OPINION ENTERED: APRIL 13, 2012

CLAIM NO. 201100295

FRASURE CREEK MINING
AS INSURED BY KEMI — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

GARY MITCHELL
FRASURE CREEK MINING
AS INSURED BY ROCKWOOD INSURANCE COMPANY — RESPONDENTS/ CROSS-PETITIONERS

AND

and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING AND ORDER DISMISSING CROSS-APPEAL

* * * * * *

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

SMITH, Member. Frasure Creek Mining ("Frasure"), as insured by KEMI, appeals from the September 16, 2011 opinion, order and award rendered by Hon. Chris Davis,

Administrative Law Judge ("ALJ"), and from the October 31, 2011 order on reconsideration. On appeal, Frasure argues the ALJ erred in ruling Gary Mitchell ("Mitchell") was not required to prove his injury occurred on July 30, 2009. Frasure also argues the ALJ erred in apportioning Mitchell's permanent total disability ("PTD") award between his 2009 and 2010 injuries.

Mitchell filed a notice of cross-appeal naming Frasure Creek Mining as the respondent. In his brief to the Board following approval of a settlement agreement with Frasure Creek Mining as insured by Rockwood Casualty Insurance ("Rockwood"), Mitchell stated "Gary Mitchell, the Respondent, Cross-Petitioner hereby withdraws and voluntarily dismisses his cross appeal." Rockwood was dismissed as a party by order dated February 15, 2012.

Mitchell filed a Form 101 Application for Resolution of Injury Claim on February 25, 2011, alleging a July 30, 2009 injury to his neck and shoulder when the rock truck he was driving hit a rock. Mitchell also alleged an injury to his neck and back occurring on or about August 9, 2010 as a result of the bed of his rock truck continually "slamming" against the truck frame during driving operations.

Mitchell testified by deposition on April 18, 2011 and at the hearing held July 25, 2011. Mitchell began working

for Frasure on October 3, 2005 driving a water truck and later worked driving a rock dump truck. Mitchell indicated he worked 55 to 63 hours per week. Mitchell testified that on July 30, 2009, he was driving a 100 ton 777D truck loaded with rocks when it hit a large rock submerged in a mud puddle on the roadway, causing the truck to jump and come back down slamming him down into his seat. He experienced an onset of pain as well as a chilling or numbness in his neck and low back. He notified his co-workers and also told his supervisor, "Copperhead" Collins, that his neck was tingling and he had back pain. A grader was brought to the location but it could not move the rock. A dozer was then driven over the rock to break it.

After Mitchell completed his shift, he sought medical treatment at the Primary Care Center in Hazard, Kentucky where he was seen by Ben W. Back, PA-C.[1] Mitchell then went to Fugate Chiropractic the following day. When asked whether his treatment was processed as a workers' compensation claim, Mitchell stated:

> No. They [sic] was no – when I called Copperhead that morning and told him that I was going to be off work, I had to go to the chiropractor, and he said, "Well, the next time you get an injury,"

[1] In his deposition, Mitchell stated he saw Mr. Back PA–C the day of the injury. At the hearing, Mitchell indicated he saw Back the day following his injury.

> said, “you need to tell me.” I said, “You knew about this because I talked to you on the CB that evening,” and he said, “Well, we need to fill out a report the next time.”

Mitchell indicated no accident report was completed at that time.

Mitchell acknowledged his initial treatment was paid through his general insurance because “the bosses don't want to fill these papers out, these accident reports, because it takes money away from their maintenance fees that they get." Mitchell stated he missed “a couple of days” from work then returned to driving a rock truck although he continued to have pain.

Mitchell alleged another work injury occurring on August 9, 2010. He had returned to his normal duties and on that day the night shift truck driver who preceded him wrote in his “pre-shift papers" that the truck bed was slamming on the rock truck. Mitchell told his supervisors about the problem but was required to continue driving the truck. In his deposition, he provided the following account:

> Q. Okay so you informed him the…
>
> A. That the night shift…
>
> Q. … That was slamming?
>
> A. The night shift had wrote [sic] it up and the bed was still slamming.

