Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 14, 2014

CLAIM NO. 201300607 & 201300605

PINE BRANCH MINING, LLC PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

STEPHEN MULLINS
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Pine Branch Mining, LLC ("Pine Branch") seeks review of the opinion, order and award rendered December 2, 2013 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), finding Stephen Mullins ("Mullins") sustained work-related cumulative trauma injuries to his neck and

lower back rendering him permanently totally disabled. No petition for reconsideration was filed.

On appeal, Pine Branch challenges the ALJ's finding Mullins suffered an injury as defined by the Workers' Compensation Act, rendering him permanently totally disabled. We vacate and remand for additional findings of fact regarding the scope of injuries, specifically the cervical spine, sustained by Mullins as a result of his cumulative trauma.

On April 19, 2013, Mullins filed a Form 101 alleging he sustained cumulative trauma to his "neck and back" due to repetitive use on November 30, 2012. The attached Form 104 indicates Mullins has worked as a heavy equipment operator for Pine Branch since March 20, 1980. Mullins also attached an April 2, 2013 questionnaire completed by Dr. Chad Morgan, D.C., who indicated his neck and back conditions were caused, either wholly or in part, by his job activities, the continuation of which would have adverse health consequences.

Mullins contemporaneously filed a Form 103 alleging an occupational hearing loss arising out of the course and scope of his employment with Pine Branch on November 30, 2012 due to repetitive exposure to loud noise. Mullins attached the December 10, 2012 report of Lisa Koch,

Au.D., who diagnosed "mild to moderate degree of SNHL" and recommended hearing aids and annual hearing exams. Mullins also attached a March 7, 2013 letter from his counsel providing notice to Pine Branch of his intent to file claims for coal workers' pneumoconiosis[1], cumulative trauma and hearing loss. By order dated July 17, 2013, the ALJ consolidated Mullins' cumulative trauma and occupational hearing loss claims.

Because this appeal only concerns Mullins' claim of cumulative trauma injuries, we will not summarize the evidence regarding his hearing loss or coal workers' pneumoconiosis.

Mullins testified by deposition on July 15, 2013 and at the hearing held September 30, 2013. Mullins was born on February 13, 1962 and resides in Bonnyman, Kentucky. He completed the 9th grade and does not have a GED. He has specialized training as a surface miner. Mullins stated he is unfamiliar with computers but is able to read, write and do simple math. Mullins confirmed he has worked in the coal mining industry as a heavy equipment operator since March 30, 1980 with Pine Branch or its subsidiaries. He began operating a front-end loader in approximately 1983. In the

[1] Mullins' claim for coal workers' pneumoconiosis is currently in abeyance.

past five years, he primarily operated the front-end loader and performed maintenance in the evenings. Mullins testified as follows in describing how he loaded coal while operating a front-end loader:

> A: I'd go in there and I'd ramp down in the seam of the coal and I'd find the bottom and I'd level out, then I'd dig it up, get me a little bit piled up and start putting it on the trucks . . . as soon as we got it widened out for the trucks.
>
> . . . .
>
> Q: Did you have to back off and, with your blade down, hit that from time to time?
>
> A: Yeah, and at times, one of us - we'd double up and one of us loaded and the other one could get on top of it and break it.
>
> Q: When you would back it up and hitting that solid seam of coal, and you're in the cab of this piece of equipment, did it affect your neck and back?
>
> . . . .
>
> A: It'd just jerk and jar, you know. Every time you'd shift, you know, you'd go into that solid coal and you'd bust it and you was jumping and jerking . . .

He entered and exited the loader via a ladder mounted on the side. He greased and fueled the loader, as well as "blow my air filter." Mullins had to pull on the hydraulic levers overhead, work the steering, and check the

equipment for cracks and leaks. He estimated he operated the front-end loader ten and a half to eleven hours a day, six days a week.

After loading coal, he performed maintenance in the evenings for approximately an hour and a half, five days a week. He climbed ladders affixed to equipment, removed air filters and blew them out with an air hose, and lifted them up to be reinserted. He estimated most of the filters weighed forty to fifty pounds, but some weighed up to one hundred pounds. He worked a total of seventy to eighty hours a week, earning eighteen dollars an hour. However, Mullins stopped performing the maintenance work in September 2012 because of his back pain and an unrelated hernia, stating "it just got to where I couldn't stand it." Mullins testified he last worked for Pine Branch on November 30, 2012 and has not worked anywhere else since.

