# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: March 7, 2014**

CLAIM NO. 201300464

T & T ENERGY PETITIONER

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

LARRY SIZEMORE
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

**RECHTER, Member.** T & T Energy ("T&T") appeals from the August 30, 2013 Opinion and Order and the October 17, 2013 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In

those opinions, the ALJ awarded Larry Sizemore permanent total disability ("PTD") benefits for an injury to his neck during the course of his employment as a dump truck driver. On appeal, T&T challenges the sufficiency of the evidence supporting the findings Sizemore suffered an injury, gave timely notice of the injury, and is permanently totally disabled as a result of the injury. For the reasons set forth herein, we affirm in part, vacate in part, and remand.

Sizemore is a 64-year old man who completed the eleventh grade and later earned his GED. He holds a surface mining license and a commercial driver's license. He has primarily worked as a truck driver his adult life, and exclusively so since 2003. From September 2011 to April 2012, he worked for T&T as a dump truck operator. This position required him to sit in the truck while a loader filled the bed with fifty to sixty tons of earth and rock, then dump the load in another area of the mining site. He repeated this process dozens of time during his typical ten-hour shift. Due to the "violent" shaking and jarring that occurred when the bed of his truck was being filled by the loader, he described feeling "pretty beat up" after a day's work.

Sizemore recalled waking up one morning in late March 2012 with a “crick” in his neck. The pain did not resolve itself as he anticipated, but consistently worsened over the next four days. He visited Dr. Dustin Chaney, with whom he had been treating for lower back pain since his employment with T&T began in 2011. On April 2, 2012, Dr. Chaney’s office note indicates Sizemore “was at work [when] they dropped a large rock into his rock truck and he thought he stretched his neck out then.” Dr. Chaney noted a diminished range of motion of the cervical spine, and recommended physical therapy. Sizemore reported some relief from physical therapy, but continued to experience pain from the base of his skull through his left shoulder area. Despite the pain, he returned to work. However, he testified it was difficult to use his left hand to steer the truck while operating the right-hand gear shift.

Due to company-wide lay-offs, Sizemore’s employment with T&T was terminated on April 11, 2012. Because his benefits ceased on April 30, 2012, he no longer attended physical therapy and thereafter treated his condition with over-the-counter pain medication and a home exercise program. When asked whether he provided notice of his injury prior to his layoff, Sizemore twice testified

that he had not. Written notice of the injury was given to T&T on January 17, 2013.

Sizemore underwent two independent medical evaluations. Dr. Arthur Hughes evaluated Sizemore on May 22, 2013. His report indicates he reviewed Dr. Chaney's treatment records for neck and shoulder pain from April 2, 2012 through October 11, 2012. However, the only record from Dr. Chaney contained in the record before this Board is the April 2, 2012 office note. Also according to Dr. Hughes' report, Dr. Chaney ordered an x-ray and MRI of the cervical spine on April 2, 2012. The x-ray showed "some straightening of the cervical spine consistent with muscle spasm", and the MRI revealed a lumbar disc bulge and degenerative disc disease in the cervical spine.

Upon physical examination, Dr. Hughes diagnosed neck pain and probable mild left carpal tunnel syndrome. He attributed the neck pain to "a large rock [] dropped into the bed of his rock truck causing the truck to vibrate." Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Hughes assigned a 5% whole person impairment rating. He recommended Sizemore avoid situations requiring repetitive twisting and extension of

the cervical spine, but opined he retains the physical capacity to return to his pre-injury work.

Dr. Daniel Primm evaluated Sizemore on June 14, 2013. He found no evidence of a permanent work-related injury, either "as a result of a specific strain-type injury or from any type of cumulative standpoint." He found no impairment pursuant to the AMA Guides, and opined Sizemore is physically capable of returning to work as a truck driver.

