

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 14, 2014

CLAIM NOS. 201301747 & 201301745

KENTUCKY FUEL CORPORATION

PETITIONER

VS.

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

NORMAN A. HOWARD AND
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
VACATING AND REMANDING

* * * * *

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

RECHTER, Member. Kentucky Fuel Corporation ("Kentucky Fuel") appeals from the May 19, 2014 Opinion and Order and the June 30, 2014 Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). It argues the ALJ's finding Norman Howard ("Howard") suffered a work-related injury is not supported by substantial evidence, and

the ALJ failed to provide sufficient analysis on the issues of causation and pre-existing active condition. For the reasons set forth herein, this matter must be remanded to the ALJ for further fact-finding.

Norman Howard began working for Kentucky Fuel in 2010 operating a loader in a coal mine. The position required occasional heavy lifting and Howard experienced constant jarring as he operated the loader with his hands and feet. Prior to 2010, Howard had worked for nearly thirty years as a heavy equipment operator for various coal mining companies. On July 12, 2012, he was laid off because the mine closed. He has not worked since that date, but has received unemployment benefits.

Howard filed a Form 101 alleging cumulative trauma injuries to his back and legs manifesting on July 12, 2012. In support of his claim, he submitted medical reports from Dr. Josh Bakun and Dr. Arthur Hughes. In a letter dated September 30, 2013, Dr. Bakun, Howard's treating chiropractor, noted his major complaints include neck pain radiating into his left arm, headaches, mid-back pain, and lower back pain radiating into both legs. Dr. Bakun's diagnoses were cervicalgia, cervicobrachial syndrome, thoracic spine pain, lumbalgia, headaches, sciatica and muscle spasm. As to causation, he stated: "Mr. Howard has

degenerative changes to his cervical, thoracic, and lumbar spine. In my opinion, these degenerative changes have been worsened by his occupation."

Dr. Hughes performed an independent medical evaluation on December 17, 2013. Howard complained of low back pain for the past four or five years and leg pain for the past two or three years. Dr. Hughes diagnosed lower back and bilateral leg pain, possibly radicular. He attributed Howard's low back and bilateral leg pain to his "many years in strip mining operating heavy equipment." He further opined Howard had no active impairment prior to the development of his low back and leg pain. Dr. Hughes stated he has not received any treatment for his ongoing pain and, therefore, is not at maximum medical improvement. However, "if appropriate medical treatment is not approved, then he is at maximum medical improvement as [December 17, 2013]." He assigned a 5% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") for "lower back pain with probable radiculopathy."

When Dr. Hughes performed his evaluation and prepared his report, he was unaware Howard had sustained a fall from a horse in 2010. Kentucky Fuel introduced medical records from Salyersville Medical Center and Dr. Scott

Arnett. On October 4, 2010, Howard presented to Salyersville Medical Center and reported he fell from a horse two days prior, and had experienced low back pain since. He was diagnosed with lumbar strain, backache, and a forearm contusion. In an office note dated October 1, 2012, Howard reported to Dr. Arnett low back pain for two years following a fall from a horse, after which he hit a rock. Dr. Arnett's notes indicate Howard continued to complain of low back pain through January 7, 2014.

At a deposition on March 5, 2014, Dr. Hughes was presented with the records from Salyersville Medical Center and Dr. Arnett. He acknowledged Howard had not reported the fall during his evaluation, nor was he provided the medical records concerning his treatment. Upon learning this additional history, Dr. Hughes stated he could not separate what portion of the 5% impairment rating is due to Howard's 2010 fall and what portion is due to his work activities. When asked if some impairment resulted from the 2010 fall, Dr. Hughes stated he did not have enough information to provide a definitive answer.

Kentucky Fuel also presented the report of Dr. John Vaughan. Dr. Vaughan's review of Howard's medical records included those from Salyersville Medical Center and Dr. Arnett. Dr. Vaughan diagnosed lumbar spondylosis with

no radiculopathy, and cervicalgia. He believed these conditions are due to normal degenerative changes, and assigned 0% impairment for both the back and neck. He did not believe Howard needed any further treatment for his back or neck. In a supplemental letter, Dr. Vaughan clarified that "the most likely cause of his chronic pain is a fall from a horse in 2010."

In the May 19, 2014 Opinion and Order, the ALJ initially noted the fact Dr. Hughes had not reviewed the medical records from Dr. Arnett or Salyersville Medical Center prior to providing his initial medical report. The ALJ likewise acknowledged defense counsel "used these admissions by Dr. Hughes to impeach his opinions as to medical causation." The ALJ then explained:

Based on the totality of the evidence in the record, including the plaintiff's sworn testimony, the medical report and deposition of Dr. Hughes, the medical report of Dr. Bakun, the records from Salyersville Medical Center and Dr. Arnett, and the medical evidence from Dr. Vaughan, I make the factual determination that the plaintiff Mr. Howard did sustain work-related injuries to his neck and back which developed over the period of 32 years in the coal mining industry, in that degenerative changes in his neck and back were worsened by his occupation.

The ALJ next rejected the assertion Howard suffered from a pre-existing, active impairment. He awarded

permanent partial disability benefits which, after conducting the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), were enhanced pursuant to KRS 342.730(1)(c)1. The ALJ also awarded medical benefits. Kentucky Fuel petitioned for reconsideration, which was denied.

