Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 20, 2015

CLAIM NO. 201400467 & 201400466

JAMES RIVER COAL COMPANY PETITIONER

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

RONALD WAYNE CHILDERS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. James River Coal Company ("James River") seeks review of the August 14, 2014, Opinion and Order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Ronald Wayne Childers ("Childers") sustained work-related neck and back injuries and awarding temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits. James River also

appeals from the September 23, 2014, Opinion and Order on Reconsideration.

Childers asserted an injury claim and a hearing loss claim which were consolidated. However, this appeal only relates to the award for Childers' alleged back and neck injuries. As such, we will not discuss the evidence concerning Childers' hearing loss claim.

Childers introduced a one page medical statement from Dr. Josh Bakun dated December 11, 2013, and the Form 107 completed by Dr. Jeffrey A. Uzzle dated April 5, 2014. Childers' June 4, 2014, deposition was introduced and he testified at the July 22, 2014, hearing. Although he initially asserted a claim for a right hip injury, it was later withdrawn.[1]

James River introduced the report of Dr. Chris Stephens, the records of Dr. George Caudill, and the records from the Spine and Brain Neurosurgical Center ("Spine and Brain") relating to Childers' treatment spanning the period of December 17, 2002, to February 1, 2005. It also introduced the records of Dr. Kevin Pugh

[1] The medical records and Childers' testimony reveal he sustained a severe right hip injury due to a motorcycle accident in 2005 which necessitated surgery involving the insertion of hardware.

generated in 2013 relating to his treatment of Childers' right hip.

At his June 5, 2014, deposition, Childers testified he was forty-three years old, had a high school diploma, and a miner's card but no vocational training. He has not worked since October 15, 2013, when he was laid off. Childers testified that after being laid off, he applied for work "anywhere and everywhere," mainly at coal companies. Childers estimated he worked in and around coal mines for approximately ten years, all of which was aboveground. He drove a rock truck for four or five years, a coal truck for approximately one year, and a water truck off and on for approximately two years. He also operated a high wall miner for seven or eight months. Childers worked for James River from 2007 to October 13, 2013, primarily driving a rock truck which had an enclosed cab with air conditioning and an air ride seat. He estimated he operated the rock truck approximately ten hours a day. He was not required to perform any maintenance work on the truck. Prior to working in the coal industry, Childers also performed construction work installing sleepers in semi-trucks.

Childers was treated by Patty Berg, a Nurse Practitioner in Dr. Caudill's office, for his right hip

problem. Even though he had no work restrictions for the last two years, Childers took Lortab for hip and back symptoms. He denied experiencing an injury while working for James River. His current low back problems consist of sharp pain in the center of his low back. Childers denied ever experiencing a back injury. He indicated his problems have worsened over the last five to seven years. Currently, he is unable to lie down for long periods of time.

Childers testified Spine and Brain previously treated him for back problems which included pain management. He may have undergone an MRI when he was treated by Spine and Brain. He testified a doctor has never told him his back problems are work-related. He takes no muscle relaxers or anti-inflammatories and has never had physical therapy. Childers estimated his neck problems began seven to eight years ago. His primary neck symptoms are stiffness and headaches. He denied ever experiencing a neck injury. Similarly, he has never undergone treatment for neck problems. Although he may have had x-rays for his neck, he denied having any physical therapy, injections, and/or pain management for neck problems. Childers indicated no one has ever told him his neck problems are work-related.

Childers has a metal rod in his right hip and, as a result, is unable to lie on his right side for any length of time. Since the 2005 motorcycle accident, he has continual right hip problems. Childers recently saw Dr. Pugh for his right hip problems. He acknowledged he may have undergone pain management treatment for his back from 2002 to 2004 while working in Indiana. He denied being told his hip condition is work-related.

At the hearing, Childers stated he was voluntarily dismissing his claim for a work-related hip injury. He testified he has not worked since he stopped working on October 15, 2013. Childers estimated the rock truck he operated weighed approximately 200 tons and was thirty-five feet high. He believed he hauled fifty or more loads of overburden a day on hilly terrain. He explained that when the loader dumps the dirt and rock into the bed of the truck it "jars [him] to death." Approximately four to five loads of material will fill the bed of his truck. Operating the rock truck was the most rigorous job he performed at the strip mines.

