OPINION ENTERED: July 31, 2012

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

AND

HARLAN CUMBERLAND COAL/DIXIE COAL
(AS INSURED BY CHARTIS) PETITIONER

VS.

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

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

* * * * * *

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

ALVEY, Chairman. Harlan Cumberland Coal Company, as insured by Zurich ("Harlan/Zurich"), and Harlan Cumberland Coal Company as insured by Chartis ("Harlan/Chartis") seek review of the opinion, order and award on reopening, rendered February 13, 2012 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), awarding permanent total disability ("PTD") benefits and medical benefits to Travis Seals ("Seals"), for a worsening of work-related injuries occurring March 5, 2002 and November 5, 2004. Both Harlan/ Zurich and Harlan/Chartis also appeal from the March 20, 2012 order correcting the opinion, award and order authorizing office visits with Dr. Echeverria once every three months, rather than every month, and denying the remaining issues argued in the petitions for reconsideration.

On appeal, Harlan/Zurich argues there has been no increase in occupational disability; Seals has not shown he is permanently totally disabled; and the ALJ made an

impermissible arbitrary apportionment of the PTD award. Harlan/Chartis argues the ALJ misapplied statutory and case law in determining Seals sustained a worsening of his shoulder condition; the determination of a worsening of the shoulder condition was erroneous based upon the record as a whole; and Seals is not permanently and totally disabled due to his right shoulder and therefore it should not be held liable for fifty percent of the PTD award. We affirm in part, vacate in part and remand.

On March 5, 2002, Seals sustained injuries to his low back, neck and right shoulder when he was struck by a falling rock while operating mining equipment. He ultimately underwent two surgeries on his right shoulder. He returned to work in 2004, and subsequently sustained an injury to his right eye. He later sustained a new injury to his right shoulder on November 5, 2004, as he rolled off of a mantrip in low coal, and attempted to crawl away. He has not worked since the November 5, 2004 injury. Seals filed a Form 101 alleging the March 5, 2002 injury, and an eye injury sustained on July 24, 2004. The claim was assigned to the ALJ, and on April 27, 2006, he issued an order joining the November 5, 2004 shoulder injury claim.

The ALJ rendered an opinion on May 7, 2007 awarding Seals permanent partial disability ("PPD")

benefits based upon a 15% impairment rating for injuries to the lumbar spine, cervical spine, and right shoulder due to the March 5, 2002 injury. He also awarded PPD benefits based upon a 5% impairment rating for the right shoulder injury he sustained on November 5, 2004 injury. The ALJ found the insurer at risk on March 5, 2002 responsible for medical expenses for the lumbar and cervical spine, and the insurer at risk 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 condition since the May 7, 2007 opinion. Subsequently, Harlan/Chartis filed a motion to reopen on May 6, 2011, and a Form 112 challenging monthly office visits with Dr. Echeverria.

Seals, a resident of Harlan, Kentucky, testified by deposition on August 1, 2011, and again at the hearing held December 14, 2011. Seals is a high school graduate, and attended college for two months. He has no specialized vocational training. His work history includes various job duties as an underground coal miner. He began working for Harlan Cumberland Coal Company in June 2001. He has not worked since November 5, 2004.

Seals currently treats with Dr. Echeverria for his work-related injuries. He testified the treatment

consists of monthly visits to manage his pain medication. He currently takes Percocet, Lyrica, Baclofen, Paxil and Celebrex. Injections on a trial basis proved unsuccessful, and physical therapy was stopped because it increased his blood pressure.

Seals testified his condition has steadily worsened since the May 7, 2007 opinion, order and award. His range of motion in the right shoulder continues to diminish, and he avoids using his right arm due to pain. He stated his shoulder pops, and two fingers in his right hand go numb. Likewise, his shoulder swells extending into his neck. He also stated he now limps. He has difficulty standing or sitting for any length of time due to his back and shoulder pain. He also stated he has difficulty sleeping due to his pain. He stated he currently treats with a chiropractor once per week for manipulations to relieve neck, back, middle back and hip pain.

Seals supported his motion to reopen with the report of Dr. Robert Hoskins, who evaluated him on April 19, 2011. Dr. Hoskins stated Seals' condition has deteriorated relative to his workers' compensation injury, especially since the entry of the May 7, 2007 opinion, order and award. Dr. Hoskins noted an increase in pain and restrictions, resulting in a greater occupational

disability. He concluded Seals is now totally occupationally disabled from any gainful employment.