In the August 30, 2013 Opinion and Order, the ALJ found Sizemore had suffered a work-related cumulative injury to his neck. He relied upon Dr. Hughes' report and Sizemore's testimony to reach this conclusion. The ALJ also determined Sizemore had informed John Gregory, T&T's safety director, of his work injury, which constituted due and timely notice as required by KRS 342.185. Finally, he concluded Sizemore is permanently totally disabled as a result of the work injury.

T&T petitioned for reconsideration, challenging the sufficiency of the evidence supporting the ALJ's findings with respect to PTD, cumulative trauma, and notice. It also requested additional findings of fact with respect to the award of PTD benefits. In a subsequent Opinion and Order on Reconsideration, the ALJ generally

denied the petition. However, with respect to the finding of cumulative trauma, the ALJ stated he had made a clerical error and amended the opinion to find a date-specific injury.

T&T now appeals, raising four arguments for review. First, it claims there is insufficient evidence to support a finding of cumulative trauma. In a related argument, it argues the ALJ exceeded the scope of the authority granted pursuant to KRS 342.281 by amending the opinion to find a date-specific injury, and that there is insufficient evidence to support the finding. Next, T&T challenges the sufficiency of the evidence supporting the finding timely notice was given. Finally, it argues the ALJ failed to make sufficient findings of fact regarding the award of PTD benefits, and the award is not based on substantial evidence.

Our analysis begins with the ALJ's Opinion and Order on Reconsideration, in which he amended the opinion to find a date-specific injury as opposed to a cumulative trauma. After stating the definition of "injury" as defined by KRS 342.0011, the original Opinion and Order provided the following discussion of Sizemore's injury:

> I saw and heard the plaintiff Mr. Sizemore testify at the Hearing and found that he was a credible and

> convincing witness. Based upon the totality of the evidence in this case, including the plaintiff's testimony and the credible and persuasive medical evidence from Dr. Hughes, I make the factual determination that the plaintiff sustained cumulative trauma to his neck as a result of working for the defendant as a rock truck driver from September, 2011 to April, 2012. Mr. Sizemore testified that 60 tons of rock was dropped into his truck bed on each load and that he experienced painful neck symptoms which required medical treatment. In his medical report, Dr. Hughes stated in terms of reasonable medical probability the plaintiff's injury as the cause of his complaints, in that he developed neck pain when a large rock was dropped into the bed of his rock truck, causing the truck to vibrate, and that this is the cause of Mr. Sizemore's ongoing neck pain, which has restricted some of his activities. I make this determination based upon said persuasive evidence from the plaintiff and from Dr. Hughes and the above-cited legal authorities.

In the subsequent Opinion and Order on Reconsideration, the ALJ amended the opinion as follows:

> This was an incorrect belief on my part, and I committed a clerical error in stating that the plaintiff sustained cumulative trauma to his neck. The sum and substance of the medical evidence from Dr. Hughes was that the plaintiff developed neck pain when a rock was dropped into the bed of his rock truck, causing the truck to vibrate, and that within reasonable medical probability that was the cause of the plaintiff's ongoing neck pain. I therefore amend the original Opinion and Order so as to state that the cause of the plaintiff's

> neck injury was a single trauma and not the result of cumulative trauma.

KRS 342.281 permits the ALJ to correct "errors patently appearing upon the face of the award, order, or decision" when they are raised in the petition for reconsideration. While the statute certainly permits the correction of clerical errors, it must be "liberally construed" to allow correction of all patent errors. Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104, 106 (Ky. App. 1985). Still, the ALJ may not reweigh the evidence upon a petition for reconsideration. Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329 (Ky. 1971). KRS 342.281 "precludes an ALJ … from reconsidering the case on the merits and/or changing the findings of fact." Garrett Mining Co. v. Nye, 122 S.W.3d 513, 520 (Ky. 2003).