Childers testified he has constant pain in his lower back at or near the belt line. The pain does not radiate into the legs. He rated his pain as seven on a scale of one to ten. The pain worsens when he "sits a

while" or turns the wrong way. He testified climbing into the rock truck entailed ascending three sets of stairs which put a lot of stress on his back. While operating the rock truck he constantly rotated his neck and head from side to side in order to check on the location of the truck. He explained this is required in order to ensure he did not back over a hill. Childers testified he cannot fully perform his previous job as a rock truck operator nor can he perform any of his past jobs on a full-time basis.

Childers testified that after being laid off, he applied for work at other strip mines. He estimated he has had neck and back problems for approximately ten to fifteen years. He again testified a doctor has never told him his back and neck problems are work-related. Currently he takes Neurontin and Lortab. Other than being treated by the Spine and Brain Neurosurgical Clinic, he has never been referred to a specialist for back or neck problems. Childers testified that during the six years he drove a rock truck, his back and neck conditions gradually worsened. He attributes his worsened conditions to the effects of the heavy loads being dumped into the rock truck which caused a lot of jarring and vibration. Childers testified he told his supervisor about his back and neck pain in approximately May 2010.

After providing a brief summary of Childers' testimony, and a summary of the reports of Drs. Bakun, Uzzle, and Stephens, the ALJ provided, in relevant part, the following findings of facts and conclusions of law regarding Childers' alleged back and neck injuries:[2]

> I saw and heard the plaintiff Mr. Childers testify at length at the Final Hearing. I sat a short distance from him and carefully observed his facial expressions during his testimony, carefully listened to his voice tones during his testimony and carefully observed his body language during his testimony. I am the only decision maker who actually saw and heard Mr. Childers testify. He was a very stoic individual. I make the determination that he was a credible and convincing lay witness and that his testimony rang true.
>
> This case calls to mind the Opinion of the Kentucky Court of Appeals in Jeffries v. Clark & Ward, 2007 WL 2343805 (Ky.App.2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and

[2] The ALJ also summarized the medical evidence pertaining to the hearing loss claim.

> substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.
>
> Based upon Mr. Childers' credible and convincing lay testimony, which is covered above, and the persuasive and compelling medical evidence from Dr. Bakun, his treating chiropractor, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Uzzle, which is covered in detail above, I make the factual determination that Mr. Childers suffered significant cumulative trauma to his back and neck as a result of his repetitive work activities in the coal mining industry over a lengthy period of time, which became occupationally disabling on October 15, 2013. In addition, based upon the persuasive and compelling medical evidence from Drs. Jones and Ormond, the university evaluators, as covered in detail above, I make the factual determination that Mr. Childers did sustain some noise induced sensorineural hearing loss due to his occupation in the coal mining industry.

The ALJ concluded Childers did not have a pre-existing active condition. In determining Childers was permanently totally disabled, the ALJ provided the following analysis:

> I again make the factual determination that the lay testimony of Mr. Childers, as covered above, was very credible and convincing. I also found very persuasive and compelling the medical

evidence from Dr. Bakun, the treating chiropractor, and Dr. Uzzle, the examining physician, which is covered in detail above. I make the factual determination that Mr. Childers will as a result of his work-related cumulative trauma to his back and neck sustain a 10% permanent impairment under the AMA Guides, Fifth Edition. As noted above, I am very familiar with *Southern Kentucky Concrete v. Campbell*, as cited above, in that I was the attorney for Mr. Horace Campbell in that litigation. I make the factual determination that the manifestation date for Mr. Childers' claim for cumulative trauma was December 11, 2013, when Dr. Bakun first told the plaintiff that he had work-related cumulative trauma to his neck and back. In making that factual determination, I rely upon the decision of the Kentucky Supreme Court in *Hill v. Sextet Mining Corporation*, 65 S.W.3d 503 (Ky.2001). I make the factual determination that Mr. Childers reached maximum medical improvement on April 5, 2014, the date selected by Dr. Uzzle.