> Q. Okay. And did you continue to work?
>
> A. Continued - he told me that he would have - they get - check it out as quick as they could.
>
> Q. Okay. And, did you continue to drive the vehicle?
>
> A. I drove the truck.
>
> Q. Okay. And, what happened after that?
>
> A. Okay. I drove every day. I come in every day, check it in the bed was slamming. I'd holler at him and tell him that the bed was still slamming. He said they'd check it out as quick as they could. He done that all the way through - the next Monday, the bed was still slamming. I told him every day.
>
> Q. And that was Mr. Howard?
>
> A. Kenny Howard, yeah.
>
> Q. Okay. What is causing you any problems?
>
> A. Sometimes I'd heard. It’d slam you, you know and jar you up and down.

Mitchell did not feel he could return to work driving a rock truck. He stated bouncing would do more damage to his back, neck and head. He was also afraid he would be a danger to himself or others. He indicated he occasionally had trouble moving his neck. Operating a rock truck required him to turn his head in order to look in the mirror and back his truck to dump his loads.

On July 30, 2009, Mitchell sought treatment at Eastern Kentucky Primary Care Center complaining of stiffness in the left side of his neck. He was diagnosed with neck pain/strain and was restricted from working for two days. He followed up on August 3, 2009 for continued neck pain and spasms and was restricted from work for one week.

Mitchell was treated on July 30, July 31, and August 3, 2009 at Fugate Family Chiropractic. Anthem Blue Cross Blue Shield, Mitchell's personal health insurance carrier, was billed since there was an indication Mitchell's condition was not related to employment.

Dr. Thien Ngo of the Southern Medical Group examined Mitchell on January 8, 2011. Mitchell complained of lower back pain radiating into his right leg, numbness, and neck pain radiating down his left arm. Dr. Ngo diagnosed low back pain secondary to osteoarthritis at L5–S1 and neck pain secondary to degenerative disc disease.

Dr. Ira B. Potter examined Mitchell on March 17, 2011. Dr. Potter indicated Mitchell's physical examination findings were plausible and consistent with his impairments. After reviewing the medical records, taking a history, and performing an examination, Dr. Potter diagnosed cervical sprain/strain, cephalgia, multi–level cervical degenerative disc disease, C-5–C6 and C6–C7 disc bulges, lumbosacral

sprain/strain, right lumbosacral radiculitis, multi–level lumbar degenerative disc disease, and L5–S1 facet joint osteoarthritis. Dr. Potter assigned a 7% impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") due to restricted cervical motion and a 6% impairment rating due to lumbar complaints. Combined, these conditions produced a 13% impairment rating. Dr. Potter stated the impairment was caused by the July 2009 and August 2010 incidents being superimposed upon pre-existing, dormant, and non-disabling degenerative changes of the cervical and lumbar spine. He concluded Mitchell could not return to the type of work he was performing at the time of his injuries. He also concluded Mitchell did not have an active impairment prior to these work injury events.

Dr. Christopher Stephens performed an independent medical evaluation ("IME") on May 12, 2011. Dr. Stephens stated Mitchell had no objective findings on examination and a review of the medical records did not mention a work-related injury. Dr. Stephens noted an August 9, 2010 cervical MRI showed multilevel cervical disc disease. Dr. Stephens stated Mitchell's complaints were consistent with the radiographic findings. He noted Mitchell was previously asymptomatic and, after the injury, had symptomatic cervical

disc disease. Dr. Stephens opined Mitchell had neck pain secondary to cervical disc disease and low back pain secondary to lumbar disc disease. He felt Mitchell's cervical disc disease and spondylosis became symptomatic when he was jarred in the truck in July 2009 and never fully recovered but was able to return to work. Dr. Stephens stated Mitchell's low back pain was very mild and was symptomatic as early as the 1980s. Dr. Stephens assigned a 5% impairment rating pursuant to the AMA Guides due to the cervical symptoms which he related to the July 2009 incident. Dr. Stephens did not believe the August 2010 injury caused a worsening of the cervical condition. He stated Mitchell did not sustain a permanent impairment to the lumbar spine but indicated any lumbar complaints would be due to the August 2010 injury since Mitchell had lumbar complaints in July of 2009.

Dr. David J. Jenkinson performed an IME on May 11, 2011. After reviewing medical records, taking a history, and performing an examination, he found no evidence of a work-related injury. Dr. Jenkinson did not believe Mitchell suffered a permanent impairment and stated Mitchell did not require work restrictions.

