OPINION ENTERED: May 15, 2012

CLAIM NO. 201100609

KENAMERICAN RESOURCES, INC. PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

BILLY G. WARREN
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. KenAmerican Resources, Inc. ("KenAmerican") seeks review of the December 1, 2011, opinion and award rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"), finding Billy G. Warren ("Warren") totally occupationally disabled due to a "cumulative trauma injury to his body, including his head,

spine, and bilateral upper extremities" and awarding permanent total disability ("PTD") benefits and medical benefits.[1] KenAmerican also appeals from the December 29, 2011, order ruling on its petition for reconsideration.

On appeal, KenAmerican asserts Warren's claim is barred because he failed to give notice in a timely manner in violation of KRS 342.185. Citing Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001), KenAmerican asserts the record unequivocally shows that long before Warren gave notice of his injuries, he had been told by a physician that his cervical spine complaints were the result of years working in underground coal mines. KenAmerican asserts Warren "unequivocally admitted as much" in his August 16, 2011, deposition. KenAmerican maintains when questioned why a cervical MRI was performed on June 4, 2007, Warren stated the cervical MRI had been ordered because he was experiencing neck pain. Warren also confirmed either Dr. Tuttle or Dr. Steven Mills told him his neck pain was the result of his head repeatedly striking the mine roof. Therefore, KenAmerican argues Warren knew a year or two before he stopped working in 2009 that he was suffering from a work-related condition, and his obligation to give

[1] KenAmerican's name is spelled numerous ways in the record. We adopt the spelling used by KenAmerican's counsel.

notice arose when a physician told him "his complaints were a work related condition."

KenAmerican cites to the following language contained in American Printing House for the Blind Ex Rel. Mutual Ins. Corp. of America v. Brown, 142 S.W.3d 145, 148 (Ky. 2004):

> In *Alcan Foil Products v. Huff*, *supra*, at 99 and 101, we noted that 'the entitlement to workers' compensation benefits stems from the fact that an occupational injury has been sustained' and that it 'begins when a work-related injury is sustained, regardless of whether it is occupationally disabling.' Nonetheless, because gradual injuries often occur imperceptibly, we reaffirm the principle that a rule of discovery governs the notice and limitations requirements for such injuries. **We determined that the obligation to give notice and the period of limitations for a gradual injury are triggered by a worker's knowledge of the harmful change and its cause rather than by the specific incidents of trauma that caused it**. Id. at 148. (Emphasis added)

Based on the above language, KenAmerican argues Warren was aware of the harmful change a year or two before he stopped working in 2009 because he was suffering from chronic neck pain that was severe enough to require pain medication prescriptions and a cervical MRI. Further, Warren was aware of the cause because his physician told him that his

neck was hurting because he was repeatedly striking his head against the mine roof. Therefore, KenAmerican asserts the record compels a finding Warren failed to give notice in a timely manner and his claim for cumulative trauma is barred in its entirety.

Alternatively, KenAmerican argues liability in this cumulative trauma claim should have been assessed on a proportionate basis. In support of its proposition, KenAmerican cites to the following testimony of Dr. William A. Schwank contained on page 25 of his August 10, 2011, deposition:

> Q: Did all of his cumulative trauma that he encountered in his entire work life as a coal miner, did all of that contribute to his cervical spine condition?
>
> A: Yes.
>
> Q: Did any portion of his work life contribute more or less than the other, as far as you know?
>
> A: No.
>
> Q: Would you then apportion causation evenly throughout his entire work life as a coal miner?
>
> A: I believe so.
>
> Q: It all contributed in some manner?
>
> A: Yes.

> Q: To causing this cervical spine condition that required surgery, is that correct?
>
> A: Yes, that's correct.