He noted Seals complained during the examination of right sided neck pain and stiffness; intermittent headaches; intermittent paresthesia and numbness in the right upper extremity to his hand; right shoulder pain, stiffness and weakness; low back pain, stiffness and weakness; intermittent pain and paresthesia in right lower extremity to the foot; multiple positional intolerances; and, limitations with activities of daily living. Dr. Hoskins diagnosed cervical sprain/strain; cephalgia; lumbosacral sprain/strain; right lumbosacral radiculitis; right shoulder impingement syndrome; history of two shoulder surgeries; and ulnar neuritis of the elbow. He opined the injuries in 2002 and 2004 caused the complaints, and he assessed a 23% impairment rating pursuant to the American Medical Association Guides to Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). In an addendum dated April 25, 2011, Dr. Hoskins changed the impairment rating to 30% pursuant to the AMA Guides. He further opined no objective evidence exists to suggest Seals has reflex sympathetic dystrophy ("RSD").

Seals also filed the November 7, 2011 report of Dr. Arthur Hughes, a neurologist, who evaluated him on

November 2, 2011. Dr. Hughes noted the history of injury occurring in 2002 resulting in two surgeries. Dr. Hughes opined Seals does not have RSD. However, he noted Seals continues to complain of pain subsequent to the two shoulder surgeries. He assessed a 25% impairment rating pursuant to the AMA Guides, due to the neck, right shoulder and right arm complaints.

Seals also filed records from Dr. Echeverria, his treating physician for the time period of March 12, 2010 through March 23, 2011. Those records indicate ongoing treatment for right shoulder and low back pain, as well as RSD.

Harlan/Chartis filed the utilization review report of Dr. Ring Tsai in support of its challenge of monthly office visits with Dr. Echeverria. Dr. Tsai stated the following:

> In a condition that is very brittle, for which there can be serious morbidity or mortality if not closely observed, monthly office visits may be appropriate. However, this individual has stable right shoulder pain with RSD, which has been unchanged for many years. No adverse effect would occur in the absence of frequent monitoring. Therefore, I recommend denial of monthly office visits. Visits every three months would be adequate.

Dr. Gregory Gleis evaluated Seals at Harlan/ Zurich's request on September 12, 2011. He had previously evaluated Seals on August 14, 2006. Dr. Gleis noted Seals' shoulder range of motion had improved since the 2006 evaluation. He concluded there was no change in the permanent impairment ratings since the 2006 evaluation. He noted no objective evidence of worsening. Dr. Gleis opined Seals is no more disabled now than he was in 2006. He further stated Seals could work within the restrictions imposed by Dr. Hoskins. He also stated visits with Dr. Echeverria should be limited to quarterly rather than monthly. He would apportion the need for medications equally between the 2002 and 2004 injuries. Finally, Dr. Gleis noted Seals exhibited signs of symptom magnification.

Harlan/Chartis also filed the report of the records review performed on November 13, 2011 by Dr. Thomas Huhn, an emergency medicine physician. Dr. Huhn disagreed with Dr. Hughes' use of the AMA Guides. He also referred to Dr. Echeverria's office note dated June 7, 2007 referencing a non-work-related fall and increase in shoulder symptoms. Dr. Huhn agreed with Dr. Gleis' assessment of no worsening, and no increase in impairment rating.

In the opinion and award rendered August 19, 2011, the ALJ found as follows:

> **Worsening on Reopening/Extent & Duration**
>
> The primary issue presented is whether plaintiff's condition has worsened any since the May, 2007 Opinion. The defendants argue that, based on Dr. Gleis' conclusions, plaintiff's impairment ratings for his back, neck and shoulder have [sic] increased at all and, as such, no award of increased benefits is appropriate. They point out Dr. Gleis is the only expert of record to have examined plaintiff both before 2007 and in this reopening and, as such, his opinions should be considered most credible. They further argue the increased impairment ratings from Dr. Hoskins and Dr. Hughes are not appropriate under the AMA Guides.
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> On this first issue, the Administrative Law Judge finds it difficult to credit Dr. Gleis' opinions in this instance. Dr. Gleis is amply qualified and quite respected, but his conclusions that plaintiff does not have credible complaints of increased pain are at odds with the Administrative Law Judge's own observation of plaintiff at the final hearing and plaintiff's medical and work history. Obviously, quantifying exactly how much a claimant's condition has worsened in almost 5 years cannot be an easy task. However, the records of plaintiff's continued treatment and plaintiff's own testimony at the final hearing persuade the Administrative Law Judge that plaintiff's shoulder and back conditions have worsened to some degree. Therefore, Dr. Gleis' opinion

to the contrary is simply not credited in this instance. Instead, based on plaintiff's treatment records and the opinions of Dr. Hoskins and Dr. Hughes, it is determined plaintiff's injuries have worsened, causing him additional pain and limitations.