Mullins' primary care physician is Dr. George Chaney, who he has seen since the 1980s for various unrelated conditions. Mullins testified he noticed his back and neck problems over time, but the pain became "real bad" five years ago. However, he did not seek medical treatment for either his neck or back until after November 2012. Dr. Chaney took Mullins off work on November 30, 2012 in order to have an unrelated hernia surgically repaired in December

2012. While he was off work for his hernia, Mullins stated he sought treatment with Dr. Chaney for his back and neck, stating as follows:

> Q: Now, you worked out there as a heavy equipment operator up through November the 30th, 2012. You were not laid off, correct?
>
> A: No. I took off for a hernia. Everything just hurt me so bad, I said I'm going to get Dr. Chaney to check me out good what time I'm off for this hernia.
>
> . . . . .
>
> Q: When did you first notice these problems in your neck and back?
>
> A: I just noticed it over time. And the reason I went to Dr. Chaney for my back and everything, when he took me off for my hernia, I guess that made me realize I - I needed something done, 'cause I hurt every night and it was getting harder and harder, and I told Dr. Chaney . . . And I told him, I said, "What time I'm off work, why don't you just check me out good, give me a good physical, you know, 'cause my back's hurting me, my leg's hurting me, and see if you can help me, do anything to help me." . . . .

Mullins testified he listed November 30, 2012 as the date of cumulative trauma injury to his back and neck because "that's when I just got where I couldn't stand it anymore." Dr. Chaney ordered an MRI and prescribed medication for his neck and back. Dr. Chaney then referred

Mullins to Dr. Morgan for chiropractic treatment. Mullins testified he has never been released to return to work. In April 2013, Drs. Chaney and Morgan informed Mullins his neck and back problems were work-related. Mullins testified Dr. Morgan told him returning to work would “destroy” him, specifically referring to his neck and back condition. Mullins is prescribed three mediations for his neck and back by Dr. Chaney. He understands he is restricted from lifting anything heavy, and if he is required to do so, he must use his legs. He also understands he is to take his medicine, take it easy and not be around dust.

Mullins testified he experiences low back, upper back and neck pain. He also experiences pain in his legs and has neck stiffness. He cannot sleep at night due to restlessness of his left leg, which occasionally gives out on him when he walks. Mullins states he cannot sit, stand or drive for prolonged periods of time. Mullins testified he does not do yard work, house maintenance or repairs. He can do household chores such as cooking, dusting, sweeping, vacuuming, laundry and dishes; however, he has to be careful lifting groceries.

Mullins testified he cannot return to his job as heavy equipment operator with Pine Branch due to problems with his back, neck and legs. At his deposition, Mullins

stated as follows regarding his ability to return to any employment:

> Q: Are there any jobs you feel like you could do other than maybe working as a laborer, any jobs in the coal fields or just in general?
>
> A: No.
>
> Q: Could you do a greeter at Walmart?
>
> A: If they'd let me walk around when I wanted to because at time my legs starts hurting me I've got to take off walking or they kill me.

When asked at the hearing if there are any jobs he could do, Mullins replied "I really don't know."

In support of his claim, Mullins filed the June 16, 2013, 107-I report of Dr. James Owen. He took a history from Mullins who reported low back pain gradual in nature and an abdominal hernia. Mullins reported low back pain occurring of approximately a year's duration which became severe in November 2012. He also reported pain radiating into his legs, trouble sleeping and pain in his upper extremities and neck. Dr. Owen reviewed medical records, including a January 31, 2013 lumbar spine MRI demonstrating a focal disc herniation at L4-5 and L5-S1 in the midline. A cervical MRI performed the same date demonstrated minimal disc bulge at C6-7 with no evidence of herniation, nucleus pulposus, or spinal stenosis.

Dr. Owen performed a physical examination and diagnosed chronic low back pain with a two-level involvement as evidenced by the MRI, with no evidence of radiculopathy on clinical exam; status post abdominal wall hernia appearing to be doing well with minimal pain post-op and; history of neck and upper back pain with no significant range of motion or muscle spasm problems.

Dr. Owen concluded Mullins' injuries caused his complaints. He also stated, "This would, in my opinion, be a cumulative trauma problem for his low back. . . ." Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Owen assessed an 11% impairment rating for the lumbar spine condition based upon the MRI and range of motion results. He assessed a 0% impairment rating for both the hernia and cervical spine conditions. Dr. Owen found Mullins had an active impairment of 2% which existed prior to the work incident. He opined Mullins had attained maximum medical improvement. He restricted Mullins from activity requiring recurrent bending, squatting or stooping and lifting greater than thirty pounds. He further stated, "It would be my opinion that he would be able to return to the type of work performed at the time of injury if he so desires and if the restrictions can be implemented fully."