Based on the above testimony, KenAmerican argues it should not have been assessed all the liability; rather, it should have only been held responsible for a proportionate share of the liability. Since the record shows Warren spent approximately thirty-one years working as an underground coal miner, and Warren was employed by KenAmerican for only twelve of those years, it could only be assessed "thirty-nine percent of any liability." KenAmerican posits the ALJ did not address this issue in the December 1, 2011, opinion and award even though it was properly preserved as a contested issue and addressed in its brief to the ALJ. KenAmerican maintains the ALJ addressed the issue in the December 29, 2011, order ruling on its petition for reconsideration but "appeared to have confused this argument" with an argument there was some prior active impairment or disability. The ALJ also questioned whether the issue was properly preserved. KenAmerican asserts the issue was properly preserved as a contested issue, because the contested issues included both work relatedness and causation. KenAmerican argues it did not assert there was any proof of either prior active impairment or disability

because it was not required to do so. Rather, it asserted liability for the income benefits awarded should only reflect that portion of the time spent in the employ of KenAmerican.

As this appeal only concerns the issue of notice, we will limit our discussion to the relevant portions of the record.

Warren, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Warren was successful in that burden, the question on appeal is whether there is substantial evidence 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 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). An 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). An ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson

Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Warren's August 16, 2011, deposition was introduced into the record and he testified at the October 14, 2011, hearing. Warren worked for thirty-one years in underground coal mines. Warren began working for KenAmerican in 1987 and works six days a week nine hours per day. While working for KenAmerican he hauled supplies into the mine and also ran a diesel scoop when rock falls occurred. In hauling supplies, Warren was required to lift in excess of fifty pounds. Warren's job at KenAmerican required bending and stooping. Warren testified that while operating the equipment hauling supplies into the mine, he would intermittently hit his head on the mine roof throughout his shift. He hit his head on the mine roof only while working for KenAmerican. In addition, when operating the equipment, he was required to lean to one side in order to guide the machine. Eventually, Warren's symptoms were so bad he was forced to quit working on April

26, 2009. Regarding the nature of his problems, Warren testified as follows in his deposition:

> Q: Tell me why you couldn't go.
>
> A: Well, I was just in a lot of pain and both arms were going numb, neck was hurting all the time, kept hitting the top all the time, right leg would go numb, just a lot of pain.

Concerning the MRI performed on June 4, 2007, Warren provided the following testimony:

> Q: Somewhere in these medical records they refer to a MRI of your neck that was done in 2009 but they compared it to one done in June of 2007. Why did they do one back in 2007, same thing, neck pain, that kind of stuff?
>
> A: Yes, yeah.
>
> Q: Do you know who would have ordered that? Dr. Mills? Now, you didn't start treating with Dr. Cole, I don't think, until after you stopped working, is that right?
>
> A: Yes, sir.[2]

During his deposition, Warren was unable to recall any other tests performed in 2007 testifying as follows:

> Q: Okay. Did they do any other tests back in 2007; do you think? Did they do one on your back or your knees or anything like that? Did they do any of those nerve tests back in 2007?
>
> A: No, not to the best of my knowledge. I don't remember.

[2] This testimony is part of the testimony relied upon by KenAmerican.

> Q: But does it sound right that they ordered this MRI on your neck in 2007 because you were having trouble with your neck, neck pain?
>
> A: Could be, yeah.
>
> Q: Okay. Did you figure it was from bouncing up against the mine roof and all that?
>
> A: Yeah, I kept hitting my head, you know, just continuously, you know.
>
> Q: Hopefully they made you wear a hard hat.
>
> A: Yeah, but no canopy, you know.
>
> . . .

Concerning what he was told by Drs. Tuttle and/or Mills, Warren testified as follows:

> Q: I didn't think so. So we're not sure who ordered the MRI back in 2007. We think it was either Dr. Tuttle or Dr. Mills.
>
> A: I say it was Tuttle.
>
> Q: Did he tell you anything about your neck after they ordered that MRI? Did he tell you what was going on, why it might be hurting, that kind of thing?
>
> A: Just, you know, I don't know how to answer that, I don't guess, but I just, you know, went in because I was hurting, you know, and kept hitting it.
>
> Q: So you go in and you see either Dr. Tuttle or Dr. Mills, he orders this MRI. The next time you see him does he tell you what was on the MRI, what it showed?

A: Yes.

Q: Do you remember what that conversation was about?

A: I don’t remember that far back, no.

Q: Did he tell you you ought to come out of the mine, you’re beating yourself up?

A: I really don’t know. All I know – I guess maybe, you know, because I was hitting it all time, you know, just…

Q: Back in 2007 did he prescribe any medicine for you at that point?

