Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 21, 2014

CLAIM NO. 201301779

KENTUCKY FUEL CORPORATION PETITIONER

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

JEDFORD COLVIN
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Kentucky Fuel Corporation ("Kentucky Fuel") appeals from the May 19, 2014, Opinion and Order and the June 30, 2014, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the May 19, 2014, Opinion and Order, the ALJ awarded

Jedford Colvin (“Colvin”) permanent total disability ("PTD") benefits and medical benefits.

On appeal, Kentucky Fuel asserts two arguments. First, it argues the ALJ erred as a matter of law by "mischaracterizing and affording unwarranted weight" to Dr. Arthur L. Hughes' report. Next, it argues the ALJ failed to conduct the appropriate analysis necessary for an award of PTD benefits.

The Form 101, Claim No. 2013-01778, alleges Colvin sustained cumulative injuries to his left shoulder and back on July 13, 2012. The Form 101 also alleges Colvin was working as a drill operator at the time the cumulative trauma injuries manifested, and the physical requirements of his job included lifting, bending, kneeling, pushing, pulling, and twisting.

The Form 104 – work history attached to the Form 101 indicates Colvin worked as a drill operator at Kentucky Fuel from 2011 through July 13, 2012. Previously, Colvin worked as a supervisor, drill operator, and HE operator at Cam Mining/AEP Coal from 1983 to 2011. Before that, Colvin worked as a drill operator and a rock truck driver at R & S Coal Corporation from 1980 to 1983.

The Form 103 – hearing loss, Claim No. 2013-01779, alleges Colvin sustained work-related hearing loss on July 13, 2012.

The two claims were consolidated by order dated December 20, 2013.

On April 24, 2014, Colvin filed a "Motion to Amend to Include Cumulative Trauma to the Cervical Spine," which was sustained by order dated May 6, 2014.

Colvin introduced the Form 107-I of Dr. Hughes which provides the following diagnoses:

> 1. Neck pain with possible left cervical radiculopathy.
> 2. Status post left carpal tunnel release with residual signs and symptoms.
> 3. Lower back pain with possible bilateral lumbar radiculopathy.
> 4. Left shoulder pain and restricted range of motion.

Regarding causation, Dr. Hughes checked "yes" by the following question: "Within reasonable medical probability, was plaintiff's injury the cause of his/her complaints?" He explained as follows: "Within reasonable medical probability, the plaintiff's multiple areas of pain and limited function and range of motion are a consequence of his long employment as a strip miner."

Concerning causation, Dr. Hughes provided the following explanation and opinion:

> Mr. Colvin has been in the strip mining business for thirty years. During some of this time, he was a foreman but this also caused additional injury in that he had to climb on and off equipment, drive a truck over very rough terrain and, on at least one occasion, a large rock fell from a high wall striking his truck and him and causing [sic] loss of consciousness and back pain. He, unfortunately, severely injured his right hand and arm leading to an amputation of the arm at the mid forearm level in the early 1990s but he continued working using only the left arm. This naturally put additional stresses on the left arm and shoulder. The accumulation of injuries sustained in his work has led to limitations in his activities in daily life, at work and at home and has limited his ability to do recreational activities.

Dr. Hughes assessed a 22% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") which is comprised of whole person impairment ratings for the following conditions: Neck pain and suspected radiculopathy, 5%; Lower back pain with suspected radiculopathy, 5%; Left carpal tunnel syndrome, 6%; Pain and restricted range of motion of left shoulder, 8%.

Under "Treatment- Prior and Current," Dr. Hughes stated as follows:

> There is an evaluation by Josh Bakun, D.C., September 30, 2013, in [sic] which notes neck pain radiating into the left arm with numbness and tingling as well as headaches, mid back pain, lower back pain, left shoulder pain, and it was Dr. Bakun's opinion that Mr. Colvin's 'previous employment caused or contributed to the aforementioned condition.' Dr. Bakun noted that Mr. Colvin had degenerative changes of the cervical, thoracic and lumbar spine and he thought that the degenerative changes 'have been worsened by his occupation.'

Dr. Hughes indicated in his report that he did not review any diagnostic tests.

In his March 26, 2014, deposition, Colvin testified that his job at Kentucky Fuel was "shut down" on July 13, 2012. He testified as follows:

> Q: And, I guess, what were the circumstances of leaving?
>
> A: Job shut down.
>
> Q: The mine actually shut down, or was it just a layoff?
>
> A: The job shut down.

