Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 17, 2014

CLAIM NO. 201300803 & 201201650

KOKOSING CONSTRUCTION CO., INC. PETITIONER

VS. **APPEAL FROM HON. JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE**

PHILLIP RIFE
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Kokosing Construction Company, Inc. ("Kokosing") appeals from the December 20, 2013, Opinion and Award and the January 28, 2014, Order on Defendant's Petition for Reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). In the Opinion and Award, the ALJ awarded Phillip Rife ("Rife") temporary total disability ("TTD") benefits from April 2, 2012, through

October 2, 2012; permanent total disability ("PTD") benefits beginning on October 20, 2012; and medical benefits.[1] The case involves consolidated claims. On appeal, Kokosing asserts the ALJ erred by finding Kokosing liable for all of Rife's cumulative trauma injury award.[2]

The November 26, 2012, Form 103, Claim No. 2012-01650, alleges Rife became disabled due to occupational hearing loss on October 30, 2012. The Form 103 further alleges as follows: "Repeated exposure to loud and noxious noise for years and years in the workplace." Rife was working in road construction at the time of the exposure.

In its January 21, 2013, Notice of Claim Denial, Kokosing denied the claim for the following reasons:

> No proof of causation; Notice not given in a timely manner after the onset of the condition; Claim not filed in a timely manner after the onset of the condition.

The Form 101, Claim No. 2013-00803, alleges Rife sustained cumulative trauma injuries, manifesting on October 30, 2012, to his neck, back, shoulders, arms, and knees in the following manner: "Repetitive Stress Trauma; plaintiff performed heavy manual labor for years and years

---

1 The period of TTD benefits awarded was corrected by Agreed Order filed April 24, 2014, which is set forth herein verbatim.
2 Kokosing has not appealed from the ALJ's decision regarding the hearing loss claim.

suffering numerous mini-traumas, which resulted in painful injuries to his spine and limbs."

The Form 104 attached to the Form 101 provides the following employment history:

- Kokosing, Inc., Construction, Heavy Equipment Operator, 8/2012-10/2012;
- Wilmore Coal Co., Coal, Heavy Equipment Operator, 1/2012-6/4/2012;
- Signal P Energy, Coal, Heavy Equipment Operator, 2010-2012;
- Hawkeye Contracting, Coal, Heavy Equipment Operator, 1998-2010;
- Lodestar Energy, Coal, Heavy Equipment Operator, 1997-1998;
- Constaine Coal, Coal, Heavy Equipment Operator, 1996-1997;
- Sunny Ridge Mining, Coal, Heavy Equipment Operator, 1994-1996.

In its Notice of Claim Denial, Kokosing denied the claim for the following reasons:

> No proof of causation; Notice not given in a timely manner after the onset of the condition; Claim not filed in a timely manner after the onset of the condition; and entire liability cannot be assessed to this employer.

The October 3, 2013, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; TTD; PTD; compensability of knee surgery due to no pre-authorization. It was stipulated that a work-related

injury or injuries occurred on October 30, 2012. The injury or injuries were not specified in the BRC order.

Attached to the Form 101 is a Form 107-I prepared by Dr. Ira B. Potter who examined Rife on May 6, 2013, and diagnosed the following:

> 1. Cervical sprain/strain
> 2. Multilevel cervical disc bulging and facet arthropathy
> 3. C6-7 & C7-T1 bilateral foraminal stenosis - severe at former
> 4. C6-7 spinal stenosis
> 5. Lumbosacral sprain/strain
> 6. Right lumbosacral radiculitis
> 7. S/p left knee total arthroplasty (04-02-13) secondary to severe tricompartmental osteoarthritis
> 8. Right knee medial and patellofemoral osteoarthritis
> 9. Right carpal tunnel syndrome

Concerning causation, Dr. Potter opined as follows:

> Within a reasonable degree of medical probability, Mr. Rife's impairments are secondary to cumulative trauma and repetitive strain encountered over his 40+ years of work as an equipment operator.
>
> With respect to Mr. Rife's lumbar spine, the seated position from which he operated equipment subjected his spine to compressive loading for several continuous hours each day. The rough terrain over which he operated the equipment subjected his lumbar spine to repetitive jarring and vibratory forces that contributed to the degenerative process. Mr. Rife did

> [sic] lumbar surgery in the 1970s. According to the AMA Guides 5th Edition, a lumbar surgery could make a strong argument that the 12% whole person impairment I assigned Mr. Rife (see Addendum) is entirely related to cumulative trauma in light of his excellent outcome following surgery in the 1970s and the lack of medical care for his lower back over many, many years. According to the records that I reviewed, it was not until the last few years of work that Mr. Rife's lumbar spine underlying dormant condition was gradually aroused and became progressively disabling.