On appeal, Kentucky Fuel first argues the ALJ's finding of a work-related injury is not based on substantial evidence. The ALJ relied upon the opinions of Drs. Bakun and Hughes. However, as Kentucky Fuel emphasizes, Dr. Hughes largely retracted his opinion the injury was work-related upon learning of Howard's 2010 fall injury. Furthermore, there is no indication Dr. Bakun was aware of Howard's 2010 fall prior to formulating his opinion.

In the May 19, 2014 Opinion and Order, the ALJ acknowledged the fact Dr. Hughes had not reviewed the medical records from Salyersville Medical Center or Dr. Arnett prior to forming his opinion. The ALJ also noted that Kentucky Fuel's attorney "used these admissions by Dr. Hughes to impeach his opinions as to medical causation." The Order on Reconsideration did not provide any elaboration.

The ALJ has provided insufficient analysis to inform the parties of his reasoning. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988). To state Dr.

Hughes' opinion as to causation was "impeached" is not technically inaccurate, but certainly inadequate. In fact, upon learning of Howard's 2010 fall, Dr. Hughes testified he could not separate what portion of the 5% impairment rating is due to that accident and what portion is due to his work activities. For this reason, the matter must be remanded to the ALJ for further fact-finding. On remand, the ALJ is requested to provide a more detailed explanation for his reliance on Dr. Hughes' opinion notwithstanding his deposition testimony.

Kentucky Fuel makes the separate, though related, argument that the ALJ provided insufficient analysis as to causation. We agree. As with Dr. Hughes' deposition testimony above, the ALJ acknowledged the records from Dr. Arnett and Salyersville Medical Center, but provided no detailed summary. Nor did the ALJ explain his assessment of this evidence. Again, the ALJ is also asked to more thoroughly discuss the evidence from Dr. Arnett and Salyersville Medical Center and its impact on his finding Howard sustained a work-related injury.

Kentucky Fuel also maintains there is no substantial evidence to support the ALJ's finding Howard sustained an injury on July 12, 2012, which was the day he was laid off. In fact, the ALJ made no specific finding of

fact as to when Howard's disability arose, but ordered income benefits to commence on July 12, 2012. Kentucky Fuel cites to Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999) for the proposition that a cumulative trauma injury manifests when a worker discovers, from a physician, that a physically disabling injury has been sustained and that it is work-related. However, Alcan Foil deals with the date of manifestation for notice and statute of limitations purposes. In this case, there is no allegation Howard failed to provide timely notice, or failed to file his claim within the applicable statute of limitations. Rather, Kentucky Fuel seems to challenge when its liability commences.

The date the symptoms of a cumulative injury arise governs when an employer's liability begins. However, this date is not one and the same as the date when a work-related injury manifests itself for purposes of notice and statute of limitations. The Supreme Court explained the distinction in American Printing House for the Blind ex rel Mutual Ins. Corp. of America v. Brown, 142 S.W.3d 145, 148 (Ky. 2004):

Under the version of KRS 342.0011(1) that pertains to this claim, an injury is a work-related traumatic event that causes a harmful change in the human organism. KRS 342.185 provides a period of limitations for a work-related

injury that runs for two years after the date of the accident that causes it. 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 reaffirmed 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. *Nothing in Alcan indicated that liability for an injury begins when the notice and limitations requirements are triggered.* (Emphasis added).

The ALJ determined Howard suffered an injury and awarded income benefits beginning on July 12, 2012. The record indicates the only significance to this date is that it is the day Howard was laid off. On remand, the ALJ must make a specific determination as to "when the disabling reality of the injuries became manifest." Kentucky Fuel's liability commences on this date.

Finally, Kentucky Fuel argues it was error to apportion the entire 5% impairment to Howard's two-year employment at Kentucky Fuel. Dr. Hughes attributed Howard's

condition to his "many years in strip mining operating heavy equipment." Indeed, Howard worked 29 years at other mining companies before beginning at Kentucky Fuel. The ALJ made the factual finding he sustained "work-related injuries to his neck and back which developed over a period of 32 years in the coal mining industry, in that degenerative changes in his neck and back were worsened by his occupation." He then stated Howard's work-related trauma caused a dormant degenerative condition to brought into disabling reality.

On remand, the ALJ must clarify these seemingly conflicted conclusions, and expressly state whether Howard's injury was due to a dormant condition being brought into disabling reality, or the result of cumulative trauma. The ALJ must further determine what portion of the injury can be attributed to his employment with Kentucky Fuel, and the medical evidence supporting this conclusion. Kentucky Fuel shall only be held liable for that percentage of Howard's disability equal to the percentage of his worklife spent with Kentucky Fuel. Southern Kentucky Concrete Contractors, Inc., 662 S.W.2d 221, 223 (Ky. App. 1983).

IT IS HEREBY ORDERED AND ADJUDGED Respondent's request for sanctions against Kentucky Fuel is **DENIED**.

For the foregoing reasons, the May 19, 2014 Opinion and Order and the June 30, 2014 Order on

Reconsideration of Hon. William J. Rudloff, Administrative Law Judge are hereby **VACATED** and this matter is **REMANDED** to the Administrative Law Judge for further findings of fact as stated herein.

ALL CONCUR.

REBEKKAH B. RECHTER, MEMBER
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