"'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

> "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

Based upon the credible and convincing lay testimony of Mr. Childers, which is covered above, and the persuasive and compelling medical evidence from Dr. Bakun, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Uzzle, which is covered in detail above, Mr. Childers has and will have serious permanent impairment due to the work-related injuries to his neck and back. Mr. Childers has reached middle age and is presently 43 years of age. Based upon the plaintiff's credible and convincing lay testimony and the persuasive and compelling medical evidence from Dr. Bakun and Dr. Uzzle, as covered in detail above, I make the factual determination that Mr. Childers is not physically able to work at any job, as per his testimony. His lay testimony is credible, competent and convincing under the decision of the Kentucky Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979). I make the factual determination that Mr. Childers had a good work history, showing a good work

> ethic, but that he will not be able to return to any regular gainful employment in the highly competitive job market. Based upon all of the above factors, I make the factual determination that Mr. Childers cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the determination that he is permanently and totally disabled from and after April 5, 2014.

The ALJ awarded TTD benefits based on the following analysis:

> KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.
>
> In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App.2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in *Helms*, *supra*, stated:
>
>> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>>
>> Id. at 580-581.
>
> Based upon the fact that the plaintiff last worked back on October

> 15, 2013 and that the fact that he reached maximum medical improvement on April 5, 2014, as per the evidence from Dr. Uzzle, I make the determination that he is entitled to recover temporary total disability benefits from the defendant-employer and its workers' compensation insurer for the period October 15, 2013 through April 5, 2014, when he reached maximum medical improvement.

Accordingly, the ALJ awarded TTD benefits from October 15, 2013, through April 5, 2014, and PTD benefits at the same rate beginning on April 5, 2014.

James River filed a petition for reconsideration asserting that although the ALJ believed Dr. Uzzle's opinions were compelling, he cited no findings by Dr. Uzzle other than his diagnosis and statement regarding causation. It argued even though Dr. Uzzle attributed causation to excessive forces over years of exposure, he did not discuss the work performed by Childers. It noted Childers was a heavy equipment operator, but under the treatment section of his Form 107, Dr. Uzzle refers to Childers as working in the mines. James River argued at great length that except for two paragraphs within the Form 107 which includes a reference to Childers' hip problems, Dr. Uzzle's report reveals a benign examination. It noted Dr. Uzzle's Form 107 reveals he did not review any x-rays or other reports. James River also cited to the findings of Dr. Caudill and

the Spine & Brain Neurosurgical Center. It took issue with the ALJ's statement that Dr. Bakun's report was compelling evidence. James River contended there was no evidence upon which the ALJ could rely in finding permanent total disability for neck or back problems. It also argued Childers' most significant physical problems relate to his right hip condition. Finally, it argued the ALJ failed to make separate findings regarding the alleged neck and back condition which would include citing to the evidence supporting a finding of an injury to both. Therefore, it asserted additional findings of fact should be made.

The ALJ's September 23, 2014, Opinion and Order on Reconsideration overruling the petition for reconsideration, provides the same summary of Childers' testimony, his finding regarding Childers' testimony, as well as the same summary of the reports of Drs. Bakun and Uzzle contained in the August 14, 2014, Opinion and Order. The ALJ also inserted other language contained within his August 14, 2014, Opinion and Order as well as his finding that "based upon Childers' credible and convincing lay testimony which is covered above and the persuasive medical evidence from Dr. Bakun, Childers' treating physician covered above, and the persuasive and compelling evidence from Dr. Uzzle covered above," he made the factual

determination Childers suffered a significant cumulative trauma to his neck and back as a result of repetitive work activities in the coal mining industry over a lengthy of period of time which became occupationally disabling on October 15, 2013. The ALJ also added the following paragraph:

> I make the factual determination that the comprehensive and thorough medical evidence produced by Dr. Uzzzle [sic] is persuasive and compelling. As stated in *Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771, 774 (Ky.2009), "physicians must use clinical judgment when assigning impairment ratings, and that 'clinical judgment, combining both the "art" and "science" of medicine, constitutes the essence of medical practice.'" The applicable law affords Dr. Uzzle certain discretion and professional judgment when interpreting the Guides and assigning an appropriate impairment rating.