Upon careful consideration, we conclude the ALJ corrected a patent error by amending the opinion. The original opinion is contradictory on its face. The ALJ first points to Sizemore's testimony regarding how many tons of rock were dropped "on each load", which is proof tending to support a finding of cumulative trauma. However, the ALJ then cites the opinion of Dr. Hughes, whose opinion as to causation clearly points to a single

traumatic event: “he developed neck pain when *a* large rock was dropped into the bed of his rock truck.”

We empathize with T&T’s assertion that the amended opinion essentially changes the theory of the case. However, mere clerical errors may, at times, effectively constitute a substantive change. Furthermore, we detect no real prejudice to T&T. Sizemore’s Form 101 alleges a single traumatic event, and his position statement discussed a single traumatic event. Finally, when read in context, there is no indication the ALJ wholly reweighed the evidence, which is prohibited by KRS 342.281. For these reasons, we believe the ALJ acted within the scope of his authority by amending the August 30, 2103 Opinion and Order to resolve the inconsistencies contained therein.

This conclusion renders moot T&T’s argument challenging the sufficiency of the evidence of a cumulative trauma. As to the sufficiency of the evidence of a single traumatic event, we believe the conclusion is adequately supported by the evidence. Dr. Hughes opined Sizemore’s neck pain was caused “when a large rock was dropped into the bed of his rock truck causing the truck to vibrate.” This proof, alone, constitutes substantial evidence to support the decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

T&T emphasizes Sizemore could not identify a singular date and time when the injury occurred, instead identifying the moment he first felt the *effects* of the injury. This is not fatal to his claim, however. The ALJ enjoys wide discretion in his assessment of the evidence, including the authority to draw reasonable inferences from the proof submitted. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Particularly in light of Dr. Hughes' opinion, it is reasonable to conclude Sizemore's condition was caused by the persistent jolts he suffered during a day's work, notwithstanding the fact he could not identify a precise moment the injury occurred.

We next turn to the question of whether due and timely notice of the injury was provided. The ALJ found Sizemore "gave verbal notice of his work injuries to John Gregory, the defendant's safety director, on April 2, 2012, which was the date of his alleged work injuries." Based on this testimony, the ALJ concluded KRS 342.185(1) had been satisfied.

This is a factually inaccurate summary of Sizemore's testimony. During his deposition testimony, Sizemore was asked if he reported "any injury to the company", to which he responded "no". He then elaborated:

> Q: Who was your supervisor at the time?
> A: Robbie Collins. Now I reported often times that the loader people were not padding the bed of the truck with dirt before the (sic) threw in the big rocks, so.
> Q: Do you know the last time you may have reported that?
> A: Times that I can verify, I would have to get my phone out to do that.
> Q: Okay. And who would you have reported that to?
> A: Robbie Collins and Tony Hamilton.

On cross-examination, Sizemore reiterated he "reported often times that the loader man was hurting me."

At the final hearing, the notice issue was revisited:

> Q: Did you ever talk to any of your bosses about them dumping those rocks on you?
> A: Several times, and even the safety man.
> Q: And, what was the safety man's name?
> A: John Gregory.

Later during the final hearing, when again asked if he provided notice of any injury before he left work on April 11, 2011, Sizemore responded he had not. Also, on re-direct, Sizemore restated he had "several" conversations with Tony Hamilton, Robbie Combs, and John Gregory about

the rocks being “dumped” too hard. He did not provide a specific date or time of these conversations.

Thus, the ALJ mischaracterized the evidence by stating Sizemore provided notice to John Gregory of his injury on April 2, 2012. In fact, Sizemore never provided the dates he spoke to Gregory, and his conversations were generally about the force of the dumps into his truck. Sizemore twice denied informing anyone at T&T about his injury after April 2, 2012. Simply put, no reasonable inference can be drawn from Sizemore’s testimony that he had a conversation with John Gregory, on April 2, 2012, about a specific injury.