Pine Branch filed the August 1, 2013 report of Dr. Rick Lyon. Mullins reported a three year history of neck and back stiffness which has progressed over time. In November 2012, his back pain and abdominal complaints progressed to the point he sought treatment from Dr. Chaney. He noted the hernia repair and subsequent treatment by Drs. Chaney and Morgan for his neck and back. Dr. Lyon performed a physical examination, noting normal inspections of his neck and lumbar spine.

He reviewed the medical records of Drs. Chaney and Morgan, a discharge summary of the December 13, 2012 hernia repair, and the January 31, 2013 cervical and lumbar spine MRIs. Dr. Lyon diagnosed chronic myofascial neck and lumbar pain, carpal tunnel syndrome left upper extremity and abdominal hernia-repaired. He noted the medical records and history provided by Mullins indicate no acute injury to his neck or back, but are chronic problems he can no longer tolerate. He also noted no objective evidence of radicular findings, despite Mullins' subjective complaints. Dr. Lyon opined Mullins has no work injury stating "it has been well documented in the orthopedic literature that 70-85% of individuals will experience back pain during their lifetime." Likewise, he opined any likely limitation Mullins' has due to neck and low back complaints are not

work-related. Therefore, Dr. Lyon concluded Mullins can return to his previous job. Like Dr. Owen, Dr. Lyon assessed a 0% impairment rating for Mullins' cervical spine. He also assessed a 0% impairment rating for the lumbar spine pursuant to the AMA Guides. Dr. Lyon concluded Mullins had pre-existing, active neck and pain and he found no evidence of a harmful change to the human organism in the lumbar, thoracic or cervical spine due to any injury occurring on November 30, 2012.

In his December 2, 2013 decision, under a section entitled "Injury under the Act" the ALJ found as follows:

> The employer also maintains plaintiff did not suffer any neck or lower back injury. In support of its position, the defendant relies upon the opinions of its expert, Dr. Lyon, who examined plaintiff and concluded he had no evidence of a work-related injury. Instead, Dr. Lyon concluded plaintiff suffered only from normal degenerative changes which do not qualify as a work-related injury.
>
> However, the Administrative Law Judge is ultimately more persuaded by the opinions of Dr. Owen. Whereas Dr. Lyon seems to dismiss the possibility of a work-related cumulative trauma injury, the law in Kentucky allows for such claims. McNutt Construction v. Scott, Ky., 40 S.W.3d 854 (2001). Dr. Owen concluded plaintiff's work activities throughout his years with the defendant caused his neck and lower back injuries. Considering the totality of evidence available, Dr. Owen's opinion

> in this regard is considered persuasive. Is therefore determined plaintiff's neck and lower back conditions are work-related and compensable.

In awarding Mullins permanent total disability ("PTD") benefits, the ALJ stated as follows:

> The next issue is the extent of plaintiff's impairment/disability. Plaintiff maintains he is totally disabled while the employer argues plaintiff has little, if any, functional impairment and can return to the kind of work he was performing at the time of his injury.
>
> In deciding this issue, the Administrative Law Judge is persuaded by the restrictions assigned by Dr. Owen. Although Dr. Owen indicated plaintiff could return to his former job if he could do so within the restrictions assigned, it is determined plaintiff could not return to his job as an equipment operator within those restrictions. Moreover, plaintiff worked in the mining industry most of his life and for this particular employer for approximately 30 years. Under these circumstances, the Administrative Law Judge is persuaded that working in the mining industry and/or as a heavy equipment operator constitutes the entirety of plaintiff's vocational training. Considering plaintiff's age and lack of education, by finding that plaintiff does not retain the ability to return to his former job, it is further determined plaintiff is permanently and totally disabled. In reaching this conclusion, the Administrative Law Judge was further persuaded by plaintiff's credible testimony and commendable work

> history that plaintiff would currently be working if he were physically able to do so.
>
> Moreover, although Dr. Owen carved out 2% of his overall impairment as being active at least two years before the claims file, the Administrative Law Judge is not persuaded plaintiff had any demonstrable occupational disability outside of his statute of limitations period to justify carving out any portion of his award of total disability. Plaintiff's award benefit is therefore calculated as follows: $1,170 x 2/3 = $780 → $736.19 (maximum PTD rate for 2012) per week.

