

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 22, 2014

CLAIM NO. 201300175

SOUTH AKERS MINING COMPANY, LLC

PETITIONER

VS.

APPEAL FROM HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE

JOSEPH MIRANDA
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. South Akers Mining Company, LLC ("South Akers") appeals from the August 30, 2013 Opinion, Award and Order and from the October 1, 2013 order on reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded Joseph Miranda permanent partial disability benefits based upon a 17% impairment

rating, enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. South Akers argues the ALJ erred in finding Miranda sustained an injury as defined by the Act, in failing to find a pre-existing active disability, in finding timely notice was given, and in enhancing the award. We disagree and affirm.

Miranda filed his claim on February 6, 2013 alleging he developed cumulative trauma disorder in his spine and upper extremities on July 27, 2012 due to his work as a coal miner. Miranda indicated he had not returned to work and was not able to perform his work as a miner as a result of his injuries.

Miranda testified by deposition on July 22, 2013 and at the hearing held July 23, 2013. He stated he has worked as a roof bolter for twelve years. Since November 2010, he worked for South Akers as a roof bolter, scoop operator and shuttle car operator. The coal in the mine was as deep as 50 inches, requiring him to frequently stoop, bend over, crouch, and kneel. The heavy bolting machinery was operated with both hands, and often involved lifting up to fifty pounds.

Miranda was terminated on July 27, 2012, though he did not believe he could have continued in his employment for much longer, speculating he might have been

able to work for one more month had he not been terminated. Specifically, he cited the continual numbness in his hands as a barrier to further work in the mines because he cannot grasp for extended periods of time. Additionally, his left knee swells, is stiff, "crunches" and gives out, making it difficult and painful to continually kneel or crouch. He continues to have back spasms and pain radiating into his hips and down his legs.

Miranda acknowledged he began having problems with his hands in 2008 or 2009, and sought treatment for the problem. He also acknowledged he began experiencing back problems in 2009 with stiffness, spasms and numbness extending to his toes. He began to experience pain in his left knee in 2002 which worsened over time.

Dr. Robert Hoskins performed an independent medical evaluation ("IME") at Miranda's request on January 23, 2013. Dr. Hoskins diagnosed lumbosacral sprain/strain; bilateral lumbosacral radiculitis; L5-S1 posterior disc bulge; left knee medial and patellofemoral compartment osteoarthritis and a history of electro-physiologically verified mild bilateral median neuropathy at the wrists. Dr. Hoskins stated Miranda's complaints were the result of years of cumulative trauma and repetitive strain associated with the physical demands of employment in the coal mining

industry. He assessed a 17% impairment pursuant to American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Hoskins opined Miranda did not retain the physical capacity to return to the type of work he performed at the time of his injury. Furthermore, Dr. Hoskins assigned extensive physical restrictions which, among other activities, limit Miranda's ability to lift, grasp, crouch, stand, stoop, and operate vibratory tools or heavy machinery.

A substantial amount of evidence was admitted concerning Miranda's medical treatment history prior to his employment with South Akers. Records of Dr. April Hall indicate Miranda was treated on April 30, 2010 for complaints of back pain radiating into his hips and lower extremities. Miranda denied any injury to Dr. Hall, but stated he worked underground. Dr. Hall diagnosed lumbago and acute myofascial strain. X-rays taken in May, 2010 revealed decreased L5-S1 disc space height. A CT scan performed on May 11, 2010 revealed a mild disc bulge at L5-S1.

In a July 22, 2013 note, Dr. Hall indicated she saw Miranda regularly during 2011 and was skeptical that he could remain employed much longer due to increasing severity of his back pain and bilateral lower extremity

loss of sensation. She also noted bilateral carpal tunnel syndrome contributed to his loss of ability to perform essential work functions. Dr. Hall opined his symptoms "so inhibit his ability to stand, walk, stoop, bend, crouch, kneel, lift and think clearly that he cannot sustain regular employment."

Treatment records from Dr. Sujata Gutti, Dr. Salem Hanna and Dr. Thomas Karelis were also introduced. Dr. Gutti conducted NCV studies of both arms in 2008 and diagnosed bilateral carpal tunnel syndrome and ulnar neuritis. In April 2011, Dr. Hanna diagnosed chronic lower back radiculopathy with exacerbation. In August 2011, Dr. Karelis diagnosed chronic pain (moderate to severe); degenerative disc disease of the lumbar spine; lumbago and facet joint arthropathy.