The April 9, 2014, Benefit Review Conference ("BRC") order lists the following contested issues: work-relatedness/causation; benefits per KRS 342; credit for

[handwritten: "unemployment benefits"]; "injury" as defined by the Act; pre-existing active; and medical benefits. Handwritten under "other" is the following: "permanent total disability." Under stipulations, the last day of exposure is indicated as July 13, 2012. It was also stipulated that Colvin is a high school graduate.

Citing Cepero v. Fabricated Metals Corp., 132 S.W.3d 839, 842 (Ky. 2004), Kentucky Fuel first argues the ALJ erred as a matter of law by relying on Dr. Hughes' medical opinions, as he only reviewed the chiropractic report of Dr. Josh Bakun.

Determining the import of what Dr. Hughes reviewed or failed to review before issuing his opinions and assessing impairment ratings is within the exclusive province of the ALJ and goes to the weight the ALJ chooses to afford Dr. Hughes' opinions and not the admissibility of those opinions. It is well established the ALJ has broad discretion as fact-finder, and as trier of fact. The ALJ is the gatekeeper and arbiter of the record both procedurally and substantively. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005). In that capacity, the ALJ is charged with making rulings affecting the competency, relevancy, materiality, and admissibility of evidence. *See*

KRS 342.275. The ALJ chose to rely upon Dr. Hughes' opinions, and the ALJ's discretion will not be disturbed.

Cepero, supra, has no applicability here. Cepero is a case involving affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee which left the claimant confined to a wheelchair for more than a month. The physician upon whom the administrative law judge relied was not informed of this prior history by the employee, and every physician who was adequately informed of this prior history opined that Cepero’s left knee impairment was not work-related but was instead attributable to the non-work-related injury two and a half years previous. The facts herein do not match those in Cepero.

Next, Kentucky Fuel sets forth a multi-faceted argument asserting that each of the impairment ratings assessed by Dr. Hughes and subsequently relied upon by the ALJ is inaccurate. We will address each argument individually.

Regarding the 5% impairment rating Dr. Hughes assessed for Colvin's lumbar spine, Kentucky Fuel asserts the ALJ should not have relied upon Dr. Hughes' impairment

rating because of the contradictory testimony he provided in his April 16, 2014, deposition. It argues as follows:

> Dr. Hughes was subsequently deposed and conceded that these complaints would qualify Plaintiff for some preexisting and active impairment in DRE Category II. Dr. Hughes Depo at 16. He subsequently reaffirmed that Plaintiff's 1998 injury warrants a preexisting and active rating. Id. at 18-19.

Kentucky Fuel asserts that instead of relying upon Dr. Hughes' impairment rating, the ALJ should have relied upon Dr. Thomas Huhn's 5% impairment rating assessed for a pre-existing active lumbar condition due to a 1998 work injury Colvin sustained prior to his employment at Kentucky Fuel.

A review of Dr. Hughes' deposition reveals the following testimony:

> Q: Now, do you believe it would be appropriate for any of the lumbar spine impairment to be qualified as pre-existing and active?
>
> A: It certainly had some aspects of pre-existence because it did go back a number of years, but he was functioning with it up until the time he left work, and it was my understanding- and if this is not correct, then he misled me, but he said he had to separate himself from work because he was not able to do the job rather than it being a layoff.

Q: Now, Mr. Colvin did report to you that he had a work injury previously in 1998; is that correct?

A: Yes, sir.

Q: And why do you believe that wouldn't be significant enough to qualify for pre-existing and active?

A: Well, it's certainly pre-existing, but it wasn't limiting his activities. He was experiencing the sensations, but it wasn't limiting what he was doing.

Q: Now, in terms of what he reported to you and what you put in your report, you said he has had persisting lower back pain extending into the left leg since that time. So that notes that he was having the continuous pain, and even though someone is able to return to work, they can still have a permanent impairment, can't they?

A: Yes, sir.

Q: So since he had that same kind of symptom since that time, why don't you believe that he would qualify for pre-existing and active?

A: Well, when we were talking about pre-existing and active, I was specifically bringing up situations in which the person was not a coal miner, and so that would be pre-existing and active prior to becoming a coal miner and then running the additional risks of injury that are intrinsic to coal mining. And in the sense that he did have the injury back in 1998, had lower back and left leg pain from that time, assuming that that is correct, I wasn't there, so if we make the assumption that that was correct, then he would

have been at some impairment at that time within the DRE Category II.

...

Q: I guess do you believe within a degree of medical probability that you could say that his progression of symptoms are cumulative rather than the acute injury that caused persisting back pain and radiculopathy or complaints of radiculopathy into the leg and his subsequent fall in 2008?

