OPINION ENTERED: MAY 10, 2013

CLAIM NO. 200477881

HARLAN CUMBERLAND COAL COMPANY
(AS INSURED BY ZURICH) PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

TRAVIS SEALS,
HARLAN CUMBERLAND COAL COMPANY
(AS INSURED BY CHARTIS),
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS, Member.

ALVEY, Chairman. Harlan Cumberland Coal Company as insured by Zurich ("Harlan/Zurich") appeals from the November 7, 2012 Opinion on Remand rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), awarding Travis Seals ("Seals") permanent total disability ("PTD") benefits due to injuries he sustained in 2002. It also appeals from the

January 3, 2013 order denying its petition for reconsideration.

On appeal, Harlan/Zurich argues the ALJ erred in finding Seals' 2002 injury caused his PTD, and the liability should be placed on the insurer at the time of the last injurious event. Because the ALJ on remand followed the Board's directives and reached a conclusion supported by substantial evidence, we affirm.

On March 5, 2002, Seals sustained injuries to his low back, neck, and right shoulder when he was struck by a falling rock. He underwent two right shoulder surgeries and returned to work for Harlan. He subsequently sustained a new injury to his right shoulder on November 5, 2004, at which time Harlan Cumberland Coal Company was insured by Chartis ("Harlan/Chartis"), and has not returned to work since.

Seals filed a Form 101, Application for Resolution of Injury Claim on August 30, 2004, alleging the March 5, 2002 injury. On April 27, 2006, the ALJ issued an order joining the November 5, 2004 right shoulder injury claim.

The ALJ rendered an opinion on May 7, 2007 awarding permanent partial disability ("PPD") benefits based upon a 15% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent

Impairment 5th Edition ("AMA Guides"), for injuries to the lumbar spine, cervical spine, and right shoulder sustained on March 5, 2002. He also awarded PPD benefits based upon a 5% impairment rating pursuant to the AMA Guides for the right shoulder injury sustained on November 5, 2004. The ALJ found Zurich, the insurer on March 5, 2002, responsible for medical expenses for the lumbar and cervical spine, and Chartis, the insurer on November 5, 2004, responsible for medical expenses for the right shoulder.

On April 29, 2011, Seals filed a motion to reopen alleging a worsening of his condition since the May 7, 2007 opinion. On February 13, 2012, the ALJ rendered a decision finding Seals' condition had worsened since the 2007 opinion rendering him permanently totally disabled and apportioned fifty percent to each injury. Both Harlan/Zurich and Harlan/Chartis appealed.

In an opinion entered July 31, 2012, the Board affirmed the award of PTD benefits, and vacated the finding regarding apportionment, providing direction to the ALJ as follows:

> Here, the ALJ clearly erred when he apportioned the 2002 and 2004 injuries to each be 50% liable for the PTD award. The injuries here do not completely overlap to the same body parts. It is therefore incumbent upon the ALJ to make a finding as to which injury is responsible for Seal's PTD. If he determines the 2002 injury is

> responsible for the worsening to PTD, Harlan/Zurich shall receive a credit for the payments made by Harlan/Chartis for the 2004 injury until the payment period for that injury expires, paying only the difference between that portion of the PPD awarded in 2007, and this PTD award. Once the PPD benefits period expires, Harlan/Zurich shall then commence payment of the PTD award in full, until the compensable period ends. Conversely, if the ALJ determines the 2004 injury is responsible for the worsening to PTD, Harlan/Chartis shall receive a credit for the payments made by Harlan/Zurich for the 2002 injury until the payment period for that injury expires, paying only the difference between that portion of the PPD awarded in 2007, and the PTD award. Once the PPD payment period expires, Harlan/ Chartis shall then commence payment of the PTD award in full, until the compensable period ends. That is a determination which must be made by the ALJ.
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> On remand, the ALJ is directed to make a determination of whether the 2002 injury or the 2004 injury is responsible for the award of PTD benefits. This will not affect the payment of PPD benefits previously awarded, and the ALJ shall reflect the appropriate credit for payments made, and for those which continue to be paid through the end of the payment of PPD benefits.

In his decision on remand rendered November 7, 2012, the ALJ found as follows:

> Having reviewed the evidence anew, the Board's decision and the parties[']

> Briefs on Remand, it is determined that plaintiff's 2002 injury is the cause of his total disability. In reaching this conclusion, the Administrative Law Judge is fully aware that the 2004 injury was the last injury, as the defendant as insured by Zurich argues that injury was the straw that broke the camel's back and ultimately caused plaintiff to be unable to return to any work. However, in 2002 plaintiff injured his lower back, neck and right shoulder, whereas the 2004 event caused only some additional impairment to the right shoulder which was then split between the 2002 and 2004 events. Moreover, plaintiff testified he never returned to full duty employment after the 2002 injury and that his lower back condition will sometimes render him unable to get out of bed for several days. Considering the totality of the evidence in the claim, the Administrative Law Judge is persuaded the 2002 injury and its worsening upon reopening have rendered plaintiff permanently and totally disabled.