On appeal, Pine Branch argues Mullins did not suffer an injury as defined by the Act. It asserts Mullins produced no objective evidence he sustained a harmful change to the human organism and any theory his work influenced his condition is merely speculative. Pine Branch cites to Dr. Lyon's opinion.

Pine Branch also argues the ALJ erred in finding Mullins permanently totally disabled as a result of a work injury. Pine Branch asserts the primary reason Mullins is not working is due to his unrelated hernia, since this is why he was taken off work in November 2012. Pine Branch also asserts Dr. Owen's opinion supports a finding Mullins can return to his pre-injury job. It also argues the restrictions assigned by Dr. Owen are not supported by objective findings. It asserts the ALJ erred in concluding

these restrictions preclude Mullins from returning to his previous job, stating as follows:

> It is unrefuted that Mullins' job involved no lifting, bending, squatting or stooping. The biggest physical challenge Mullins faced was climbing into the cabin of his loader once per day. This activity did not pose a problem, and climbing was not restricted by Dr. Owen. If the ALJ was to rely on Dr. Owen, and if he was aware of his job's physical demands, the only possible conclusion would be a finding that he can continue in his pre-injury capacity. Relying on Dr. Owen would not only prohibit a permanent and total award, it would preclude an Award of the 3 multiplier.

It also argues Mullins could work in some capacity even if Dr. Owen's restrictions are accepted. It notes Mullins is only 51 years old, has no emotional problems affecting his ability to work, is able to read, write and do math, has "displayed the ability to quickly learn additional skills within his job," and can do household chores.

The claimant in a workers' compensation case bears the burden of proving each of the essential elements of his cause of action before the ALJ, including whether he sustained an "injury" as defined by the Kentucky Workers' Compensation Act and the extent of his disability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Mullins

was successful in his burden, the question on appeal is whether there was 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 making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his or her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Further, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's factual conclusions. *See* Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

We vacate and remand for additional and specific findings of fact regarding whether Mullins sustained neck injuries due to his work with Pine Branch. In his decision, the ALJ found the opinion of Dr. Owen more persuasive than that of Dr. Lyon. He noted Dr. Owen concluded Mullins' work activities throughout the years with Pine Branch caused his neck and lower back injuries. The ALJ therefore determined under the totality of the evidence, "Dr. Owen's opinion in this regard is considered persuasive. Is therefore determined plaintiff's neck and lower back conditions are work-related and compensable." After finding in favor of

Mullins regarding the issue of work-relatedness/causation, the ALJ then determined he was permanently totally disabled as a result of his cumulative trauma injuries. However, before the ALJ could reach a determination regarding work-relatedness/causation, he first is required to find whether Mullins sustained an injury as defined by the Act.

KRS 342.0011(1) defines "injury" as "any work-related traumatic event or series of traumatic events, including cumulative trauma . . . arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." KRS 342.0011(33) defines "objective medical findings" as "information gained through direct observation and testing of the patient applying objective or standardized methods." In Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), the Court recognized in addition to objective diagnostic tools such as x-ray, CT scan, EMG/NCV or MRI, there is a wide array of standardized laboratory tests and tests of physical and mental function available to the medical practitioner. Therefore, the Court held the existence of a harmful change can be established indirectly, through information gained by direct observation, and/or by testing which applies

objective or standardized methods demonstrating the existence of symptoms of such a change. Id. at 762.

In this instance, we acknowledge the treatment records of Drs. Chaney and Morgan, as well as the January 31, 2013 cervical and lumbar spine MRI reports referenced by Drs. Owen and Lyon, were not submitted into evidence. In addition, the April 2, 2013 questionnaire completed by Dr. Morgan only addresses whether Mullins "neck and back" conditions were caused, either wholly or in part, by his job activities, not whether he sustained an injury as defined by the Act. Therefore, the ALJ was left with the conflicting reports of Drs. Owen and Lyon.