A: Yes.

Q: You believe it is cumulative trauma still?

A: Yes.

Q: But you believe a portion could be attributed to the prior accident in 1998?

A: I don't think we've got any evidence of that.

Q: But I guess given you had talked about the importance you place on their subjective complaints- just his subjective complaint that he's had that pain since 1998 and that it's been radiating into the leg since 1998. Do you think that any portion of his impairment could be attributed to that 1998 injury?

...

A: Yeah, I think that if the history is correct, that he had left leg pain dating from that time, you'd have to say yes. But I wasn't there and we don't have any history that actually documents that, so I'm basing that entirely on his description.

While we concede Dr. Hughes' deposition testimony on the issue of a pre-existing active lumbar condition is equivocal, Dr. Hughes did not retract his original opinions and the impairment rating he assessed regarding Colvin's lumbar spine condition as set forth in the January 23, 2014, Form 107-I. He did not apportion any of the 5% impairment for Colvin's lumbar spine condition to a pre-existing condition either in his deposition or in an amended report. Thus, the ALJ's reliance upon Dr. Hughes' 5% whole person impairment rating for Colvin's lumbar spine condition will not be disturbed.

Regarding the 8% impairment rating Dr. Hughes assessed for Colvin's left shoulder, Kentucky Fuel asserts Dr. Hughes' impairment rating cannot be relied upon because in his deposition he admits to using the wrong methodology when converting the upper extremity impairment ratings to a whole person impairment rating. It contends Dr. Hughes failed to first combine the impairment ratings for the left shoulder condition and the left carpal tunnel syndrome before converting them to a whole person impairment.

In his deposition, Dr. Hughes testified as follows:

> Q: Now, going through your report, you assessed impairment for left carpal tunnel of 10 percent for the upper

> extremity, which you converted to 6 percent for the whole person?
>
> A: Yes, sir.
>
> Q: And then there was also 13 percent for the upper extremity for range of motion of the left shoulder?
>
> A: Correct.
> Q: Which you converted to 8 percent whole person for the left shoulder?
>
> A: Yes, sir.
>
> Q: Okay. Now, don't the guides require that you combine the two upper extremity impairments prior to converting them to whole person impairments?
>
> A: I think they do, and I may have made an arithmetic error in that regard. I don't think it's going to change things.

A review of page 438, Section 16.1c, of the AMA Guides, reveals the following language:

> Similarly, multiple regional impairments, such as those of the hand, wrist, elbow, and shoulder, are first expressed individually as upper extremity impairments and then *combined* to determine the total upper extremity impairment. The latter is finally converted to whole person impairment (Table 16-3).

Dr. Hughes' methodology in calculating the impairment rating for Colvin's left upper extremity is flawed, as he failed to combine the impairment ratings for

Colvin's left shoulder and left carpal tunnel syndrome before converting the total impairment to a whole person impairment rating. As we are remanding, the ALJ is permitted to consult the AMA Guides in order to calculate the correct impairment rating. *See* Thomas v. United Parcel Service, 585 S.W.3d 455 (Ky. 2001).

Kentucky Fuel next argues Dr. Hughes' 6% whole person impairment rating for left carpal tunnel syndrome cannot be relied upon because he failed to consider Dr. David Jenkinson's report in which he depicted a successful carpal tunnel release surgery. However, in his deposition, Dr. Hughes fully explained the basis of his impairment rating despite Colvin's carpal tunnel release surgery:

> Q: Now, I guess, based on that finding from his treating physician, why do you think that he would still require the maximum of the range of impairment?
>
> A: Because he still was significantly symptomatic.
>
> Q: So it's exclusively on subjectively how he's expressing his complaints to you?
>
> A: Yes, sir, which, of course, in carpal tunnel release is not uncommon. Sometimes you're worse after the release than you were at the beginning. So surgery is indicated, but, unfortunately, if you go back to the same kind of work you were doing prior to the surgery, there's a high

> likelihood you get a recurrence of symptoms.
>
> Q: But did he state in his evaluation whether he was having an increase in symptoms or whether the surgery had helped; can you recall?
>
> A: I don't recall, and if I didn't comment on it, I- let me take a look there. I don't recall that specific question. Yes, it was of some help, but he was- the reason I phrased it as some help is that he was not convinced it did that much good, and, of course, he was significantly symptomatic at the time that I saw him. He had all of the usual carpal tunnel symptoms right back again.