On appeal, James River argues the ALJ's finding of cumulative trauma injuries and his determination Childers is permanently totally disabled are not supported by substantial evidence. It argues the record does not support a finding of cumulative trauma injuries due to Childers' employment with James River as a coal truck driver. James River maintains the contents of Dr. Bakun's report are devoid of any physical findings supporting the

ALJ's conclusions. Therefore, it cannot serve as the basis for an award of income benefits.

James River maintains Dr. Uzzle's physical examination was "benign." It observes Dr. Uzzle reviewed no diagnostic studies of the cervical spine and diagnosed chronic cervical sprain from cumulative trauma "by history." Further, Dr. Uzzle did not review any studies of the lumbar spine as evidenced by the fact the summary of the results of the lumbar radiographs contained in Section E of the Form 107 is blank. James River argues the results of Dr. Uzzle's examination cannot constitute objective medical evidence of an injury. It also takes issue with the restrictions he imposed.

James River argues the ALJ cited no evidence establishing the nature and duration of Childers' work aggravated a degenerative disc condition to the extent it culminated in an active physical impairment. It contends there is no medical evidence explaining how Childers' back and neck symptoms are causally related to his employment activities. It argues there are no findings by Dr. Uzzle other than his diagnosis and statement "on causality" of "excessive forces over years of exposure." It notes Childers' job was characterized as a heavy equipment operator yet Dr. Uzzle stated his job was working in the

mines. James River also cites to the records of Dr. Caudill and the Spine and Brain Neurosurgical Center which it contends do not support the ALJ's findings.

James River asserts the report of Dr. Stephens is the only thorough and persuasive evidence. It notes Dr. Stephens' examination was essentially normal. As a result, Dr. Stephens diagnosed daily neck pain secondary to early cervical disc disease and daily low back pain secondary to lumbar degenerative disc disease. Dr. Stephens opined Childers' ten years of occupational exposure was not adequate exposure to produce cumulative trauma change.

James River next argues the award of TTD benefits was erroneous as there is no evidence Childers was temporarily totally disabled. It notes Childers applied for work immediately after he was laid off.

Finally, James River argues the ALJ erred in failing to make separate findings regarding each alleged injury, asserting the ALJ provided no evidentiary basis for his legal conclusion that Childers is permanently totally disabled due to cumulative trauma cervical and lumbar spine injuries. It contends the ALJ did nothing more than state the evidence from Drs. Bakun and Uzzle was persuasive and compelling and did not and could not cite to an evidentiary

basis because the reports he relied upon did not contain findings which support his decision.

Because the ALJ's decision contains multiple errors, we vacate and remand.

As the claimant in a workers' compensation proceeding, Childers had the burden of proving each of the essential elements of his cause of action, including the extent of his disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Childers was successful in that burden, the question on appeal is whether there was substantial of record to support 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).

In making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and

substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

That said, the ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). The holding of the

Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004) is instructive. There, the Supreme Court remanded the claim "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

The ALJ did not provide sufficient findings of fact and an explanation which allow for meaningful review of his determination Childers sustained work-related cumulative trauma injuries to his back and neck.

The ALJ stated he relied in part on Childers' credible and convincing lay testimony which he had previously summarized. However, a review of his summary of Childers' testimony reveals the ALJ stated Childers testified he worked for James River for seven or eight years, drove a rock truck, and operated heavy equipment. After summarizing Childers' description of his job duties, the balance of the ALJ's summary is as follows:

> He began experiencing low back pain. He reported his symptoms to his supervisor in May, 2010. Dr. Boggs has treated him for his painful symptoms. He last worked for the defendant on October 15, 2013. The plaintiff stated that he was not physically able to return to work for the defendant or any other job at which he had work experience. He has applied for Social Security disability. The plaintiff withdrew his hip injury claim.