A: Yes, sir, I believe he did.

Q: So what did you start taking?

A: Some pain pills.

Q: Was it like over-the-counter or was it a prescription?

A: No, prescription.

Q: Like Lortab, something like that?

A: Yes, Lortab.

[text omitted]

Q: So when he started writing, whoever it was, either Dr. Tuttle or Dr. Mills, started writing this prescription, did he tell you you’re getting beat up from hitting the mine roof over and over?

A: Yes, sir.

Q: You knew that’s what it was?

A: Yes, sir.

Q: But he confirmed that?

A: Yes, sir.

Q: Okay. Did he tell you you ought to come out of the mines?

A: You know, I don’t know what he said.

Q: You don’t remember anybody suggesting that you ought to stop working then?

A: No, sir.

Q: How often would this happen that you would hit your head on the top or catch a roof bolt hanger or something?

A: Probably once a day just about. I mean I didn’t have but a half inch to play with and I was like this all day long and –

Q: You’re leaned over?

A: Yeah.

Q: And you’re driving this buggy?

A: And if I just hit a pebble, my hard hat’s always hitting the top. I mean it was a every day thing.

[text omitted]

Q: So you probably had some conversation with either Dr. Tuttle or Dr. Mills and described to him how you were banging your head against it?

A: Yes, sir.

Q: And he told you well, that’s what’s causing your neck pain. Does that sound right?

> A: That sounds right.
>
> Q: But he didn't tell you to quit, come out of the mines? You have to say yes or no.
>
> A: No.
>
> [text omitted]
>
> Q: Did he tell you maybe you ought to get a different kind of job, try to get one of those outside jobs or something like that? Do you remember anything about that?
>
> A: I don't remember that.
>
> Q: Okay. And that would have been a year or two before you stopped working in April of 2009?
>
> A: Sounds right.
>
> Q: Okay, and you kept working as long as you could?
>
> A: I kept going as long as I could because I had to work, you know.[3]

Warren explained that in the first six months of 2009 there was no one particular instance of hitting his head against the mine roof which was more significant. He testified as follows:

> Q: Nothing in particular happened in that first six months of 2009, you didn't have one particular incident where you banged your head against the

[3] Portions of the above testimony are cited by KenAmerican in support of its argument Warren knew a year or two before he stopped working in 2009 that he was suffering from a work-related condition. Thus, he was obligated to give notice when told by physicians his complaints were work-related.

> top and really messed it up or anything like that?
>
> A: Far as I know, I just kept hitting it over the years. I mean it was a ever [sic] day thing and then it finally got to where I couldn't go.
>
> Q: Did it ever break your hard hat or anything like that?
> A: Yeah, I think I broke a couple of them, you know.
>
> Q: You hadn't had any particular injuries otherwise in all the time that you were at Ken American [sic]? I mean you didn't sprain your neck, you weren't off work for a few days or anything like that? This was just one thing after another.
>
> A: One thing after another.
>
> Q: Okay. And then eventually you come to see Dr. Schwank and he does neck surgery September 20 of 2010?
>
> A: That sounds right.
>
> Q: So it took a while until you got to him and had that surgery done?
>
> A: Yes, sir.

Warren explained he took off work in April 2009, hoping his condition would improve so he could return to work. When he did not get better, Warren sent notice to KenAmerican of his injuries and his intent to file a claim.[4]

[4] Attached to the hearing transcript as exhibit 1 is a copy of the July 8, 2009, letter Warren sent to KenAmerican and the certified mail receipt confirming KenAmerican received the letter.

Dr. Schwank was deposed, and his medical records were introduced as an exhibit to his deposition. Dr. Schwank testified he first saw Warren on May 13, 2009, and received a history from Warren that he had worked in underground mines for thirty-one years. Warren told him that while employed at KenAmerican he drove a machine; however, Dr. Schwank was unable to provide the name of the machine. Warren also provided a history of hitting his head against the mine roof multiple times while operating the machine. In addition, Warren also stated he was required to lean to one side to guide the machine. Warren had complaints of low back pain, cervical neck pain and pain into both of his shoulders into his arms all the way down to the elbows. Warren also complained of pain and numbness into his small and second finger.