In his report, Dr. Lyon noted the results of his physical examination. He noted his inspection of Mullins' neck "reveals it to be grossly normal for his age" and the inspection of his lumbar spine "also shows no gross abnormalities." He found no evidence of masses or edema. He found Mullins' spinal alignment from the cervical to lumbar region within normal limits, and had full range of motion of his neck, lumbar and thoracic spine. He noted Mullins had tenderness in the trapezius muscles and paraspinal tenderness in the lower lumbar spine. Dr. Lyon also reviewed the medical records, including those of Dr. Chaney, the chiropractic records of Dr. Morgan, and the

January 31, 2013 MRI reports of the cervical and lumbar spine. The cervical MRI demonstrated "C3-4 had loss of signal and height of the disc space and C6-7 had a minimal disc bulge noted in the midline and loss of signal and height for the disc space" with no evidence of disc herniation. The lumbar spine MRI demonstrated slight loss of signal and height of the disc space of L5-S1 and a small focal disc herniation at L4-5 and L5-S1 in the midline. Dr. Lyon concluded Mullins "has no work injury," but instead has myofascial neck and back pain unrelated to work. He found any limitations to his cervical and lumbar spine active and pre-existing to the alleged work event. He found "no evidence of harmful change in the human organism in the lumbar, thoracic, or cervical spine as a result of any injury in 11/30/2012" and no impairment to the cervical or lumbar spine.

Dr. Owen likewise took a history, reviewed the medical records and performed a physical examination. He noted the lumbar spine MRI demonstrated a focal disc herniation at L4-5 and L5-S1 in the midline. The cervical MRI demonstrated "minimal disc bulge at level C6-7 in the midline. No evidence of herniation, nucleus pulposus, or spinal stenosis." Dr. Owen documented the results of his physical examination which in relevant part stated:

> Normal gait and station. Straight-leg raise supine 70 and negative right and left; sitting 60 and negative right and left. Lateral flexion 22/22/22 right and 22/22/22 left; anterior flexion 80/20, 80/20, 80/20; extension 28/8, 28/8, 28/8. He had mild tenderness. I could not convince myself there was any significant spasm of his lower back. **His neck certainly has no spasm and range of motions[sic] were within normal limits as per chart.**
> (emphasis added).

Dr. Owen diagnosed chronic low back pain with a two-level involvement as evidenced by the MRI, with no evidence of radiculopathy on clinical exam; status post abdominal wall hernia appearing to be doing well with minimal pain post-op and; history of neck and upper back pain with no significant range of motion or muscle spasm problems. Dr. Owen concluded Mullins' injuries caused his complaints. He also stated, "This would, in my opinion, be a cumulative trauma problem for his low back." Pursuant to the AMA Guides, Dr. Owen assessed an 11% impairment rating for the lumbar spine condition and a 0% impairment rating for both the hernia and cervical spine. Dr. Owen found Mullins had an active impairment of 2% which existed prior to the work incident.

We first note Dr. Owen's report constitutes substantial evidence supporting a finding Mullins sustained a cumulative low back injury due to his long time employment with Pine Branch. Dr. Owen's opinions regarding the low

back are supported by objective medical evidence as defined by KRS 342.0011(33) since his information was gained through direct observation and test results, primarily the January 2013 lumbar spine MRI, and was based on the application of objective or standardized methods. We likewise find his opinion constitutes substantial evidence in determining "This would, in my opinion, be a cumulative trauma problem for his low back."

However, the evidence is equivocal at best regarding whether Mullins sustained a cumulative trauma injury to his cervical spine. As noted above, Dr. Lyon's inspection of Mullins' neck revealed it to be grossly normal, with normal alignment and full range of motion. He noted the cervical MRI report demonstrated "C3-4 had loss of signal and height of the disc space and C6-7 had a minimal disc bulge noted in the midline and loss of signal and height for the disc space" with no evidence of disc herniation. Likewise, Dr. Owen's examination revealed "His neck certainly has no spasm and range of motions [sic] were within normal limits as per chart." He also noted the cervical MRI demonstrated minimal disc bulge at C6-7 with no evidence of herniation, nucleus pulposus, or spinal stenosis. Dr. Owen assessed no impairment for the cervical condition.

On remand, the ALJ is directed to make specific findings of whether Mullins sustained cumulative trauma injuries to his cervical spine and point to the evidence in the record which support his conclusion. Only then can the ALJ make a determination as to causation/work-relatedness, i.e., whether Mullins neck and/or low back injuries are the result of his lengthy work history with Pine Branch, and whether those work-related injuries have rendered him permanently totally disabled. If the ALJ determines Mullins has not sustained work-related, cumulative trauma injuries to his cervical spine, he must then determine whether Mullins is permanently and totally disabled based solely on his lumbar spine injury.

Accordingly, the December 2, 2013 the opinion, order and award by Hon. Grant S. Roark, Administrative Law Judge is hereby **VACATED** AND **REMANDED** for additional findings consistent with the view expressed herein.

ALL CONCUR.

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