We are unable to determine the specific portion or portions of the summarized testimony which supports the ALJ's determination Childers sustained work-related injuries to the back and neck. Even though the ALJ stated Childers testified he began experiencing low back pain, he did not discuss any testimony as to what Childers believed caused this low back pain. Significantly, Childers testified he had received extensive treatment for low back pain prior to working for James River. The ALJ's statement Childers testified he was not physically capable of returning to work for James River or any other job for which he has work experience does not establish Childers sustained a work injury. More importantly, Childers' testimony summarized by the ALJ contains no reference to neck symptoms and by extension a neck injury. Further, the ALJ's summary does not indicate whether Childers was referring, in part, to the effects of his severe hip condition when he stated he was unable to work for James River or perform any other job at which he had work experience. We note Childers provided extensive testimony, during his deposition and at the hearing, regarding his symptoms and the nature of his injury, none of which was summarized by the ALJ.

In the same vein, without referencing specific statements of the doctors, the ALJ stated he relied upon the testimony of Dr. Bakun which he characterized as Childers' treating chiropractor, and the report of Dr. Uzzle in finding Childers sustained work-related cumulative trauma back and neck injuries. A review of the one-page document from Fugate Family Chiropractic entitled "Medical Statement" does not establish Dr. Bakun was Childers' treating chiropractor. Notably, Childers never testified Dr. Bakun was one of his treating physicians. Further, Dr. Bakun's "Medical Statement" contains the following: "[b]ased upon your treatment of the above-referenced patient, please provide the following." In response, Dr. Bakun provided his "Findings Upon Examination" which only contains Childers' subjective complaints. Without providing his findings upon examination, Dr. Bakun listed the following diagnosis: 723.1 Cervicalgia; 728.85 Muscle Spasms; 723.3 Cervicbrachial Syndrome; 724.1 Pain in Thoracic Spine; 724.2 Lumbalgia; 724.3 Sciatica; and 784.0 Headaches. In response to the question, "[in] your medical opinion, has the patient's previous employment caused or contributed to the aforemention [sic] condition(s)? If so, please explain," Dr. Bakun wrote the following:

> Mr. Childers has a loss of the normal cervical lordotic curve, loss of the normal thoracic kyphotic curve, and lumbo-sacral facet syndrome at L5/S1. In my opinion, these structural changes and myospasms of the affected areas have been worsened by his occupation.

Dr. Bakun stated that these opinions have been within the realm of reasonable medical probability. Dr. Bakun then signed and dated the report. Based on the form and the contents of his report, it certainly appears Dr. Bakun was an evaluating physician.

Dr. Bakun's benign statement that in his opinion the "structural changes and mild spasms in the affected areas have been worsened by Childers' occupation" does not establish Childers sustained work injuries during his employment at James River. Further, Dr. Bakun did not state the extent to which the conditions were aggravated and whether these were dormant non-disabling conditions aroused into disabling reality by Childers' work activities at James River. Dr. Bakun did not offer an opinion as to whether Childers sustained a work injury. More importantly, Dr. Bakun does not diagnose work-related injuries to the back and neck. Thus, the ALJ's reliance upon the portions of Dr. Bakun's report, which he summarized, without further explanation does not

sufficiently provide the basis for his determination of causation.

The ALJ also relied upon what he characterized as persuasive and compelling medical evidence from Dr. Uzzle. The ALJ provided the following summary of Dr. Uzzle's testimony:

> The plaintiff also filed the Form 107 medical report of **Dr. Jeffrey Uzzle** dated April 5, 2014. Dr. Uzzle took a medical history from Mr. Childers regarding his medical conditions. Mr. Childers complained of chronic neck and low back pain, which he related to cumulative trauma from his work in the mining industry from 2005 to 2013. Dr. Uzzle noted the plaintiff's medical treatment. Dr. Uzzle performed a comprehensive physical examination of Mr. Childers and reviewed medical records and diagnostic test results. Dr. Uzzle's diagnoses were as follows: (1) Right hip osteoarthritis that has developed following hip fracture from a non-occupational related motorcycle accident in 2005 that was treated with open reduction internal fixation. (2) Chronic neck sprain strain from cumulative trauma according to his history. (3) Chronic lumbar sprain strain with degenerative disc disease. Dr. Uzzle stated within reasonable medical probability the plaintiff's injury was the cause of his complaints and that the cause of his complaints was cumulative trauma sustained over his work history. Dr. Uzzle stated that in his opinion the plaintiff was subjected to a series of mini traumas experienced by him in the course of his work life, which was brought into disabling reality by his last work with