The ALJ was permitted to rely upon the impairment rating since Dr. Hughes sufficiently explained the basis for his impairment rating and there is no allegation his impairment rating is not in conformity with the AMA Guides. The ALJ's reliance upon Dr. Hughes' 6% whole person impairment rating will not be disturbed. However, the impairment rating for the left carpal tunnel syndrome must be combined with the impairment rating for the left shoulder. Then the ALJ must convert the total to a whole person impairment rating in keeping with Section 16.1c of the AMA Guides.

We find no significance to the fact Colvin did not specifically plead left carpal tunnel syndrome in his

Form 101. Initially, he pled cumulative trauma to his left shoulder and back. Colvin later amended his Form 101 to include cumulative trauma to his cervical spine. Nevertheless, Dr. Hughes assessed an impairment rating for left carpal tunnel syndrome which was relied upon by the ALJ. However, in its appeal brief, Kentucky Fuel concedes Colvin sustained cumulative trauma to his left upper extremity without limiting this to his left shoulder. We believe a "left upper extremity" injury may include left carpal tunnel syndrome. Thus, as Kentucky Fuel concedes Colvin sustained cumulative trauma to his left upper extremity, the fact Colvin failed to specifically plead left carpal tunnel syndrome is of no significance.

Kentucky Fuel's objection to Dr. Hughes' 5% whole person impairment rating for Colvin's cervical spine is that Colvin's Form 101 did not include an allegation of cumulative trauma to the spine. Additionally, Kentucky Fuel argues Colvin stated to Dr. Huhn that his neck complaints were not part of this claim.

Significantly, the Form 101 was amended by order dated May 6, 2014, to include cumulative trauma to Colvin's cervical spine. Additionally, what Colvin may or may not have reported to Dr. Huhn regarding his cervical spine complaints does not thwart the ALJ's reliance on Dr.

Hughes' opinions regarding the extent of Colvin's cervical condition and the impairment he assessed for the condition. Again, as there is no allegation the rating is unsupported by the AMA Guides, the ALJ may rely upon the impairment rating. The ALJ's reliance upon Dr. Hughes' 5% whole personal impairment for Colvin's cervical spine will not be disturbed.

Finally, Kentucky Fuel argues that the ALJ failed to conduct a thorough analysis regarding permanent total disability. A review of the May 19, 2014, Opinion and Order and the June 30, 2014, Opinion and Order on Reconsideration reveals the following findings regarding permanent total disability:

> In the present case, I considered the severity of Mr. Colvin's work injuries, including the injuries to his neck, back and left upper extremity area, as well as his hearing loss. All of this evidence is covered in detail above. I also considered the persuasive and compelling medical evidence from both Dr. Hughes and Dr. Eisenmenger, as covered in detail above. I also considered the plaintiff's age, which is now 52, meaning that he is an older worker in the highly competitive job market. I also considered the fact that he received his high school diploma many years ago and has no post-high school education or specialized training. It is uncontradicted that Mr. Colvin has a complete lack of any specialized or vocational training. I also considered his credible lay

> testimony regarding his continuing physical pain and physical limitations and occupational disability, all of which is crucial as held by the Kentucky Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979). Based upon all of the above factors, I make the factual determination that Mr. Colvin cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled. I accept the opinion of Dr. Huhn that Mr. Colvin reached maximum medical improvement on November 26, 2012.

In the June 30, 2014, Opinion and Order on Reconsideration, the ALJ put forth the following additional findings:

> I sat a few feet from the plaintiff Mr. Colvin during his testimony at the Final Hearing. I carefully listened to his voice tones during his testimony. I carefully observed his facial expressions during his testimony. I carefully observed his body language during his testimony. I am the only decision maker who actually saw and heard the plaintiff testify. I make the factual determination that Mr. Colvin was a credible and convincing lay witness and that his testimony rang true.
>
> In Hush v. Abrams, 584 S.W.2d 48 (Ky.1979), the Kentucky Supreme Court stated that where the medical evidence clearly and unequivocally shows the plaintiff's actual bodily condition, his lay testimony is competent on the question of the extent of disability which has resulted from his bodily

condition, and that where there is medical testimony from which the decision maker could conclude that the plaintiff did suffer trauma, the decision maker could then use lay testimony to determine the extent of the plaintiff's occupational disability.

In the present case, I considered the severity of Mr. Colvin's work injuries, including the injuries to his neck, back and left upper extremity area, as well as his hearing loss.