Dr. Potter assessed a 39% whole-person impairment rating pursuant to the 5th Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides").

A Form 107-I Addendum, also attached to the Form 101, breaks down the 39% whole-person impairment rating as follows: 8% for the cervical spine; 12% for the lumbar spine; 20% for the left knee; and 4% for the right knee. Dr. Potter opined as follows:

> Combining Mr. Rife's left knee impairment of 20% whole person with his lumbar regional impairment of 12% whole person yields 30% whole person impairment (Combined Values Chart, page 604). Combining the 30% whole person impairment derived above with his cervical spine regional impairment of 8% whole person yields 36% whole person impairment (Combined Values Chart, page 604). Combining the 36% whole person

> impairment derived above with his right lower extremity regional impairment of 4% whole person yields 39% whole person impairment (Combined Values Chart, page 604).

Dr. Potter suggested as follows: "I recommend electrophysiological testing to rule out median neuropathy at the right wrist. If median neuropathy is verified, then the whole person impairment of 39% will need upward revision."

Dr. Potter was deposed on August 13, 2013, and testified as follows regarding the history he received from Rife:

> Q: Okay. By history, did Mr. Rife tell you that any particular period of employment made any of his complaints noticeably worse or was this a gradual progressive thing, or what did he tell you in that regard?
>
> A: He said it was more gradual, but it came also in spurts in the sense that it would bother him more at times and less at times, but it was really cumulative over the entire last several years.
>
> ...
>
> Q: Let me ask you, did all of his work history contribute equally to cause him those complaints?
>
> A: Well, since the type of work he did was the same, you would have to say yes.

> Q: So the entire work history contributed on a proportionate basis?
>
> A: I would say his entire work history, certainly going back over the last ten years. It's hard to say how much in his young days it contributed because it appears to be more of a problem as you get older. But in general it's your- it's considered to be your entire work history, I guess.
>
> Q: And did he tell you that he was operating heavy equipment on a full-time basis prior to getting laid off in, I want to say 2012, but let me check the date here, October 20 of 2012?
>
> A: I don't recall that he used the word full time, but he did indicate that that's what he was doing before he was laid off.

Concerning Rife's work history, Dr. Potter testified as follows:

> Q: What did he tell you about his work history? What kind of work has he done in the last few years?
>
> A: Well, Mr. Rife says that he is a heavy equipment operator and, you know, aside- and operating equipment, of course, it involved doing things around the equipment such as lifting and helping with repairs and things.
>
> Q: So that essentially was the entirety of his work life, was operating various pieces of heavy equipment?
>
> A: That's what he told us, yes.

Rife's medical history includes a low back injury which occurred in the 1970s necessitating surgery. Rife underwent total left knee replacement surgery in April 2013, and Dr. Potter examined him five weeks after the surgery. Dr. Potter acknowledged that even though Rife was not at maximum medical improvement ("MMI") when he examined him following the knee replacement surgery, he still assigned an impairment rating. At the time of Dr. Potter’s examination, Rife had just started physical therapy for his left knee. Dr. Potter agreed his impairment rating for the left knee was premature.

Regarding Rife's lumbar spine condition, Dr. Potter testified Rife has a pre-existing active impairment, explaining as follows:

> Q: So somewhere in the late '70s early '80s when he reached MMI from that low back injury and subsequent surgery, he had an impairment rating that he carried with him that was pre-existing, correct?
>
> A: That's the way it reads in the book, yes.
>
> Q: Okay. That's regardless of how it impacts his life otherwise, it's under the DRE if you've had surgery for that, you get the impairment rating no matter what?
>
> A: That's right.