Dr. Schwank's January 13, 2010, report reflects Dr. Schwank only reviewed the MRIs performed in 2009. Likewise, Dr. Schwank's testimony reveals he had not seen the June 4, 2007, MRI report. Dr. Schwank's report provides the following diagnoses:

> The current diagnosis of Mr. Warren's condition is spondylosis of the cervical and lumbar spine secondary to degenerative disease. Bilateral carpal tunnel syndrome. Left ulnar nerve entrapment at the level of the elbow.

Concerning Warren's cervical injury, Dr. Schwank opined as follows:

> 5a) His cervical neck injury.
>
> b) The patient does [sic] relate a specific injury to his neck and we have not seen [sic] for a specific shoulder injury and I am not an expert on shoulder pain so we will defer that to an orthopaedic surgeon.
>
> c) The physical problems that he currently has in his lumbar back they certainly can be caused by the awkward position that he rides on the machine. His MRI [sic] we did not see any herniated disc but just degenerative disease and he should improve as he stopped doing that type of work [sic]
>
> d) The physical problems that he currently has in his elbow, wrist and hands, I believe that his carpal tunnels are related to the type of work that he does and his elbow is also most likely related to his job.

Concerning Warren's impairment rating, Dr. Schwank opined as follows:

> On paragraph 5 you asked me my opinion about a permanent whole body impairment on this patient. It is difficult to say right now if he does have or not a permanent impairment since he can go through bilateral carpal tunnel releases and ulnar nerve release that can improve his condition and usually have no impairment rating.
>
> On the cervical spine he has degenerative changes, significant spondylosis especially at the level of C5-6 and C6-7 that can cause him to

> have an entrapped nerve root and giving him the shoulder pain and the limitation on the range of motion of the cervical spine would limit him to a 5% impairment of the whole person according to the Table 15-5 on Page 392 of the AMA Guidelines to Permanent Impairment.
>
> According to his back, the patient has not a history of a specific injury for his back, as well as for his neck. And I do not know if he really will qualify for an impairment. However on the DRE Category he will qualify for maybe 4% Category II on Table 15-3, Page 384.
>
> . . .
>
> Considering the nature of his degenerative disease, spondylosis of the cervical and lumbar spine, I think that he has 50% of pre-existing condition and 50% aggravated by the type of work that he does.

With respect to the issue on appeal, the ALJ provided the following Analysis, Findings of Fact, and Conclusions of Law:

> **Notice and statute of limitations.**
>
> In a workers' compensation claim alleging a cumulative trauma injury, notice is required and the statute of limitations begins to run when a worker "discovers that a physically disabling injury has been sustained and knows that it is caused by work." Alcan Foil Products vs. Huff, 2 SW3d 96 (Ky. 1999); Special Fund vs. Clark, 998 SW2d 487 (Ky. 1999). The manifestation date is not necessarily controlled by the date of last employment.

In Special Fund vs. Clark, *supra*, the Supreme Court modified Alcan to a degree, holding that an employee is entitled to recover benefits for that portion of disability which occurred in the two years preceding the filing of the claim.

Plaintiff testified he worked six days a week until the end of April 2009 when he "got where I couldn't go." (Plaintiff's depo., p. 16). As early as June 2007 he had an MRI of his cervical spine. Plaintiff did not recall any testing done on his back, knees or arms. (Plaintiff's depo., p. 19). The Plaintiff testified in response to the following question by defense counsel:

> Q. Okay. Did you figure it was from bouncing up against the mine roof and all that?
>
> A. Yeah, I kept hitting my head, you know, just continuously, you know.

As the cross-examination continued regarding the MRI of 2007, the Plaintiff was obviously not clear as to why the test was ordered or why his neck was hurting. The sequence of questioning continued:

> Q. Did he tell you anything about your neck after they ordered that MRI? Did he tell you what was going on, why it might be hurting, that kind of thing?
>
> A. Just, you know, I don't know how to answer that, I don't guess, but I just, you know, went in because I was

> hurting, you know, and kept hitting it.
>
> Q. So you go in and you see either Dr. Tuttle or Dr. Mills, he orders this MRI. The next time you see him does he tell you what was on the MRI, what it showed?
>
> A. Yes.
>
> Q. DO you remember what that conversation was about?
>
> A. I don't remember that far back, no.
>
> Q. Did he tell you you ought to come out of the mine, you're beating yourself up?
>
> A. I really don't know. All I know – I guess maybe, you know, because I was hitting it all time, you know, just… (Plaintiff's depo., pp.20-21).