Dr. J. Rick Lyon performed an IME on June 13, 2013 at South Akers' request. Miranda complained of pain involving his back, arms, shoulders, knees and neck. Dr. Lyon diagnosed subjective complaints of low back pain, bilateral shoulder pain, bilateral knee pain and cervical pain, all with no objective findings. Dr. Lyon assessed 0% impairment pursuant to the AMA Guides. He explained that none of Miranda's diagnoses were work related, and he did not have a diagnosis as a result of cumulative trauma. Dr.

Lyon stated Miranda did not need work restrictions nor did he need further medical treatment.

In a July 26, 2013 letter, Dr. Hoskins disagreed with the Dr. Lyon's report, explaining Miranda exhibited objective physical findings on examination. He noted even Dr. Lyon's examination produced objective findings in the form of abnormal range of motion, a positive straight raising test, and lumbar paraspinal tenderness. Dr. Hoskins emphasized his medical opinion is based on history, clinical symptoms, clinical findings and documentation, and verified electrodiagnostic studies.

After reviewing the evidence, the ALJ determined South Akers failed to satisfy its burden of proof to establish Miranda had an impairment ratable condition prior to the work injury. Therefore, the ALJ determined South Akers failed to meet its burden to establish a pre-existing active disability or impairment. Based upon Miranda's testimony that he lacked any knowledge of the work relatedness of his conditions until the examination conducted by Dr. Hoskins on January 23, 2013, the ALJ determined Miranda gave timely notice through a certified letter on February 5, 2013 and the filing of a Form 101. The ALJ then made the following findings relevant to this appeal:

14. The ALJ finds that the most credible medical evidence provided in this matter is the report and supplemental filing of Dr. Hoskins.

15. Dr. Hoskins has opined that the Plaintiff's injuries are the result of years of cumulative trauma and repetitive strain associated with his employment in the coal mining industry and assessed a 17% whole person impairment. He also opined that the Plaintiff is not capable of returning to the same type of work.

16. The thorough, well-reasoned and convincing opinions of Dr. Hoskins have convinced the ALJ and the ALJ therefore finds that the Plaintiff suffered a work-related injury resulting in a 17% whole person impairment and all related medical expenses are the responsibility of the Defendant. The ALJ further finds that the Plaintiff does not retain the ability to return to the same type of work and is thus entitled to the "three" multiplier pursuant to KRS 342.730(c)1.

South Akers filed a petition for reconsideration raising the same arguments it now makes on appeal. In his October 1, 2013 order, the ALJ stated he found Miranda's testimony did not establish an impairment ratable condition prior to the work injury, Miranda was not aware he had a work related injury until the January 2013 evaluation, and he gave notice as soon as practicable thereafter. The ALJ reiterated that he found Dr. Hoskins persuasive regarding impairment.

South Akers raises four arguments on appeal. First, it claims the ALJ abused his discretion in concluding Miranda sustained an injury as defined by the Act. It points to the documentation of Miranda's medical treatment prior to the alleged date of injury, and the fact he had subjective complaints for several years prior to his employment with South Akers. Because the ALJ relied on Dr. Hoskins' report to conclude Miranda suffered cumulative trauma, this argument is essentially a challenge to the sufficiency of the evidence.

As the claimant in a workers' compensation proceeding, Miranda bore the burden of proving each of the essential elements of his cause of action, including notice and injury as defined by the Act. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that 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).

The record contained conflicting medical opinion on the issue of whether Miranda sustained a cumulative trauma injury. Where evidence is conflicting, the ALJ as fact-finder has wide discretion to pick and choose whom and what to believe. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977). Although an opposing party may note evidence supporting a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). South Akers' argument on appeal is an attempt to have the Board re-weigh the evidence and find the opinion of Dr. Lyon more persuasive than that of Dr. Hoskins. We may not do so. The ALJ, as was his prerogative, found the opinion of Dr. Hoskins more persuasive. The opinion of Dr. Hoskins is substantial evidence supporting the ALJ's conclusion that Miranda sustained cumulative trauma injuries producing a 17% impairment to the body as a whole.