Dr. Joseph L. Zerga performed an IME on May 23, 2011. After reviewing medical records, taking a history, and

performing an examination, Dr. Zerga diagnosed cervical spondylosis and osteoarthritis unrelated to a specific injury. Dr. Zerga believed the incident with the truck bed in 2010 caused a continuing aggravation of complaints which started in July 2009.

Dr. Gregory T. Snider performed an IME on June 2, 2010. After reviewing medical records, taking a history and performing an examination, Dr. Snider diagnosed neck and back pain. He found no medical documentation of an acute work injury and stated Mitchell was at maximum medical improvement ("MMI") from any acute work injury. He did not believe Mitchell suffered a permanent impairment due to either the July 30, 2009 or August 9, 2010 injury.

After reviewing the evidence, the ALJ made the following findings:

> As for work–relatedness/causation and "Injury" as defined by the act, for both cervical and lumbar injuries, the Administrative Law Judge is convinced that both conditions are permanent, work–related injuries effectively manifesting on July 30, 2009 and August 9, 2010, respectively.
>
> There is no evidence prior to the two dates of the injuries that the Plaintiff had any impairment rating, work–restrictions or significant medical treatment for each body part. The undersigned is also convinced that the two precipitating events, hitting the rock and truck bed slamming down, both occurred.

The finding that these conditions are permanent and work–related are primarily based on the opinions of Dr. Potter but are also supported, to some degree, by the opinions of Dr. Stephens, the medical records as a whole and the Plaintiff's testimony.

As for whether or not the Plaintiff was actually injured on July 30, 2009 the undersigned notes that while unusual is no bar to compensability of a claim that the plaintiff cannot remember, or even more to the point herein, inaccurately yet emphatically mis–remembers the exact date. Plaintiffs are not required, with automatic dismissal following if they fail, to correctly allege the exact date. Herein the Administrative Law Judge is satisfied that the plaintiff was injured at work, on or near July 30, 2009, in the manner he described, and with the follow up symptoms he described.

As for impairment ratings the undersigned finds the ratings assigned by Dr. Potter are more applicable. The undersigned believe [sic] that both conditions remain symptomatic as described by the plaintiff. The undersigned is not [sic] see a way that he can logically find the plaintiff has the symptoms he has, including pain and limitations on his ability to function, and find his impairment rating is zero. Regardless, Dr. Potter will be relied upon in his assignment of an impairment rating for both the cervical and lumbar conditions.

Further the undersigned believes that the Plaintiff lacks the capacity to return to the type of work done on the date of injury. The undersigned understands that following the injuries,

particularly the July 30, 2009 injury, the Plaintiff continued to work. However, [the] undersigned is convinced that it was out of financial necessity and that as his condition did not improve, combined with the effect of the second injury, that he reached the conclusion that he could not go on and I agree with that conclusion.

This finding is supported by the restrictions from Dr. Potter, which include restrictions on prolonged sitting and prolonged or repetitive use of equipment that subjects the spinal column to vibration. Clearly it would be unreasonable to expect the plaintiff to return to work driving a truck in and around the mines with these restrictions. The very injuries are as a result of the jarring to the spinal column.

The Administrative Law Judge further finds that the plaintiff is sixty years of age and his work history consists of manual labor. In addition to the job restrictions cited above all of the restrictions assigned by Dr. Potter, which are accepted, and which are listed under Section K.3. in the Form 107 he provided, preclude him from returning to manual labor. Indeed, the restrictions assigned by Dr. Potter, taken in the aggregate but with emphasis on the limitations on sitting and standing, reasonably preclude a return to the workforce.

Given the Plaintiff's age, educational background, work history and restrictions he is permanently, totally disabled. Job retraining is not a realistic option for a man of his age. Given that the impairment rating and restrictions as a whole, from the two injuries, combine to make the Plaintiff's [sic] totally disabled, and

the fact that it is possible, though difficult to tell, that if he had only one injury he might be employable, the undersigned finds that as far as the income benefits [sic] each date of injury, and therefore each Defendant, is responsible for 50% of the PTD award.

The defendant for the July 30, 2009 date of injury shall be responsible for the medical benefits for the cervical injury. The defendant for the August 9, 2010 date of injury shall be responsible for the medical benefits for the lumbar injury.

. . .