The Plaintiff went on to testify that either Dr. Tuttle or Dr. Mills wrote him a prescription for pain pills but he did not take them at work. (Id. 23). He agreed with counsel's question that either Dr. Tuttle or Dr. Mills told him he was "beat up from hitting the mine roof over and over". However, he did not remember anyone suggesting that he come out of the mines. (Plaintiff's depo., p. 23).

Of importance to this fact-finder is the obvious uncertainty of what the Plaintiff knew and when he knew it. Indeed, the Plaintiff could not even testify which doctor ordered the first MRI, or which doctor wrote his

prescription for pain pills. Importantly, he does not remember the doctor ever telling him to quit working in the mines. He doesn't remember the doctor ever telling him that he should get a different kind of job. (Id. P. 25). The only thing he is clear about was that he was hurting and that hitting his head was a continuous thing throughout the entire day. He was clear that the pain progressed to the point that he began taking off work and finally had to quit work altogether in April 2009.

In the case of Brummitt vs. Southeastern Kentucky Rehabilitation Industries 156 SW3d 276 (Ky. 2005) the Kentucky Supreme Court noted:

> [T]his manifestation of disability date is a fact intensive determination by the fact finder based upon the particular circumstances in each case.... [A]n ALJ is authorized to conclude, if supported by evidence of record, that a disability could manifest on the date the claimant seeks treatment and is informed on that occasion that her condition is related to her work.

However, the Brummitt, *supra*, case, as well as the subsequent case of Johnson vs. Bluegrass Cooperage, 2006-SC-0340-WC (Ky. 2007), requires the ALJ to apply the holding in Special Fund vs. Clark, 998 SW2d 487 (Ky. 1999) and "consider the effect of work performed within the two-year period before each claim was filed." This ALJ is charged thereby with determining: (1) whether the claimant sustained repetitive or cumulative trauma from work performed

> within the two-year period before the application was filed; (2) and whether it caused a harmful change in his cervical spine, lumbar spine, elbow, and wrists; and (3) whether such a change entitled him to any benefits.
>
> Apparently, the results of the MRI in 2007 did not result in either Dr. Tuttle or Dr. Mills referring Plaintiff to a specialist for further evaluation. However, by the time the MRI in 2009 was ordered, Plaintiff's condition had progressed to the point that he was referred to the specialist, Dr. Schwank. Further, the Plaintiff's condition in 2009 had progressed to the point of requiring other diagnostic testing, e.g. EMG/NCV. Plaintiff put the Defendant/employer on notice of the claim by written letter date July 8, 2009. This claim was formally filed in the Department of Workers Claims on April 21, 2011, within two years of the date the Plaintiff last worked and was last subjected to the cumulative trauma. After considering all of the evidence I find that: (1) the Plaintiff sustained repetitive or cumulative trauma from work performed within the two-year period before the application was filed; (2) and that it caused a harmful change in his cervical spine, lumbar spine, elbow, and wrists; and (3) that the harmful change entitles him to benefits. For these findings I rely upon the testimony of the Plaintiff, the written notice to the employer and the medical evidence including opinions of Dr. Schwank and Dr. Cole.

KenAmerican's petition for reconsideration raised the same arguments it asserts on appeal. The ALJ overruled

KenAmerican's petition for reconsideration by order dated December 29, 2011.