Upon review of all relevant portions of the record, we conclude, as a matter of law, Sizemore’s testimony does not satisfy the requirements of KRS 342.185 to notify the employer of a specific injury. We recognize no particular form of notice is required to satisfy the statutory directive prescribed in KRS 342.185. Harry M. Steven Co., Inc. v. Workers’ Compensation Board, 553 S.W.2d 852 (Ky. App. 1977). Nonetheless, Sizemore testified only as to generic conversations, occurring at unspecified times, with his supervisors about a general concern he harbored. Under no interpretation can these conversations

constitute notice of an actual accident or injury "after the happening thereof".

In its petition for reconsideration, T&T requested further findings of fact regarding the notice issue. When the ALJ amended his opinion to find an injury as a result of a single incident, it was incumbent upon him to revisit the notice issue. This is because the date on which the obligation to give notice is triggered can be different in cumulative trauma versus single incident trauma. For this reason, we vacate that portion of the ALJ's decision finding Sizemore gave timely notice. The ALJ must revisit the issue of notice on remand. Having concluded Sizemore's testimony is inadequate to establish he notified John Gregory of a work-related injury, the ALJ must determine whether notice was otherwise provided to T&T "as soon as practicable".

In its final argument, T&T challenges the award of PTD benefits, arguing the ALJ failed to make adequate findings of fact and the award is not supported by substantial evidence. We agree the ALJ has not provided sufficient analysis to permit meaningful appellate review, as requested by T&T in its petition for reconsideration.

Through citation to Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the ALJ

identified the applicable law and appropriate standards to declare a claimant is permanently totally disabled. He then explained:

> In this case, I considered the severity of Sizemore's injuries, his advanced age, his work history of hard physical labor over many years, his education, the testimony of the plaintiff and Dr. Hughes' medical opinions regarding the plaintiff's physical limitations and occupational disability. I note that Dr. Hughes states in his medical report that the plaintiff has permanent neck pain which has restricted some of his activities and that he should avoid situations which require repetitive twisting, flexion and extension of his cervical spine. Based on all of those factors, I make the factual determination that the plaintiff 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 make the factual determination that the plaintiff became permanently and totally disabled as of the date he last worked, which was April 11, 2012.

The deficiency of this analysis lies in the ALJ's failure to acknowledge or consider the significant evidence tending to support the conclusion Sizemore is not permanently totally disabled. In either the summary of the evidence or the analysis of PTD benefits, the ALJ does not acknowledge Sizemore's work history outside of truck driving. The ALJ generally references Sizemore's

testimony, but identifies no particular portions to support his conclusion. While Sizemore indicated he experienced pain at work after the initial onset of symptoms, he indicated he would be able to continue driving a truck if "I was getting treatment like I was before". He also has applied for several jobs as a truck driver since he was injured.

Additionally, the medical evidence in this case necessitates further analysis. While the ALJ recounted the restrictions imposed by Dr. Hughes, no connection is made between these restrictions and Sizemore's job requirements. In fact, both Dr. Hughes and Dr. Primm opined Sizemore retains the physical capacity to return to his pre-injury work. Furthermore, the ALJ incorrectly stated Dr. Hughes characterized Sizemore's neck pain as "permanent." This is not so; Dr. Hughes described Sizemore's neck pain as "on-going".

In short, we are unable to discern the basis of the ALJ's decision. KRS 342.0011(b), (11)(c) and (34) require the ALJ to make an *individualized* determination of what the worker is and is not able to do. The required analysis "necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors

interact." Ira A. Watson, 34 S.W.3d at 51. Given the nature of the evidence presented in this case, it is incumbent upon the ALJ to identify the portions of the claimant's testimony upon which he bases his opinion, and to explain his reasoning.

For the foregoing reasons, the August 30, 2013 Opinion and Order and the October 17, 2013 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff are hereby **AFFIRMED IN PART**, **VACATED IN PART** and **REMANDED**. On remand, the ALJ is directed to enter additional findings of fact with respect to the issue of timely notice and the award of PTD benefits.

ALL CONCUR.

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