South Akers next argues the ALJ improperly failed to find Miranda suffered a pre-existing active disability. It points to the treatment records of Drs. Hanna, Gutti, Hall and Karelis as proof Miranda's conditions pre-existed his employment with South Akers. Because South Akers failed to satisfy its burden of establishing a pre-existing condition, our analysis is whether the evidence, when

considered as a whole, compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. App. 1984); REO Mechanical v. Barnes, 691 S.W.2d 224, 226 (Ky. App. 1985) *superseded on other grounds by statute as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007).

While South Akers identifies ample evidence in the record indicating Miranda received treatment for various conditions prior to July 27, 2012, it produced no evidence his symptoms rose to the level of an impairment ratable condition immediately prior to that date. Miranda was never previously assigned an impairment rating, and performed his job until July 27, 2012, albeit with the assistance of pain medication. Likewise, no physician has offered the opinion Miranda's condition was ratable prior to this date. These facts are appropriate considerations in determining whether his condition was symptomatic and impairment-ratable. Indeed, South Akers has maintained throughout the litigation Miranda has no impairment

whatsoever. Notwithstanding Miranda's treatment records prior to July 27, 2012, we do not believe the evidence compels a different conclusion.

In its third argument on appeal, South Akers challenges the ALJ's determination timely notice was given. It points to Miranda's Form 101, which identified a cumulative trauma with a manifestation date coinciding with his last date of employment, July 27, 2012. However, Miranda's testimony indicates he was unaware of the cumulative trauma until he was evaluated by Dr. Hoskins in January 2013. South Akers reasons Miranda was therefore aware of the manifestation seven months before he gave notice.

KRS 342.185(1) requires notice of an accident to be given to the employer as soon as practicable after the accident. Implicit in the finding of a gradual injury is a finding no single instance of workplace trauma caused an injury of appreciable proportion. Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001). For that reason, in cumulative trauma claims, the date triggering the obligation to give notice is the "manifestation of disability," which is the date a worker first learns he has sustained a gradual injury and knows it is due to his work. Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999). In an

unbroken line of cases since Hill, Kentucky appellate courts have determined, in claims involving cumulative trauma, a worker is not required to give notice until first informed by a physician the condition is work-related.

Furthermore, as pointed out in Hill, Miranda is not required to self-diagnose the cause of his conditions. Until informed of the diagnosis by Dr. Hoskins, Miranda did not have an obligation to notify his employer of a gradual work-related injury. Although he began experiencing symptoms from various conditions from 2008 through 2011, Miranda testified he was not advised by a doctor he had a gradual work-related injury prior to the evaluation by Dr. Hoskins. Likewise, the medical records do not reflect a diagnosis of a gradual work-related injury or that Miranda was ever advised he had sustained a gradual work-related injury prior to the time he was seen by Dr. Hoskins.

Miranda's testimony constitutes substantial evidence supporting the ALJ's determination he was first advised he had a gradual work-related injury after Dr. Hoskins diagnosed a cumulative trauma injury. The ALJ could reasonably conclude notice given on February 5, 2013, approximately two weeks following Dr. Hoskins' evaluation, was timely. Because the ALJ's finding concerning the issue of whether Miranda gave due and timely notice is supported

by substantial evidence, we are without authority to disturb his decision on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Finally, South Akers argues the ALJ erred in awarding the three multiplier. South Akers centers its argument on the fact Miranda did not leave work due to the work injury. Rather, he was terminated for reasons unrelated to his disability. In light of these circumstances, it argues Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009) bars application of the three multiplier.

We find no merit in South Aker's argument that Chrysalis House precludes application of the three multiplier in this claim. In that case, the Supreme Court held the two multiplier was applicable only if the reason for the cessation of earnings at the same or greater wage than that earned at the time of injury related to the disabling effects of the injury. The fact Miranda was terminated for a reason unrelated to his work injury is simply irrelevant in determining the appropriate multiplier in Miranda's case. Because there was no return to work at the same or greater wage the two multiplier is not applicable.

Application of the three multiplier is determined based solely on the injured worker's post-injury physical capacity to perform the work he was performing at the time of the injury. The ALJ could reasonably find the extensive restrictions assigned by Dr. Hoskins would preclude Miranda from performing the type of work he performed at the time of his injury. Dr. Hall's office notes support this conclusion as well. The record contained substantial evidence supporting application of the three multiplier.

For the foregoing reasons, the August 30, 2013 Opinion, Award and Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, and the October 1, 2013 order denying South Akers' petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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