Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 20, 2015

CLAIM NO. 201400156

JAMES RIVER COAL COMPANY PETITIONER

VS. **APPEAL FROM HON. DOUGLAS GOTT, ADMINISTRATIVE LAW JUDGE**

ELDEN HOWARD
and HON. DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. James River Coal Company ("James River") appeals from the August 4, 2014, Opinion, Award, and Order and the August 26, 2014, Order on Reconsideration of Douglas Gott, Administrative Law Judge ("ALJ"). In the August 4, 2014, Opinion, Award, and Order, the ALJ awarded Elden Howard ("Howard") permanent partial disability

("PPD") benefits at the rate of $38.39 per week for 425 weeks and medical benefits.

On appeal, James River asserts the ALJ's award of benefits for a cervical spine injury is not supported by substantial evidence.

The Form 101 alleges Howard injured his "back, neck, right arm, hands, legs" on October 14, 2013, during the scope and course of his employment with James River in the following manner: "Continuous exposure to coal/rock dust and loud noise, constant bending, stooping, pulling, pulling,[sic] lifting, repetitive hand/foot movement, twisting, etc."

The Form 104 attached to the Form 101 indicates Howard was employed with James River as a drill operator from April 2010 through October 14, 2013. Howard's previous employment history is as follows:

- Laurel Mountain, drill operator, 2009-2010
- Austin Powder, drill operator, 2009 (6 months)
- Miller Bros. Coal, drill operator, 2007-2009
- Knott Floyd Land, drill operator, 2000-2007
- Arch Coal, drill operator, 1996-1999
- Coal-Mac, Inc., drill operator, 1983-1996

The June 3, 2014, Benefit Review Conference ("BRC") Order lists the following contested issues: work-relatedness/causation; benefits per KRS 342.730; credit for unemployment benefits; "injury" as defined by the Act; and medical benefits. Handwritten under "other" is the following: "CWP in abeyance & submitted issues have no bearing on that claim." Stipulations include the following: "3. Plaintiff sustained a work-related injury or injuries on 10/14/13." It is important to note James River did not seek to be relieved of this stipulation at any point during the pendency of the litigation pursuant to 803 KAR 25:010 Section 16(2).

In the August 4, 2014, Opinion, Award, and Order, the ALJ put forth the following Findings and Conclusions:

> It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers compensation claim. *Young v. Burgett,* 483 S.W.2d 450 (Ky. 1972).
>
> The first issue is the work relatedness of Howard's complaints. The ALJ relies on Dr. Wright's treatment notes, Dr. Uzzle's opinion, and Howard's description of his work duties to find that he has sustained his burden of proof with respect to his cervical injury; but relies on Dr. Wright's notes and Dr. Primm's opinion to find that he

> has not sustained his burden with respect to his low back claim.
>
> The second issue is the extent and duration of Howard's occupational disability. Howard was working full-time without restrictions at the time of his layoff; and no "aroused" condition in his cervical spine in need of surgery has been discovered since, so he cannot reasonably be considered to be totally disabled. For the same reasons, in this particular instance, the ALJ does not find the evidence to support a finding that Howard is entitled to the three-multiplier based on a finding that he lacks the physical capacity to perform the very work he was doing at the time of the layoff. The ALJ relies on Dr. Primm in finding that Howard is not entitled to the three-multiplier of KRS 342.730(1)(c)1. His PPD benefits are therefore to be calculated pursuant to KRS 342.730(1)(b), as follows: AWW of $935.82 x 2/3 = $623.88, subject to maximum for 2013 injuries of $564.52 x 8% x .85 = $38.39 for 425 weeks.

In its petition for reconsideration, James River requested the ALJ to address the issue of whether there was an "injury" as defined by the Act. James River's petition for reconsideration was denied by order dated August 26, 2014.

Howard was deposed on April 28, 2014. Regarding his employment history, Howard explained that Laurel Mountain, his employer before James River, was bought by

James River. He testified regarding his duties as a drill operator at James River.

> Q: Tell me what a drill operator has to do on a day-to-day basis.
>
> A: Well, tram. You know what tramming is, don't you?
>
> Q: No. Explain that for the record.
>
> A: Move the drill from one bench to the other bench. Then you just make off your holes walking around. Then you start your drill and drill the hole, then you move up to the next hole, and move up to the next hole. And when you get that one drilled out, you might move the drill two hours away. You've got to stand up most of the time. That's where- that's where most of my wear-and-tear come [sic] from, just trying to get from one place to the other place.

Concerning his upper back problems, Howard testified as follows:

> Q: How, your upper back, is that different from your neck or is it kind of right in the same area?
>
> A: Right in the middle of my shoulders up to my neck. It hurts so bad sometimes it'll give me a headache.
>
> Q: And you say that started five to six years ago, too?
>
> A: Yeah.

Howard was laid off on October 15, 2013.

