it does not relate to the issues on appeal, we will not discuss in detail the medical proof filed in this claim.

Based upon Stines' testimony and the opinion of Dr. Robert Hoskins, the ALJ determined Stines sustained significant injuries to his neck and left shoulder as a result of the August 21, 2012 accident. The ALJ further concluded Stines sustained a cumulative trauma injury to his low back, resulting in his leaving work due to pain. The ALJ found Stines did not have a pre-existing active impairment or occupational disability prior to the work-related injuries. Relying upon Dr. Hoskins' opinion, the ALJ determined Stines had a 7% impairment for the cervical condition, 5% for the left shoulder injury and 8% for the

[1] Stines directly testified he quit work in December, 2013 due to his back pain. Later, in response to a leading question, he agreed he quit work due to his neck and shoulder pain.

lumbar injury. Dr. Hoskins assessed these impairment ratings pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Finally, the ALJ concluded Stines is permanently totally disabled from and after December 27, 2013.

AIG and Brickstreet filed petitions for reconsideration noting the ALJ failed to enter specific findings concerning the impairment produced by each injury. AIG requested a specific finding of the percentage of impairment attributable to the 2012 injury, and whether the two multiplier would be applied once Stines ceased working in December 2013. It also requested that the ALJ limit such benefits to the appropriate 425 week period from and after the date of injury. Brickstreet requested specific findings concerning the impairment ratings attributable to the 2012 injury and the cumulative trauma injury.

The ALJ, relying on Dr. Hoskins' supplemental report dated July 21, 2014[2], apportioned two thirds of the permanent total disability award to the 2012 cervical and shoulder impairments and one third to the 2013 impairment.

[2] Dr. Hoskins indicated he was asked to apportion the extent Stines' impairments contributed to the "totality of his current condition." Dr. Hoskins apportioned one-third to the lumbar condition and two-thirds to the cervical and shoulder conditions. He explained he based the apportionment on the fact the low back symptoms were manageable with treatment and "did not prevent him from working at a very physically demanding job nor from engaging in most ADL's without being drastically hampered in doing so."

The ALJ again determined Stines was permanently totally disabled as of 27, 2013. AIG appealed.

On appeal, AIG correctly notes the 2012 cervical and shoulder injuries did not produce a permanent total disability. Although he had ongoing symptoms from the time of the injury through 2013, Stines was able to perform his regular duties for more than one year despite the cervical and shoulder conditions. The cervical and shoulder injuries produced a permanent partial disability commencing from the date of the 2012 injury. AIG is responsible for a 425 week award of benefits. In Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009), the Supreme Court stated as follows:

> A condition 'arises' when it comes into being, begins, or originates. Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* consider the amount of impairment that *remains* at MMI to be 'permanent.' The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. We conclude, therefore, that the compensable period for partial

> disability begins on the date that impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration. [citation omitted]
>
> The evidence compelled a finding that the claimant's injury produced permanent impairment and disability from the outset. Thus, it also compelled a partial disability award in which the compensable period began on the date of injury. The claim must be remanded for that purpose.
> Id. at 839-840.

Consequently, the ALJ is required to begin the award of permanent partial disability benefits on August 21, 2012, the date of the cervical and shoulder injury.

The ALJ determined Stines became permanently totally disabled on December 27, 2013, and no party has appealed that determination. This case is governed by Sears Roebuck & Co. v. Dennis, 131 S.W.3d 351 (Ky. App. 2004). In Dennis, the claimant sustained a low back injury in 1995 while working for Radio Shack. He sustained a knee injury in 2000 in the employ of Sears.

The Court of Appeals considered the case in light of the Kentucky Supreme Court ruling in Campbell vs. Sextet Mining, 912 SW2d 25 (Ky. 1996) and its companion cases Fleming vs. Windchy, 953 SW2d 604 (Ky. 1997), Whittaker vs.

Fleming, 25 SW3d 460 (Ky. 2000) and Spurlin vs. Brooks, Ky., 952 SW2d 687 (1997). The Court of Appeals stated:

> [C]laimants who are rendered totally disabled by a series of work injuries with different overlapping awards are to receive benefits that correspond to the whole of their disability *on the date that disability begins*. Generally, if a worker has a disability for which he is receiving benefits, or is so entitled at the time his permanent total disability manifests, then the employer liable for the subsequent total disability award receives a dollar-for-dollar offset for permanent partial disability benefits paid from and after the date total disability benefits are scheduled to begin. However, where a subsequent injury occurs and the worker is determined to be totally and permanently disabled, the amount and duration of an award for a prior condition may not be extended beyond that allowed under the Act for permanent partial disability if the first injury is combined with the subsequent injury to find total disability. Liability for the injured worker's total disability award falls to the employer or carrier when the subsequent injur[y] occurred with a dollar-for-dollar credit permitted for any prior overlapping permanent partial disability awards, and the extent and duration of that total award is determined as of the date of the last work-related injury.... After the expiration of any overlapping period of permanent partial disability, the original overlapping dollar amount becomes excess disability and becomes the liability of the workers' compensation insurance carrier legally

> responsible for the final injury for so long as the claimant is disabled. Id at 354-355.

In the case *sub judice*, the ALJ's apportionment in the award of benefits as contained in the Opinion and Order on Reconsideration does not comport with the law. On remand, the ALJ is directed to enter an award of permanent partial disability benefits for the cervical and shoulder injuries for which AIG is responsible and an award of permanent total disability benefits commencing December 27, 2013 for which Brickstreet is responsible. The amended award shall provide Brickstreet is entitled to a credit for the overlap until the expiration of the permanent partial disability period. *See* Fleming, 953 S.W.2d at 608 ("[T]he correct method for excluding the percentage of prior, active disability on these facts is to permit an offset against Trojan's and the Special Fund's liability pursuant to the award of total disability to the extent that benefits paid by the defendants pursuant to the partial disability award overlap the compensable period of the subsequent total disability award.").

Accordingly, the August 14, 2014 Opinion and Order and the September 11, 2014 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **REVERSED IN PART** and

**REMANDED** for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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