the defendant-employer. Dr. Uzzle stated that the traumas were excessive forces which were placed on the plaintiff's musculoskeletal system as well as his joints, the disc in his spinal column, as well as the associated ligaments, fibers and other structures that support the joints of his spine. Dr. Uzzle stated that these conditions have developed over years of exposure, but were largely not symptomatic until his last employment. Dr. Uzzle stated that the plaintiff had dormant non-disabling conditions which were aroused into disabling reality by cumulative trauma. Dr. Uzzle stated that using the AMA Guides, Fifth Edition, the plaintiff's permanent whole person impairment will be 10%. Dr. Uzzle stated that the plaintiff reached maximum medical improvement on April 5, 2014. Dr. Uzzle stated that the plaintiff does not retain the physical capacity to return to the type of work which he performed at the time of his injuries. Dr. Uzzle placed upon the plaintiff restrictions on his work activities as a result of his injuries, as follows: 1. Lifting, pushing, pulling (overhead) 20 pounds occasionally and negligible frequently. 2. Lifting, pushing, pulling (waist) 20 pounds occasionally and negligible frequently. 3. Lifting, pushing, pulling (below the waist) 20 pounds occasionally and negligible frequently. 4. Carrying 20 pounds occasionally and negligible frequently. 5. Limit the following types of activities to occasional: bending, twisting, stooping, kneeling, crawling, squatting, standing, climbing stairs, climbing ladders, walking, sitting, heights, driving. 6. Avoid vibratory equipment.

The above summary aside, we note Dr. Uzzle diagnosed “chronic neck sprain/strain from cumulative trauma according to his history” and “chronic lumbar sprain/strain with degenerative disc disease.” He did not link either to Childers’ work. Rather, under the heading “Causation,” he stated “[c]umulative trauma sustained over the work history of Ronald Childers is the cause of his complaints.” In his explanation of causal relationship, Dr. Uzzle states a series of mini traumas which have been experienced by Childers in the course of his work life was brought into disabling reality by his last work with James River. Dr. Uzzle characterized the traumas as excessive forces placed on the musculoskeletal system and the joints, disc in the spinal column, ligament fibers, and other structures supporting the joints in the spine. Notably absent is a statement specifically stating which sections of the spine were subjected to the mini-traumas and how the mini-traumas affected specific segments of the spine. Dr. Uzzle then stated these conditions have been developing over the years of exposure and largely not symptomatic until Childers’ last employment. Dr. Uzzle’s statement that Childers’ problems were largely not symptomatic until his last employment does not establish Childers sustained back and neck injuries solely attributable to his last

employment. In fact, Dr. Uzzle's next statement that this was a dormant non-disabling condition aroused into disabling reality by cumulative trauma does not in any fashion attribute any or all of the cumulative trauma to Childers' work for James River. Rather, Dr. Uzzle indicates a dormant non-disabling condition, which he does not describe, was aroused by cumulative trauma. Dr. Uzzle's report does not provide separate and distinct discussions of the nature of the cumulative trauma injuries to both the back and neck.

Thus, without more, the ALJ's references to Childers' summarized testimony and to medical evidence from Drs. Uzzle and Bakun "covered in detail above" do not sufficiently apprise the parties or this Board of the basis for the ALJ's decision on the issue of whether Childers sustained a compensable back and or neck injury. The ALJ must provide a separate and distinct analysis regarding each alleged injury, and enter sufficient findings of fact which provide the basis for his determination as to whether Childers sustained a work-related neck injury and a work-related back injury. This is especially true since in its petition for reconsideration, James River requested separate findings for each alleged injury and the ALJ

failed to comply with the request. We emphasize we are not expressing an opinion as to the outcome on this issue.

In cumulative trauma claims, the date upon which the obligation to give notice is triggered by the date of manifestation. Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). Pursuant to KRS 342.185(1), a claimant has two years "after the date of accident" or following the suspension of payment of income benefits to file a claim. The Court of Appeals, in the case of Randall Co./Randall Div. of Textron, Inc. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), stated as follows regarding the clocking of the statute of limitations in the case of a cumulative trauma claim:

> We therefore conclude that in cases where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest.