Howard also testified at the final hearing. Regarding his employment with James River, and the relationship between Laurel Mountain and James River, he testified as follows:

> Q: Mr. Howard, was there any period of time between your work with Laurel and when you started with James River?
>
> A: No.
>
> Q: Were you at one company one day and then-
>
> A: (Interrupting) They just bought it--
>
> Q: (Interrupting)- at the other company the next?
>
> A: Yeah, they just bought it out and I went straight to work for James River.

As the claimant in a workers' compensation proceeding, Howard had the burden of proving each of the essential elements of his cause of action, including "injury" as defined by the Act. *See* Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Howard was successful in his burden, the question on appeal is whether substantial evidence supports the ALJ's decision. 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).

The August 4, 2014, Opinion, Award, and Order reflects the ALJ relied, in part, upon the opinions of Dr. Jeffrey Uzzle and Howard's testimony to conclude Howard sustained a cumulative trauma injury to his cervical spine. In his Form 107-I dated February 23, 2014, Dr. Uzzle provided the following findings in his "physical examination" section:

> Cervical range of motion is painful stiff and limited in extension, right cervical side bending and rotation moderately. Lumbar range of motion is painful and limited in flexion at 60˚ and moderately limited right sidebending 15˚ due to back pain. There are no major joint deformities detected on survey of the 4 extremities.
>
> He has negative sitting and supine straight leg raise bilaterally. He has some mild guarding with range of motion of his right shoulder due to neck pain. He does not have any positive right shoulder impingement or apprehension signs otherwise. There is no atrophy in the 4 extremities detected. Reflexes are intact and symmetrical in the 4 extremities. Negative Hoffmann clonus and Babinski bilaterally. Sensation is intact in the 4 extremities. Grip strength is 13 PSI right 14 PSI left. Strength testing is 5 out of 5 in the 4 extremities.

Dr. Uzzle diagnosed: cervicaligia; lumbalgia; sciatica; headache; shoulder pain; knee pain, pain in the thoracic spine; and wrist pain. Concerning causation, Dr. Uzzle opined as follows:

> I have reviewed the work history of the Plaintiff. I have conducted a clinical evaluation of the Plaintiff. It is my opinion that the series of mini traumas which has been experienced by this individual in the course of his work life has been brought into a disabling reality by his last work with the Defendant/Employer. The traumas were excessive forces which were placed on the musculoskeletal system as well as the joints, the disc in the spinal column, as well as the associated ligaments, fivers, and other structure that supports the joints in the spine. These have been developing over years of exposure; however, were largely not symptomatic until his last employment. This was a dormant non-disabling condition aroused into disabling reality by cumulative trauma.

Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, Dr. Uzzle assigned an 8% impairment rating for Howard's cervical spine condition; and a 6% impairment rating for his lumbar spine condition.

The above-cited evidence from Dr. Uzzle constitutes substantial evidence supporting the conclusion Howard sustained cumulative trauma to his cervical spine

that aroused a dormant non-disabling condition in Howard's cervical spine- i.e. cervicaligia; etc.- into disabling reality. Despite James River's assertions that an "injury" under the Act has not been proven by objective medical findings, Dr. Uzzle's opinions, upon which the ALJ relied, are supported by objective medical findings- specifically, his findings based upon his examination and the testing of Howard as recounted in the Form 107-I and cited herein verbatim.

Additionally, while the ALJ failed to make a specific finding that it was Howard's employment at James River which aroused his cervical spine condition into disabling reality, it can be inferred from the ALJ's reliance upon Dr. Uzzle’s opinion this is what the ALJ concluded. In the Form 107-I, Dr. Uzzle clearly opines that Howard was "largely not symptomatic until his last employment." This is also consistent with Howard's testimony. In his April 28, 2014, deposition, Howard testified his cervical spine symptoms "started five to six years ago." Pursuant to the Form 104, this is consistent with when Howard was working for Laurel Mountain from 2009-2010, a company, according to Howard's testimony, that was acquired by James River. Therefore, as the ALJ relied upon both Dr. Uzzle's opinion and Howard's testimony, the

reasonable inference is the ALJ believed Howard's employment with James River ultimately aroused Howard's dormant cervical condition into disabling reality.

Notably, the parties stipulated Howard sustained a work-related injury on October 14, 2013. In addition, James River failed to request additional findings on causation or challenge the sufficiency of the ALJ’s findings regarding causation in its petition for reconsideration. Instead, it requested additional findings solely on the issue of whether Howard sustained a cervical "injury" under the Act. As it was stipulated, Howard sustained a work injury and James River never sought to be relieved of this stipulation, it has waived the right to argue substantial evidence does not support a finding of a work-related cervical injury. Additionally, as James River does not raise on appeal the issue of a lack of evidence regarding causation, this Board will not disturb the ALJ's findings, however scant, regarding causation.

Accordingly, the August 4, 2014, Opinion, Award, and Order and the August 26, 2014, Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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