In Hill v. Sextet Mining Corp., supra, the Supreme Court noted as follows:

> In concluding that the claimant sustained a gradual injury, the ALJ chose to rely upon an independent medical evaluation that was conducted by Dr. Gaw. Dr. Gaw examined the claimant on August 13, 1998, and reviewed the MRIs, x-rays, and notes of Drs. Bowles and Coladonato. Among other conditions, he diagnosed degenerative cervical and lumbar disc disease and grade 1 or 2 spondylolisthesis and L5 with left radiculopathy. He testified that the degenerative condition was present as early as 1992 but that because the claimant always returned to an asymptomatic state after periodic flare-ups, had missed work for no more than a few weeks in the past 7-8 years, and was able to run long distances, he did not consider the condition to be active or disabling until after the February 11, 1998, incident. In his opinion, the repetitive insults to the claimant's neck and back from his work as a coal miner had caused a cumulative trauma injury to his spine, aggravating and accelerating both his degenerative problems and the spondylolisthesis.
>
> Dr. Gaw indicated that the spondylolisthesis was the claimant's "biggest problem" and that it had existed as early as 1995. As a preventative measure, he would have recommended at that time that the claimant not lift more than 40-50 pounds and would have advised him to do work that allowed him to change

> positions frequently. Noting that the claimant was working and active up until February, 1998, Dr. Gaw viewed the previous episodes of back pain as being no more than temporary exacerbations of symptoms of the ongoing spondylolisthesis and degenerative disc disease, and he characterized the conditions as being dormant and nondisabling before that time. Whereas, after February, 1998, the conditions were active and disabling.

Id. at 506.

The Supreme Court held as follows:

> Implicit in the finding of a gradual injury was a finding that no one instance of workplace trauma, including those specifically alleged and those of which the employer was notified, caused an injury of appreciable proportion.
>
> . . .
>
> Medical causation is a matter for the medical experts and, therefore, the claimant cannot be expected to have self-diagnosed the cause of the harmful change to his cervical spine as being a gradual injury versus a specific traumatic event. He was not required to give notice that he had sustained a work-related gradual injury to his spine until he was informed of that fact. [Citations omitted]
>
> It is clear that the claimant was aware of symptoms in his cervical spine and associated the periodic flare-up of symptoms with his work long before evaluated by Dr. Gaw, and he also sought medical treatment after some specific incidents of cervical trauma. Furthermore, it is clear that the

> physicians who treated the claimant's symptoms over the years had encouraged him to quit working in the mines and had told him that the work was too stressful. Nonetheless, there is no indication that any of them ever informed him of his work-related gradual injury, i.e., that his work was gradually causing harmful changes to his spine that were permanent. Under those circumstances, we are not persuaded that the claimant was required to self-diagnose the cause of the cervical pain that contributed to his inability to work after February 11, 1998, as being such an injury. On August 13, 1998, Dr. Gaw became the first physician to determine that the claimant's work over the years had accelerated the development of the degenerative condition in his cervical and lumbar spine and had aroused the preexisting spondylolisthesis into disabling reality. This was the first time that a physician had diagnosed a gradual work-related injury. It is not clear whether the claimant was informed of that fact on the date of the exam or later, but he notified the employer of the gradual injury when his claim was filed one month later. We conclude, therefore, that substantial evidence supported the finding that the claimant gave timely notice of the gradual injury to his cervical spine. For that reason and although the ALJ's reasoning was different from our own, the finding should not have been reversed on appeal.

Id. at 507-508.

We believe the above language clearly controls the outcome in the case *sub judice*. Warren's testimony reflects that although Dr. Tuttle or Dr. Mills told him his

symptoms were due to his work, i.e. hitting his head against the mine roof was causing his neck pain, he was not told by any physician that he had a gradual work-related injury. Only after seeing Dr. Schwank did Warren receive a diagnoses of gradual work-related injuries to his neck, back, arms, and hands. Dr. Schwank's January 13, 2010, report is the only medical evidence in the record reflecting Warren sustained gradual work-related injuries. By the time Dr. Schwank examined him, Warren had already sent the letter providing notice to KenAmerican of his work-related injuries. In that regard, Warren explained he quit work hoping he would get better and be able to return to work. When he did not get better, he sent the letter to KenAmerican informing it of his work-related injuries and intent to file a claim.

As pointed out in Hill v. Sextet Mining Corp., supra, Warren is not required to self-diagnose the cause of the pain and reoccurring symptoms in his neck, back, arms, and hands. Further, the fact Dr. Mills or Dr. Tuttle informed Warren that repeatedly hitting his head on the mine roof was causing his symptoms did not create an obligation on Warren's part to notify his employer of a gradual work-related injury and file a workers' compensation claim. Warren did not testify Drs. Mills or

Tuttle advised him he had gradual work-related injuries. Likewise, the medical records do not reflect a diagnosis of gradual work-related injuries and that Warren was ever advised he had sustained gradual work-related injuries prior to the time Warren was seen by Dr. Schwank.