Mitchell's permanent total disability award shall be [$]599.00 (PTD rate) per week, from August 23, 2010, his last date of work, until such time as he qualifies for normal Social Security retirement benefits. Each defendant shall be responsible for 50% of the total weekly award, $299.50 per week. He is also entitled to all reasonable and necessary work related medical expenses for the July 30, 2009 cervical injury and the August 9, 2010 lumbar injury.

In making these findings, Orders and Awards the Administrative Law Judge is aware of the contrary medical evidence regarding causation, impairment rating and restrictions. I am aware that following the July 30, 2009 incident he worked for over one year and for two weeks following August 9, 2010. I am aware of the TIA episodes but find them coincidental and not affecting this outcome. I am aware that the employment records show that on July 30, 2009 the Plaintiff was on vacation but have addressed that. Simply put I believe and so find that the accidents occurred at work, in the manner described, on or close to the dates alleged and that they

> have resulted in the symptoms, impairment and restrictions alleged by Dr. Potter and the plaintiff.

Frasure, as insured by KEMI ("KEMI"), filed a petition for reconsideration arguing the ALJ's decision holding KEMI liable for lifetime benefits for the July 30, 2009 work injury incident violated relevant case law specifically Hodgkin v. Webb, 221 S.W.2d 644 (Ky. 1949); Whitaker v. Fleming 25 S.W.3d 460 (Ky. 2000); Fleming v. Windchy 953 S.W.2d 604 (Ky. 19970); Phoenix Manufacturing Company v. Johnson 69 S.W.3d 64 (Ky. 2001); and Sears Roebuck & Company v. Dennis 131 S.W. 3d 351 (Ky. App. 2004). KEMI also argued that since the last injury occurred when Frasure was insured by Rockwood Insurance Company, Rockwood must be held liable for all medical expenses. Finally, KEMI argued the ALJ should make further findings substantiating his conclusions.

Rockwood filed a lengthy petition for reconsideration relating to the August 9, 2010 injury taking issue globally with the ALJ's opinion, order, and award in its entirety. Frasure's independent counsel also filed a lengthy petition for reconsideration on its behalf taking issue with the ALJ's findings.

The ALJ addressed all three petitions in his October 31, 2011 Order on Reconsideration. He specifically

addressed Frasure's allegations that Mitchell's failure to remember the exact date of his injury should be fatal to his claim. The ALJ noted that he had provided "more than sufficient analysis of fact and law as to why Mitchell's failure to remember his exact date of injury was not fatal to his claim." The ALJ stated “The law is clear that such errors, even in traumatic injury claims, are not, as a matter of law, fatal to a claim.” Accordingly, the ALJ denied the petitions as they relate to the issues on appeal to the Board.

On appeal, Frasure argues the ALJ erred as a matter of law by ruling Mitchell was not required to prove the date of injury. Frasure notes Mitchell, in the Form 101, alleged he was injured on July 30, 2009 and he never amended the claim to allege any other date in 2009. Frasure further notes Mitchell gave a history of being injured on July 30, 2009 to every medical provider. Frasure asserts it proved Mitchell was on vacation on July 30, 2009. Frasure argues the date of injury is an essential element of the claim and therefore Mitchell was required to prove the injury actually occurred on July 30, 2009. Frasure contends that, after it proved the injury could not have occurred on July 30, 2009, Mitchell had a duty to either identify a different injury date and amend his claim or face dismissal of his claim.

Frasure contends Mitchell's first mention of an alleged work-related injury in any medical report was in the history given Dr. Potter at the IME on March 17, 2011, almost two years after the alleged injury. Frasure notes, Copperhead Collins "was gone with the wind" by that time. Thus, it contends its ability to investigate the alleged injury was "essentially nil."

Frasure further argues the ALJ erred as a matter of law by apportioning the PTD award between the 2009 and 2010 injuries. If the 2009 claim is not dismissed, Frasure argues the correct award for the 2009 injury is a permanent partial disability award for 425 weeks, and the correct award for the 2010 injury is a permanent total disability award with a credit for the overlap in benefits from the 2009 PPD award pursuant to the holdings in Spurlin v. Brooks., 952 S.W.2d 687 (Ky. 1997) and Fleming v. Windchy, 953 S.W.2d 604 (Ky. 1997).