> Q: Okay. So he did have a pre-existing active impairment, didn't he?
>
> A: Well, on the assumption that he was rated and was given an impairment rating, that would be correct, yes.
>
> Q: Because in your report, your Form 107, you said there was no active impairment, pre-existing active, and it would appear to me that he did have a pre-existing active impairment by virtue of having undergone that surgery?
>
> A: Yes. Our thinking at that time was that he was recovered from that, or he said he was.
>
> Q: But the DRE doesn't really make a-
>
> A: That's right.
>
> Q: -difference, that's not really a factor, is it?
>
> A: Right. Right.

Dr. Potter agreed that according to Rife, he had no physical impairment of his lower back as the surgery in the 1970s did not preclude him from working.

Dr. Potter's October 1, 2013, letter was also introduced which states as follows:

> Thank you for forwarding the medical report of Dr. Gregory Snider and your summary of Mr. Rife's deposition testimony.
>
> I agree with Dr. Snider's opinion that Mr. Rife is not yet at MMI secondary to his left knee replacement surgery.

However, I disagree with his assertion that there are not sufficient treatment records with which to make a diagnosis of impairment due to cumulative trauma. Assuming that Mr. Rife has completed the requisite course of physical therapy, I would place Mr. Rife at MMI six months post-surgery, or October 2, 2013. I am perplexed about Dr. Snider's statement that Mr. Rife had a poor outcome after seemingly routine knee joint arthroplasty as Mr. Rife indicated to me that he feels as though he has had a very successful outcome and this was confirmed by my examination. In fact, Mr. Rife said he was exploring the possibility of a right knee replacement, which is experiencing similar problems due to the success of the left knee operation.

Based on your deposition summary, Mr. Rife testified that his job at Kokosing, his last employer, was more difficult physically and more painful than his prior job in Montana and at Wellmore [sic] Coal because he was actually running heavy equipment, including an excavator with a hammer to break rocks, which would violently jar him all day, 8-10 hours per day. It is my understanding that he said his back, which until that time had not given him any problems despite the prior surgery, became actively symptomatic again. Mr. Rife also stated that he was required to manually grease the hammer of the excavator, which required him to use a large grease gun that he had to squeeze 50 to 100 times to put grease on the hammer, a task that took around 15 minutes, and which caused noticeable strain and permanent pain in his neck, between his shoulder blades and in his lower back. Thus, I would stand by my initial opinion in my report that the entire lumbar impairment should be

considered to be related to cumulative trauma rather than to the specific injury that Mr. Rife suffered in the 1970s and which remained dormant for the next thirty years. I believe this opinion is supported by Example 16.c Aggravation on page 12 of the AMA Guides. If forced to make a determination regarding pre-existing, active impairment, I would assign 10% of the lumbar impairment to the prior surgery and 2% to cumulative trauma.

To perform the greasing function, Mr. Rife also would have to climb off the excavator every hour and manually grease the hammer, which exacerbated the pain in both his knees. Although we did not make note of it in our initial report, it is my understanding that Mr. Rife suffered an injury to his left knee in Montana that was most likely a meniscal tear. Mr. Rife stated that in his job at Kokosing he had to climb on and off the excavator every hour on the hour, which caused severe pain in both his knees and which he felt caused the left knee to rapidly deteriorate and forced him to seek treatment with Dr. Hall, who subsequently performed the left knee replacement. I would note that the treatment records from Dr. Thad Manning from February 2012 and April 2012 do not indicate any problems with either Mr. Rife's left knee or his lower back or his cervical spine and that these complaints began subsequent to Mr. Rife's employment at Kokosing.

Given the description of his physical activities and the fact that they caused pain in parts of Mr. Rife's body that were asymptomatic immediately prior to the employment, it is my opinion that Mr. Rife's work activities at Kokosing were a substantial contributing cause to the cumulative

> trauma that resulted in his current physical conditions.
>
> You also asked about Mr. Rife's employment immediately before Kokosing at Wellmont Coal. It is my understanding that Mr. Rife worked as a superintendent at Wellmont Coal and that this job was mainly supervisory and the only time he would be operating equipment would be when someone was absent or to train someone. As this did not require the continuous activity and did not exacerbate pain levels like at Kokosing, I do not feel that this employment would have contributed in a meaningful way to the cumulative trauma condition.