All of this evidence is covered in detail above. I also considered the persuasive and compelling medical evidence from both Dr. Hughes and Dr. Eisenmenger, as covered in the original Opinion and Order. I also considered the plaintiff's age, which is now 52, meaning that he is an older worker in the highly competitive job market. I also considered the fact that he received his high school diploma many years ago and has no post-high school education or specialized training. It is uncontradicted that Mr. Colvin has a complete lack of any specialized or vocational training. I also considered his credible lay testimony regarding his continuing physical pain and physical limitations and occupational disability, all of which is crucial as held by the Kentucky Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979). Based upon all of the above factors, I make the factual determination that Mr. Colvin cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled. I accept the opinion of Dr. Huhn that Mr.

> Colvin reached maximum medical improvement on November 26, 2012.

The finding of permanent total disability and the award of PTD benefits are vacated for several reasons not argued by Kentucky Fuel, and this case is remanded for the ALJ to: 1) conduct an analysis of the extent of Colvin's occupational disability without considering Colvin's hearing loss; 2) determine what, if any, percentage of each impairment is attributable to Colvin's period of employment at Kentucky Fuel from 2011 to July 13, 2012; 3) determine the date of manifestation for each of Colvin's cumulative trauma injuries; and 4) recite Colvin's precise work injuries in the amended Award.

A review of the language used by the ALJ in the May 19, 2014, Opinion and Order reveals that he considered Colvin's work-related hearing loss in determining he is permanently totally disabled. Considering hearing loss in conjunction with the physical injury in determining whether an employee is totally disabled is expressly prohibited by statute. *See* KRS 342.730(1)(a). On remand, the ALJ must conduct his analysis of the extent of Colvin's disability *without* considering Colvin's work-related hearing loss. In doing so, if the ALJ determines Colvin is not permanently totally disabled, he must instead award permanent partial

disability ("PPD") benefits. Any award for the work-related hearing loss must be separate and distinct from an award of income benefits for the cumulative trauma injury or injuries.

Second, as required by Southern Kentucky Concrete Contractors, Inc. v. Horace W. Campbell, 662 S.W.2d 221, (Ky. App. 1983), the ALJ must determine what percentage of Colvin's impairments, *if any*, are directly attributable to his employment with Kentucky Fuel. In doing so, the ALJ must cite, in his amended opinion and order, the medical proof that establishes Colvin's work at Kentucky Fuel contributed in some degree to the effects of each cumulative trauma injury, and then, with specificity, denote to what degree it contributed. Simply because Colvin was last employed by Kentucky Fuel does not impose the entirety of the liability for all of Colvin's alleged occupational disability upon Kentucky Fuel. There must be evidence of record establishing that Colvin's work activities performed during his employment with Kentucky Fuel contributed to his overall permanent condition, producing some degree of harmful change to the human organism.

Third, the ALJ failed to determine the date of manifestation of Colvin's cumulative trauma injuries. On remand, he must do so.

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, 490 (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.

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.

A review of the ALJ's Award reveals PTD benefits were initiated on the date Dr. Huhn opined Colvin reached maximum medical improvement ("MMI") which is November 26, 2012. This is not the date of manifestation. Additionally, a review of the record reveals July 13, 2012, the date of injury in Colvin's Form 101, is the date upon which Kentucky Fuel shut down the mine. Again, this is not the date of manifestation. Thus, on remand, the ALJ must determine the date of manifestation for each of the alleged cumulative trauma injuries the ALJ ultimately determines Colvin has sustained. This is a critical determination, as this is the date upon which the ALJ's award of income benefits must begin.

Finally, a review of the May 19, 2014, Opinion and Order reveals the ALJ failed to recite in the Award the specific work injuries Colvin sustained. On remand, he must specifically list each injury for which an award of either PTD benefits or PPD benefits is applicable.

Accordingly, except for the failure of Dr. Hughes to combine the impairment ratings for the left upper extremities, the ALJ’s reliance upon Dr. Hughes' opinions

and impairment ratings as set forth in the May 19, 2014, Opinion and Order and the June 30, 2014, Opinion and Order on Reconsideration are **AFFIRMED**. The ALJ's determination of permanent total disability and the award of PTD benefits are **VACATED** and this claim is **REMANDED** to the ALJ for entry of an amended opinion and award containing an analysis of the extent of Colvin's occupational disability without considering Colvin's hearing loss; a determination of what, if any, percentage of the impairment ratings are attributable to Colvin's employment at Kentucky Fuel from 2011 to July 13, 2012; a determination of the date of manifestation for each of Colvin's cumulative trauma injuries; and a recitation of Colvin's precise work injuries in the amended Award. Further, the ALJ shall also determine the combined impairment rating for the left shoulder condition and the left carpal tunnel syndrome.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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