The next question is the extent of plaintiff's impairment/disability and the apportionment of any increased award. Dr. Hoskins and Dr. Hughes each assigned higher impairment ratings than was determined in the May, 2007 Opinion, Order & Award. So the next question is whether plaintiff's worsened condition has increased his permanent partial disability or has resulted in permanent, total disability. On this issue, the defendants point out plaintiff has not had any increased medication or treatment and has not had any surgery since 2007 and, therefore, there is no basis to conclude he is now totally disabled. However, in the 2007 Opinion, it was determined plaintiff did not retain the physical ability to return to his former work as an underground coal miner. Having concluded that plaintiff's condition has worsened, and noting plaintiff still has not returned to any work since the 2004 injury, the Administrative Law Judge is ultimately persuaded the additional worsening of plaintiff's condition has now rendered him totally disabled. Plaintiff testified credibly as to the severe shoulder pain and back pain he frequently has now. As most of plaintiff's work life has been as an underground miner, and having already concluded he cannot return to that kind of work and having concluded his condition has worsened, it is concluded

plaintiff is now permanently and totally disabled.

The question next becomes how to apportion the increased award of total disability. Obviously, the 2002 injury caused more injuries, impairing the shoulder, neck and lower back. But plaintiff was able to return to work until the 2004 shoulder injury. With no other clear means of apportioning between the two injuries, it is determined each injury caused 50% of plaintiff's current total disability. His award of increased benefits, beginning April 29, 2011, is calculated as follows:

For the 2002 injury:

$739.70 x 2/3 = $493.13 x 50% = $246.57 per week.

For the 2004 injury:

$470.34 x 2/3 = $313.56 x 50% = $156.78 per week.

Medical Fee Dispute

The employer also disputes the frequency of office visits with Dr. Echeverria, pointing out both Dr. Huhn and Dr. Gleis indicate there is no reason for plaintiff to see Dr. Echeverria to see plaintiff every month for the sole purpose of refilling prescriptions. Plaintiff argues Dr. Echeverria's practice makes the most sense and is actually safer than carrying around a 3 month supply of Percocet. Ultimately, the Administrative Law Judge agrees that office visits just to refill prescriptions is not reasonable or necessary. Even if plaintiff receives a prescription for 3 months' worth of

> Percocet, he could likely only fill that prescription one month at a time if he is concerned for his safety. The monthly office visits are therefore determined not to be compensable.

Both Harlan/Zurich and Harlan/Chartis filed petitions for reconsideration. Harlan/Zurich argued it was error for the ALJ to find Seals totally disabled, and such determination was not supported by the evidence of record. Harlan/Zurich also argued it was a mistake to rely upon the reports of Dr. Hoskins and Dr. Hughes. It also argued Seals is no more disabled now than he was in 2007. Finally, Harlan/Zurich argued the 2004 injury, not 2002, was responsible for Seals' inability to work.

Harlan/Chartis argued the ALJ used an incorrect legal standard, and no objective evidence exists which would support a worsening since 2007. It also argued the apportionment of permanent total disability was improper. Finally, it argued the ALJ did not include in his finding the determination that monthly visits with Dr. Echeverria are not compensable.

In his order on reconsideration entered March 20, 2012, the ALJ found monthly visits with Dr. Echeverria are not compensable. He denied both petitions for reconsideration in all other respects.

As we have noted numerous times in the past, the ALJ's discretion is broad. Since Seals was successful before the ALJ in establishing his condition has worsened, the question on appeal is whether the ALJ's determination that Seals is now total disabled is supported by substantial evidence. 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 an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The 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 (Ky. 1977).

Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not

an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As established by the 2007 opinion, order and award, Seals sustained an injury to his neck, back and right shoulder in 2002 and to his right shoulder in 2004. Likewise, the previous opinion established Harlan/Zurich is responsible for ongoing medical benefits for the neck and back, and Harlan/Chartis is responsible for ongoing medical care for the right shoulder. In his opinion, the ALJ noted both Dr. Hoskins and Dr. Hughes recorded higher impairment ratings than those assessed prior to the 2007 opinion. The ALJ determined the increased impairment rating coupled with Seals' increased complaints establish he has sustained a worsening of condition.

Evidence of record exists which could have supported a contrary result. However, despite the assertions of both Harlan/Zurich and Harlan/Chartis, the opinions of Dr. Hopkins and Dr. Hughes constitute substantial evidence sufficient to support the outcome selected by the ALJ. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940); Smyzer v. B. F. Goodrich

Chemical Co., supra; and Special Fund v. Francis, supra. Upon consideration of the ALJ's analysis, we are likewise satisfied the ALJ utilized the proper legal standard and made adequate findings of facts sufficient to apprise the parties of the basis for his decision regarding Seals' worsening of condition. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). Hence, we find no error.