Concerning the issue of whether Rife's cumulative trauma injury or injuries may be solely attributable to his work at Kokosing, the ALJ opined as follows in the December 20, 2013, Opinion and Award:

> 21. The opinion of Dr. Potter in this matter regarding the Plaintiff's cumulative trauma injury, impairment rating, and the portion incurred while he was employed for the Defendant is persuasive and convincing in this matter. Dr. Potter opined that the Plaintiff's employment with Wellmont Coal just prior to the employment with the Defendant was more supervisory in nature and did not contribute in a meaningful way to the Defendant's cumulative trauma injuries. This is also consistent with the testimony of the Plaintiff who related in detail the extent to which his job of breaking rocks violently and repetitively jarred his body. Dr. Potter further specifically opined that the

> Plaintiff's activities at Kokosing caused pain in parts of the Plaintiff's body that were not symptomatic prior to his employment there. This opinion has convinced the ALJ.
>
> 22. The ALJ therefore finds as a factual matter and based upon the opinion of Dr. Potter as supported by the testimony of the Plaintiff that the Plaintiff's cumulative trauma injuries resulted from his employment with the Defendant and that he has suffered a 26% whole person impairment as a result.3 [sic]

On appeal, Kokosing argues the record does not support an award of TTD benefits for Rife's left knee from April 2, 2012, through October 2, 2012. Next, Kokosing argues the ALJ's ruling regarding the apportionment issue is not supported by substantial evidence, as Dr. Potter's opinions do not support imposition of the entire liability for Rife's cumulative trauma injury or injuries on Kokosing. Kokosing requests remand to the ALJ for additional findings.

On April 24, 2014, an Agreed Order was filed in the record stating as follows:

> Comes the Parties, by Agreement and in order to correct a patent error on the face of the Administrative Law Judge's Opinion and Award of December 20, 2013,

3 The 26% whole person impairment is derived from the reduction by Dr. Potter of his assessment of the lumbar impairment in his supplemental report by using the Combined Values Chart on page 604 of the AMA Guides.

> stipulate and agree that any temporary total disability benefits awarded by the Administrative Law Judge should have been initiated after the Respondent Rife's left knee surgery on April 2, 2013 and should have continued through October 2, 2013 based on the report of Dr. Potter as adopted by the Administrative Law Judge in his Opinion and Award and subsequent Order on Reconsideration.
>
> In entering this Agreed Order, the Parties agree that the Petitioner reserves and does not waive any other argument as set forth in its appellate brief regarding the appropriateness or inappropriateness of any temporary total disability benefits awarded by the Administrative Law Judge against the Petitioner.

We vacate the award of PTD benefits and TTD benefits and remand the claim for additional findings.

As the ALJ failed to identify the specific compensable injury or injuries, on remand, the ALJ must define each cumulative trauma injury, if any, he determines Rife sustained. Rife's Form 101 alleges cumulative trauma injuries to his neck, back, shoulders, arms, and knees. However, Dr. Potter assigned impairment ratings for injuries to Rife's cervical spine, lumbar spine, left knee, and right knee. Based on the evidence, the ALJ must specifically identify each cumulative trauma injury he believes Rife sustained and the impairment attributable to

each injury. Should the ALJ determine Rife sustained only some of the cumulative trauma injuries alleged in the Form 101, he must provide the appropriate analysis as to the nature of the disability resulting from these injuries. In doing so, the ALJ must fully address and dispose of the remaining cumulative trauma injuries Rife alleges in his Form 101.

In addition, the ALJ must determine the date of manifestation for each of the cumulative trauma injuries he determines Rife sustained. October 30, 2012, cannot be the date of manifestation for Rife's alleged cumulative trauma injuries, as the record indicates the only significance to this date is that it is the date Rife was laid off. There is no evidence in the record establishing October 30, 2012, is the date of manifestation as defined herein for any of the alleged cumulative trauma injuries.