Although KenAmerican relies upon certain portions of Warren's testimony which establish the physicians told him he was experiencing *symptoms* due to his work activities, Warren's testimony does not establish Drs. Tuttle or Mills ever advised he had a gradual work-related injury or injuries. Further, Warren testified he was never told by either Dr. Tuttle or Dr. Mills he should stop working at KenAmerican. The medical records in this case reflect the first diagnosis by any physician of gradual work-related injuries was made by Dr. Schwank. That diagnosis was made after Warren had provided notice to KenAmerican of his work-related injuries. Informing Warren his *symptoms* were due to his work is a far cry from a diagnosis of a *specific work-related injury*. The fact Warren experienced symptoms which Dr. Tuttle or Dr. Mills informed him were related to his work does not establish a gradual work-related injury or injuries had been specifically identified and diagnosed. Thus, the obligation to notify KenAmerican of an injury after Warren

was seen by Dr. Tuttle or Dr. Mills in 2007 was not triggered.

Warren's testimony and the opinions of Dr. Schwank constitute substantial evidence supporting the ALJ's determination the first time Warren was ever advised he had gradual work-related injuries was after Dr. Schwank diagnosed cumulative trauma injuries. Like Dr. Gaw in Hill v. Sextet Mining Corp., supra, Dr. Schwank was the first physician to determine Warren's work over the years had resulted in gradual work-related injuries to his cervical and lumbar spine, shoulders, arms, and hands. Likewise, Dr. Schwank was the first physician to diagnose gradual work-related injuries. Since the decision of the ALJ concerning the issue of whether Warren gave due and timely notice is supported by substantial evidence, we are without authority to disturb her decision on appeal. Special Fund v. Francis, supra.

We find no merit in KenAmerican's alternative argument that liability in this claim should have been assessed on a proportionate basis. Fatal to this argument is the fact the September 9, 2011, benefit review conference ("BRC") order reflects the following contested issues: benefits per KRS 342.730, work-relatedness/ causation, notice, unpaid or contested medical expenses,

TTD, and statute of limitations. The parties did not check "exclusion for pre-existing disability/impairment" as a contested issue. At the hearing, the parties confirmed the contested issues were as set forth in the BRC order. Regardless of KenAmerican's attempt to characterize this as an issue involving work-relatedness/causation, we find the attempt to have liability assessed on a proportionate basis falls under the category of exclusion for pre-existing disability/impairment. Therefore, exclusion for pre-existing disability/impairment should have been listed as a contested issue in the BRC order. 803 KAR 25:010 (13)(14) reads as follows:

> (13) If at the conclusion of the benefit review conference the parties have not reached agreement on all the issues, the administrative law judge shall:
>
> (a) Prepare a summary stipulation of all contested and uncontested issues which shall be signed by representatives of the parties and by the administrative law judge; and
>
> (b) Schedule a final hearing.
>
> (14) Only contested issues shall be the subject of further proceedings.

Since KenAmerican did not list this as a contested issue, it waived its right to make such an argument in its brief to the ALJ, its petition for

reconsideration, and to this Board on appeal. We find no merit in KenAmerican's assertion its argument relates to the issue of work-related/causation. KenAmerican's argument is that since Warren only worked in the underground mines for thirty-one years and only twelve of those years for KenAmerican it is only responsible for 39% of the assessed liability. That clearly falls under the issue of exclusion for a pre-existing disability/impairment and not the issue of work-relatedness/causation. That aside, Dr. Schwank's testimony cited by KenAmerican, does not satisfy KenAmerican's burden as set forth in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). Thus, assuming, *arguendo*, KenAmerican could assert such an argument, its argument has no merit. We note KenAmerican's argument it should only be assessed 39% of the liability is not supported by any medical evidence but is counsel's assessment of its liability.

Accordingly, the December 1, 2011, opinion and award, and the December 29, 2011, order ruling on KenAmerican's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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