The ALJ applied the appropriate legal standard for determining PTD in accordance with the Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). After considering the evidence, the ALJ was persuaded Seals is now permanently totally disabled due to the effects of worsening of the injuries he sustained in 2002 and 2004. Substantial evidence of record exists to support that conclusion. For that reason, we cannot say the ALJ's decision is so unreasonable under the evidence the decision must be reversed as a matter of law. Therefore we affirm the ALJ's determination Seals is entitled to PTD benefits.

Finally, Harlan/Zurich and Harlan/Chartis argue the ALJ erred by apportioning the PTD award between them. The ALJ determined the worsening was due to both the neck and back conditions caused by the 2002 injury, and the

shoulder injury which occurred in 2004. Based upon the lack of evidence supporting a more definitive apportionment, the ALJ determined each injury was equally responsible for the worsening of the condition.

This situation is unique. It does not consist of successive injuries determined by separate awards, nor does it concern injuries sustained while working for separate employers. Seals sustained injuries to his neck, back and right shoulder in 2002. He underwent two surgeries to the right shoulder due to that injury. He returned to work and sustained a subsequent injury to the right shoulder in 2004. Although he has had no additional surgery, Seals has never returned to work since the second right shoulder injury.

The ALJ found Seals' condition has worsened since the 2007 opinion and he is now permanently totally disabled. He must now determine whether the injuries Seals sustained on March 5, 2002, to the neck, back and right shoulder have worsened to the point he is so disabled, or whether it is due to the worsening of the November 5, 2004 injury. That is a factual determination which must be made by the ALJ. The insurer for whichever injury is found to be responsible for the award of PTD benefits shall be

entitled to a credit for payments made pursuant to the PPD award by the other insurer.

Because this claim involves successive compensable injuries, the concept of "excess disability" applies. Prior to 1996 when the Special Fund shared liability with the employer, the doctrine of “excess liability” placed liability on the Special Fund so that the employer would not be responsible for more liability than the injury sustained while in its employ. KRS 342.120(6) provided that where the combined effect of the worker’s previous disability and a new injury resulted in a greater overall degree of disability than the latest injury alone would have caused, the employer was liable only for that percentage of disability attributable to the last injury. Pursuant to KRS 342.120(7), the greater disability which resulted from the combined effect of the latest injury superimposed upon the previous disability was apportioned to the Special Fund. Since the 1996 amendments, what was once Special Fund liability has been shifted to the employer. *See* McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001). With the demise of the Special Fund the doctrine of “excess disability” survived the 1996 amendments only with regard to awards was for total and not partial benefits. *See* Moore v. Pontiki

Coal Corp., 2001-SC-0089-WC (rendered October 25, 2001 and ordered not to be published).

The Board considered the issue of excess disability in a case of successive injuries resulting is total disability in Sears Roebuck & Co. v. Dennis, 131 S.W.3d 351 (Ky. App. 2004). In Dennis, the claimant sustained an injury to his low back in 1995 while working for Radio Shack. He sustained an injury to his knee in 2000 in the employ of Sears. The court in Dennis affirmed the Board's decision and cited extensively from our opinion. It noted the Board analyzed Campbell vs. Sextet Mining, 912 SW2d 25 (Ky. 1996) and its companion cases of Fleming vs. Windchy, 953 SW2d 604 (Ky. 1997), Whittaker vs. Fleming, 25 SW3d 460 (Ky. 2000), and Spurlin vs. Brooks, 952 SW2d 687 (Ky. 1997). It cites our opinion verbatim as follows:

> (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.
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> *Id* at 354.

In Tempur-Pedic, Inc. v. Hall, (Claim Nos. 00-01447 & 98-62170, rendered May 21, 2002) we considered facts where there were two injuries, both of which occurred post-1996 with the same employer but different insurance carriers at risk resulting in the claimant's total occupational disability. Therein we held:

> Our understanding of the Court's guidance on these matters is that, generally, if a worker has a prior, active disability for which he is receiving benefits, or is so entitled at the time his permanent total disability manifests, then the defendant 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 has occurred after which a worker is determined to be totally and permanently disabled, the amount and duration of an award for a prior active condition may not be extended beyond that allowed under the Act for permanent partial disability. Hence, liability for the injured worker's total disability award falls to the last employer or carrier 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. The fact that a prior active disability contributes to the injured worker's total disability does not alter this analysis.

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.

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.

For the foregoing reason, the opinion, award and order rendered February 13, 2012, and the March 30, 2012 order on reconsideration are hereby **AFFIRMED IN PART, VACATED IN PART AND REMANDED** for further determination consistent with the views expressed in this opinion.

ALL CONCUR.

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