A cumulative trauma injury must be distinguished from an acute trauma injury where a single traumatic event causes the injury. In Randall Co. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery with regard to cumulative trauma injuries holding the date of injury is “when the disabling reality of the injuries becomes manifest.” In Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999), the

Supreme Court of Kentucky defined "manifestation" in a cumulative trauma injury claim as follows:

> In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

Id. at 490.

A cumulative trauma injury manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma injury. *See* American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness. Thus, on remand, the ALJ must determine the date of manifestation for each of the alleged cumulative trauma injuries the ALJ ultimately determines Rife has sustained.

In addition, the ALJ cannot rely upon the impairment rating Dr. Potter assessed for the left knee condition, as the impairment rating is premature. The record reveals Rife underwent left total knee arthroplasty

on April 2, 2013. Dr. Potter assigned an impairment rating for Rife's left knee condition on May 6, 2013, while fully acknowledging the impairment rating is premature. Section 2.4 of the AMA Guides reads as follows:

> An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximal medical improvement (MMI).

In his May 6, 2013, Form 107-I Addendum, Dr. Potter stated that "Mr. Rife is not yet at maximum medical improvement and any assigned rating should not be labeled as 'permanent' as it may be amended in the future." While it is unclear whether this language applies only to the impairment rating assigned to Rife's left knee, we assume, based on Dr. Potter's later statements, it does. In his October 1, 2013, letter, Dr. Potter stated that he agrees with Dr. Snider that Rife is not at MMI with respect to his left knee. In his September 5, 2013, deposition, Dr. Potter reiterated his impairment rating for Rife's left knee is premature.

Finally, on remand, if the ALJ determines Rife sustained certain cumulative trauma injuries, the ALJ must determine, based upon the evidence, what portion of the impairment rating assigned to each of these injuries is due

to his two months of employment at Kokosing. In his October 1, 2013, letter, Dr. Potter stated that "Mr. Rife's work activities at Kokosing were a substantial contributing cause to the cumulative trauma that resulted in his current physical conditions." Despite other opinions by Dr. Potter in the record indicating Rife's impairments are a result of cumulative trauma "encountered over his 40+ years of work as an equipment operator," this is sufficient for the ALJ to determine Rife sustained cumulative trauma injuries during his employment with Kokosing.

In his analysis, the ALJ must consider Dr. Potter's language in the record that implies Rife sustained an exacerbation of dormant conditions, which are in essence hybrid cumulative trauma injuries. For instance, regarding Rife's lumbar spine, Dr. Potter stated in the May 6, 2013, IME report that "it was not until the last few years of work that Mr. Rife's lumbar spine underlying dormant condition was gradually aroused and became progressively disabling." There is also a different opinion regarding Rife's lumbar impairment in Dr. Potter's October 1, 2013, letter, in which he opined that "[i]f forced to make a determination regarding pre-existing, active impairment, I would assign 10% of the lumbar impairment to the prior surgery and 2% to cumulative trauma."

In his analysis on remand, the ALJ must directly address the nature of each of the injuries the ALJ determines Rife sustained. Significantly, should the ALJ determine Rife's lumbar spine condition was not impairment ratable and symptomatic at the time Rife began his employment with Kokosing, the ALJ is not required to find Rife has a pre-existing active condition. *See* Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). Should the ALJ determine Rife sustained certain cumulative trauma injuries, the ALJ must determine exactly what portion of any impairment ratings assigned to these injuries are attributable to his employment at Kokosing. If the ALJ determines the impairment rating assigned to each cumulative trauma injury is attributable to Rife's employment at Kokosing, the ALJ can impose liability for that cumulative trauma injury upon Kokosing.

Accordingly, the December 20, 2013, Opinion and Award and the January 28, 2014, Order on Defendant's Petition for Reconsideration are **VACATED** in part. This claim is **REMANDED** to the ALJ for additional findings and entry of an amended opinion consistent with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON A STUART BENNETT
P O BOX 2150
LEXINGTON KY 40588

COUNSEL FOR RESPONDENT:

HON C PHILLIP WHEELER JR
5055 N MAYO TRAIL
PIKEVILLE KY 41501

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN WEATHERBY
2780 RESEARCH PARK DR
LEXINGTON KY 40511