The record reveals October 15, 2013, is the date Childers was laid off from work for reasons unrelated to his alleged injury. This does not comprise a date of manifestation. The ALJ's determination that Childers' cumulative trauma became occupationally disabling on October 15, 2013, is flawed as Childers testified he was laid off and continued to look for work thereafter. In

addition, Childers denied sustaining an injury while working for James River. Thus, October 15, 2013, cannot constitute the date the cumulative trauma became occupationally disabling. The ALJ made the factual determination the date of manifestation for Childers' cumulative trauma was December 11, 2013, when Dr. Bakun first told him he had a work-related cumulative trauma to his neck and back. That finding is specifically refuted by Childers' testimony that no doctor ever told him his back and neck problems are work-related. In fact, Dr. Bakun's report does not state Childers sustained work-related cumulative trauma to either his back or neck. He merely stated the structural changes and mild spasms of the affected areas were worsened by Childers' occupation. Therefore, the ALJ's determinations Childers sustained a cumulative trauma injury which became disabling on October 15, 2013, and manifested on December 11, 2013, are erroneous as the record does not support either finding.

Since the basis for his determination of work-related back and neck injuries is not supported by sufficient findings of facts, the ALJ's determination Childers sustained back and neck work injuries must be vacated. Similarly, the award of PTD benefits must also be vacated.

In addition, we note the ALJ did not make a specific finding as to the impairment rating attributable to each injury. In his report Dr. Uzzle stated Childers' lumbar and neck condition each resulted in a 5% impairment rating; however, as argued by James River the ALJ made no finding as to the impairment attributable to each. Rather, the ALJ found as a result of work-related cumulative trauma to the back and neck, Childers had a 10% permanent impairment. A finding of the impairment rating attributable to each work injury was necessary.

On remand, should the ALJ determine Childers sustained a work-related injury or injuries, he must identify the specific portions of Childers' testimony and medical evidence upon which he relied in support of his findings. This analysis would necessarily include specific findings as to the nature and extent of any work injury he determines Childers sustained, the basis for each determination, and the impairment rating attributable to the work injury.

In addition, since this claim concerns a cumulative trauma injury, the holding in Southern Kentucky Concrete Contractors, Inc. v. Horace W. Campbell, 662 S.W.2d 221, 222 (Ky. App. 1983) is applicable. In Southern Kentucky Concrete, supra, the claimant's pre-existing

condition was found to be attributable to “his hard manual labor” with multiple employers over the years of his work life. It was determined that the last employer– Southern Kentucky Concrete – could not be held liable to the extent the claimant’s condition was work-related and pre-existed his employment at Southern Kentucky Concrete. Thus, the Court remanded the matter with the following directions:

> We are therefore of the opinion that this case should be remanded to the Workers' Compensation Board with directions to determine the percentage of Campbell's disability attributable to the work performed by him while employed by Southern, and Southern is to be liable to that extent. Absent evidence to the contrary, Southern shall be liable for that percentage of Campbell's disability which is equal to the percentage of Campbell's worklife spent with Southern. The remainder of his disability is the responsibility of the Special Fund.

Id. at 222-223.

The ALJ’s statement that Childers suffered significant cumulative trauma to his back and neck as a result of repetitive work in the coal mining industry over a lengthy period of time and became occupationally disabled on October 15, 2013, is not supported by the record, as that was the date Childers was laid off. In addition, Childers denied experiencing an injury on October 15, 2013,

and acknowledged he continued to seek employment with multiple coal companies.

In summary, on remand, should the ALJ again determine Childers sustained a work-related injury or injuries he must state what percentage of Childers' impairment, if any, is directly attributable to his work at James River. In doing so, the ALJ must cite, in his amended opinion and order, the medical proof that establishes Childers' work at James River contributed in some degree to the effects of his overall cumulative trauma injury and then, with specificity, denote to what degree it contributed. Simply because Childers was last employed by James River does not place the entire liability for Childers' alleged disability on James River. The ALJ must cite to evidence of record establishing that Childers' work activities performed during his employment with James River contributed to his overall permanent condition, producing some degree of harmful change to the human organism.