On November 19, 2012, Harlan/Zurich filed a petition for reconsideration raising essentially the same arguments it now raises on appeal. In an order issued January 3, 2013, the ALJ denied the petition for reconsideration, noting the arguments were merely an attempt to re-argue the merits of the decision.

On appeal Harlan/Zurich argues the ALJ erred in finding the 2002 injury caused the worsening of condition leading to the PTD award. Harlan/Zurich notes Seals' right shoulder was involved in both the 2002 and 2004 injuries, and asserts

the ALJ cannot find the 2002 injury worsened without finding the 2004 injury also worsened. Harlan/Zurich contends if the shoulder condition has worsened, it is due to the 2004 injury. Harlan/Zurich further contends the ALJ, in order to determine the 2002 injury is responsible for the worsening, must find every body part injured in 2002 is worse except for the shoulder.

Harlan/Zurich notes the ALJ relied on the treatment records and opinions of Drs. Hoskins and Hughes to determine Seals' condition had worsened. It asserts those records and opinions support a worsening of Seals' 2004 shoulder injury. Therefore, any increased award due to the worsening of the shoulder condition, which caused his inability to return to his former employment, is Harlan/Chartis' responsibility. Harlan/Zurich contends nothing in the record indicates the 2002 accident caused or contributed to Seals' inability to work.

Harlan/Zurich asserts the ALJ did not delineate why the 2002 injury is responsible for the worsening, other than stating Seals never returned to full duty work afterward, and the 2002 back injury occasionally hinders his ability to get out of bed. Harlan/Zurich notes this evidence comes directly from Seals' testimony, and is therefore subjective.

Harlan/Zurich stresses Seals' primary problem is due to the 2004 shoulder injury.

Harlan/Zurich argues, contrary to the ALJ's findings, the evidence from Drs. Hoskins and Hughes actually supports a finding in its favor since a majority of the worsening of Seals' condition stems from the 2004 shoulder injury. Citing Sears & Roebuck v. Dennis, 131 S.W.3d 351 (Ky. App. 2004), Harlan/Zurich concludes liability for the total disability must be placed on Harlan/Chartis, the insurer in 2004.

Since Seals, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has discretion to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same parties' total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to merely show some evidence supporting a contrary conclusion. McCloud v. Beth-Elkhorn

Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, we may not ordinarily reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We are convinced the ALJ understood and followed the Board's directives on remand in deciding which insurer is responsible for PTD benefits, and his decision is supported by substantial evidence. Significantly, in the first appeal, the Board vacated and remanded for the ALJ to determine which insurer is responsible for PTD benefits. Implicit in the Board's decision to vacate and remand rather than reverse and remand is a holding the record contained conflicting evidence to support differing conclusions. The Board concluded the ALJ could determine either the 2002 or 2004 injury caused Seals' to be permanently totally disabled, and no appeal was taken from that opinion.

Dr. Hoskins assigned greater impairment ratings for the cervical and lumbar conditions on reopening than the ratings relied upon by the ALJ in the 2007 opinion, but did not increase the impairment rating for the shoulder. The increased impairment ratings assigned to the cervical and lumbar conditions constitute substantial evidence supporting a worsening related to the 2002 injury. Additionally, Seals' testimony regarding a worsening of his back pain,

including interference with his sleep and the effect on his ability to sit for extended periods of time, is substantial evidence supporting a conclusion the effects of the 2002 injury worsened following the 2007 decision. A claimant's own testimony as to capabilities and limitations may be relied upon by the fact-finder in determining the physical capacity to return to work following an injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Ruby Construction Company v. Curling, 451 S.W.2d 610 (Ky. 1970). There being substantial evidence supporting the ALJ's determination, we may not reverse.

Harlan/Zurich's reliance on Sears Roebuck & Co. v. Dennis, supra, is misplaced. Here, although there were successive injuries, Seals was not found to be totally disabled at the time of the original decision. The ALJ determined the evidence established Seals sustained a worsening of the effects of the 2002 injury subsequent to the original decision. The mere chronology of the occurrence of the injuries is not determinative given the facts in the claim *sub judice*.

Accordingly, the November 7, 2012 Opinion on Remand rendered by Hon. Grant S. Roark, Administrative Law Judge, and the January 3, 2013 Order on Petition for Reconsideration are **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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