Before the ALJ, Mitchell had the burden to prove each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Mitchell was successful before the ALJ, the question on appeal is whether there was substantial evidence of probative value to support the ALJ's conclusion. 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). As fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may weigh the evidence and draw any reasonable inferences therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ may reject any testimony and believe or disbelieve various parts of the testimony, regardless of whether it comes from the same witness or the same adversarial party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). The mere presence of evidence that would support a decision contrary to the ALJ's decision is not an adequate basis for reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Much of Frasure's argument on appeal is an impermissible attempt to have this Board re-weigh the evidence and reach a contrary conclusion. The ALJ was

clearly aware of the discrepancy between the history related by Mitchell and that recorded in the contemporaneous medical records. Dr. Potter reviewed those same records and was convinced Mitchell sustained an injury on or about the date Mitchell alleged he was injured. The record contains no evidence that Mitchell had any impairment rating, work-restrictions, or significant medical treatment prior to the alleged dates of injury. There was substantial evidence upon which the ALJ could find Mitchell sustained a work injury manifesting at the time alleged.

The ALJ was convinced an incident involving Mitchell driving his truck over a large rock occurred in July 2009. The ALJ found Mitchell gave Frasure due and timely notice of both injuries, and that finding is supported by substantial evidence. Mitchell testified he gave notice to his supervisor, Copperhead Collins, on the day he experienced his cervical injury in July, 2009. Since the ALJ found Mitchell's testimony regarding notice credible, Frasure had an opportunity to investigate the incident after Mitchell reported it to his supervisor. It would be highly unlikely Frasure was unaware of the incident in 2009 given that a grader was called and was unsuccessful in moving the rock from the roadway and a dozer was later

required to break the rock so that the 100 ton rock dump truck could pass.

Although Mitchell specifically stated his injury occurred on July 30, 2009, his testimony at the formal hearing indicates he saw Dr. Back on the day following the injury. Records establish Mitchell saw Dr. Back on July 30, 2009. Absent any other treatment for Mitchell's neck prior to that office visit, the ALJ could reasonably conclude Mitchell's work on or about July 30, 2009 was the cause of the complaints which necessitated treatment on July 30, 2009. The ALJ has some discretion to conform his findings to the proof. Kroger v. Jones, 125 S.W.3d 241 (Ky. 2004); Nucore v. General Electric, 812 S.W.2d 131 (Ky. 1991). Therefore, we affirm the ALJ's finding of the occurrence of an injury manifesting on or about July 30, 2009.

Mitchell sustained compensable successive injuries with the same employer but different carriers. We believe the ALJ must address the 2009 injury prior to addressing the permanent total disability he assessed following the 2010 injury. Dr. Potter, upon whom the ALJ relied, assessed impairment ratings for both injuries. The ALJ must first determine if Mitchell sustained a compensable work injury in 2009, and if so, its extent. Since Mitchell

continued to work after that injury date, the evidence compels a finding of an award of permanent partial disability. We therefore vacate and remand the ALJ's assessment of 50% of the permanent total disability award to Frasure as insured by KEMI.

The 425 week period for the 2009 injury had not expired when Mitchell became permanently totally occupationally disabled due the 2010 injury. Significantly, the ALJ determined a combination of these two work injuries rendered Mitchell totally occupationally disabled. When a claimant is rendered totally disabled as a result of two injuries on separate occasions, he is entitled to be fully compensated for those injuries on the date disability begins. Therefore, the amount and duration of the award for a prior condition may not be extended beyond that allowed under the Act for permanent partial disability if the first injury combined with the subsequent injury results in a total disability. Liability for Mitchell's total disability award falls on Frasure as insured by Rockwood Casualty Insurance ("Rockwood"), the carrier on the date of the second injury. Rockwood, which settled its liability, would have received a dollar-for-dollar credit for the prior overlapping permanent partial disability award. Since Mitchell will qualify for normal

old-age Social Security retirement benefits prior to the expiration of the 425 week PPD award period, the principle of “excess disability” is inapplicable.

Therefore, on remand, the ALJ must calculate the weekly amount of benefits for the award for permanent partial disability attributable to the 2009 injury and the appropriate multiplier, if any.

Accordingly, the decision of the Administrative Law Judge is **AFFIRMED IN PART, REVERSED IN PART** and this matter is **REMANDED** for the entry of an award in conformity with the opinion expressed herein. **IT IS HEREBY ORDERED** that the cross appeal filed by Mitchell is **DISMISSED**.

ALL CONCUR.

_____
LAWRENCE F. SMITH, MEMBER
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