Even though we are vacating the award of PTD benefits, we are compelled to address the ALJ's analysis concerning the issue of permanent total disability. Permanent total disability is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform

any type of work as a result of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). The Kentucky Supreme Court set forth the following analysis in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000) in determining whether a claimant is permanently and totally disabled:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra,* it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

Here, the ALJ only cited to Ira A. Watson Department Store v. Hamilton, supra, and did not engage in

the appropriate analysis of the factors discussed above. The mere statement he relied upon Childers' testimony and the medical evidence from Drs. Bakun and Uzzle, which the ALJ indicated he had covered in detail previously, is insufficient to apprise the parties and this Board of the basis for his determination. The ALJ provided Childers' age and noted he had a good work ethic. He did not indicate how Childers' age and work ethic factored into his decision. Any analysis concerning the existence of permanent total disability requires the ALJ to set forth how the severity of Childers' injury or injuries as well as how his age, work history, and education factored into his decision to award PTD benefits. As noted by the Supreme Court in Ira A. Watson Department Store v. Hamilton, supra, the ALJ must make specific findings regarding Childers' post-injury physical, emotional, intellectual, and vocational status and how those factors interact. The ALJ failed to discuss any of those factors.

The ALJ's analysis regarding Childers' entitlement to PTD benefits is insufficient as the ALJ did not provide the basis for his finding Childers would not be able to find work consistently under normal employment conditions. He merely stated that based upon "the above factors" he made the factual determination Childers could

not find work consistently under regular work circumstances and work dependably. That statement without further explanation is insufficient. The ALJ must cite to the specific portions of the lay and medical evidence he relied upon for making such a finding.

As we are vacating the ALJ's findings regarding a work-related injury and the award of permanent total disability, the award of TTD benefits must also be vacated. We note, the award of TTD benefits in a claim where PTD benefits have been awarded is unnecessary. That fact aside, we agree with James River the ALJ's analysis regarding TTD benefits is insufficient.

KRS 342.0011(11)(a) defines temporary total disability as follows:

> 'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery

> process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Id. at 205.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Id. at 659. In other words, where a claimant has not reached maximum medical improvement ("MMI"), TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

More recently, in Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was

performing at the time of the injury. The court in Magellan Behavioral Health v. Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>
> . . .
>
> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), with regard to the standard for awarding TTD, the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based

> entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
>
> . . .
>
> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

In the case *sub judice*, it is clear the ALJ awarded TTD benefits based upon Dr. Uzzle's assessment of MMI. What is not clear, however, is why the ALJ initiated his award of TTD benefits on October 15, 2013, which, according to the evidence in the record, is the day Childers was laid off. Significantly, Childers testified that after being laid off on that date he applied for work anywhere and everywhere but mainly at coal companies. The ALJ merely cited to Magellan Behavioral Health v. Helms, supra, but did not outline the law pertaining to entitlement to TTD benefits in detail in both the August 14, 2014, Opinion and Order and the September 23, 2014, Opinion and Order on Reconsideration. The ALJ merely

stated he relied upon Dr. Uzzle's opinion as to when Childers attained MMI, which is an insufficient analysis supporting an award of TTD benefits on this issue. Again, the ALJ must provide adequate findings of fact based on the evidence in order to advise the parties and this Board of the basis for his decision. Shields v. Pittsburgh and Midway Coal Min. Co., supra; Big Sandy Cmty. Action Program v. Chaffins, supra. It is not the role of this Board to speculate on the ALJ's rationale and to render an opinion based on that speculation.

On remand, should the ALJ determine Childers is only entitled to PPD benefits, the ALJ must engage in the two prong analysis outlined herein in determining any period during which Childers is entitled to TTD benefits. The ALJ must also determine the appropriate start date for the payment of PPD benefits.

Accordingly, the August 14, 2014, Opinion and Order and the September 23, 2014, Opinion and Order on Reconsideration finding Childers sustained work-related back and neck injuries and awarding TTD benefits and PTD benefits are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion in conformity with the views expressed herein.

ALL CONCUR.

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