Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 21, 2014

CLAIM NO. 201300210

TECO COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

LLOYD PENCE
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

* * * * * *

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

ALVEY, Chairman. Teco Coal Corporation ("Teco") seeks review of the opinion and award rendered September 9, 2013 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") awarding permanent partial disability ("PPD") benefits and medical benefits to Lloyd Pence ("Pence") for cumulative trauma injuries. Teco also seeks review of the

October 7, 2013 order denying its petition for reconsideration.

On appeal, Teco challenges the sufficiency of the evidence supporting the ALJ's finding of work-related cumulative trauma injuries. We vacate in part and remand for additional findings clarifying whether Pence sustained work-related injuries, the nature of the injuries, the body part or parts injured, and the manifestation date for each injury.

Pence filed a Form 101 on February 8, 2013 alleging cumulative trauma injuries to his "neck and back" on March 31, 2011 due to repetitive use while employed by Teco as a flowman/repairman. The Form 104 indicates Pence has worked as a flowman/repairman in the coal mining industry since 1973. He worked for Teco in this capacity from 2000 to March 31, 2011. In support of the Form 101, Pence filed the records of Dr. Chad Morgan, D.C., indicating he administered chiropractic treatment for low back and neck pain and stiffness from June to December 2012. Dr. Morgan diagnosed cervical subluxation, cervicalgia, lumbar subluxation and lumbago. In a January 4, 2012 medical questionnaire, Dr. Morgan indicated Pence's "back and hearing" issues were caused, either wholly or in

part, by his work and continuing his job duties would have adverse health consequences.

Pence simultaneously filed a Form 103 alleging he became disabled on March 31, 2011, due to occupational hearing loss while employed by Teco caused by his repetitive exposure to loud noise in the work place. By order dated April 9, 2013, the ALJ consolidated the cumulative trauma and occupational hearing loss claims.[1] We will only summarize evidence relevant to the injury claim since it is the only issue on appeal.

Pence testified by deposition on April 20, 2013 and at the hearing held July 24, 2013. Pence was born on March 18, 1945 and resides in Hazard, Kentucky. He completed the 11th grade. Other than maintaining a surface mining license, Pence has no specialized or vocational training. At the time of his deposition, Pence was sixty-eight years of age. Pence testified he has worked primarily as a flowman/repairman in the coal mining industry since 1973, and began working for Teco in 2000. He retired on March 31, 2011 and has not returned to work since. He stated he worked twelve hours a day, four days a week, earning $21.25 per hour.

[1] Pence also filed a coal workers' pneumoconiosis claim, which is currently held in abeyance.

Pence explained as a flowman, he cleaned the tipple, a large piece of equipment which transports and crushes large amounts of coal. Pence confirmed the tipple stood approximately one hundred feet tall and had various belt lines and screens upon which coal would be loaded and carried away. Pence cleaned the tipple where coal spilled, and if it was backed up, he had to shovel it back onto the vibrator.

As a repairman, Pence serviced various parts of the tipple, including pumps, vibrators, motors and belts. Pence testified he occasionally lifted heavy objects. He was occasionally required to crawl to reach parts needing repair or service.

At his deposition, Pence stated he has back pain and a herniated disc. He denied any other problems related to his work. However, Pence later stated he also has neck pain, but his biggest problem is in his low back. He stated he receives treatment from Dr. Morgan for both his low back and neck conditions. Pence has treated with his primary care physician, Dr. John Gilbert, for the past twenty-five years for various unrelated conditions, but not for his neck or back pain explaining “whenever my back was bothering me, I’d tough it out, wouldn’t go to a doctor with it.” Dr. Gilbert prescribes Naprosyn, but did not

clarify what problem it was prescribed to treat. Pence stated he began receiving chiropractic treatment from Dr. Morgan for neck and back pain approximately a year after he retired and continues to treat with him on a monthly basis. Dr. Morgan was the first provider to inform him his pain is work-related.

At the hearing, Pence testified he began experiencing neck and back problems eight to ten years ago, which has progressively worsened over time. He stated Dr. Gilbert, while not rendering treatment for his neck and back pain, has prescribed Naproxen for arthritis in his back along with other medications since at least 2011. Pence stated he treats with Dr. Morgan on a monthly basis for his neck and back pain. Dr. Morgan advised him he has a disc problem. On cross-examination, Pence confirmed he never received treatment from a physician for any pain complaints while he worked. Other than a discussion with Dr. Gilbert regarding his arthritis, Pence never treated for back pain prior to seeing Dr. Morgan who was recommended by his attorney.

Pence stated he retired on March 31, 2011 because "I just got until I couldn't go up and down the steps . . . like I need to." Prior to his retirement, he applied for an opening with Teco as a tipple operator which he stated

was a less physically demanding position, but he did not get the job. He retired because he was eligible for Social Security retirement benefits and due to his physical problems. Pence testified he left his job as flowman/ repairman at Teco because he could no longer perform his duties and cannot currently return to that position.

Teco filed the treatment records of Dr. Gilbert from Primary Care Centers of Eastern, Kentucky for his treatment rendered from May 2011 to April 2013. He saw Pence approximately three times a year for regular check-ups and medication refills for various unrelated conditions. In May 2011, Dr. Gilbert noted Pence's complaints of arthritis and a request for a refill of Naproxen. Dr. Gilbert continuously refilled the Naproxen prescription, although it is unclear from the records what condition it was prescribed to treat.

Teco filed the June 28, 2013 report of Dr. Daniel D. Primm, an orthopaedic surgeon. Pence reported a gradual onset of low back pain beginning approximately ten years earlier, and occasional mild neck pain, with no complaints of pain or numbness in his extremities. After reviewing the medical records and performing an examination, Dr. Primm diagnosed "mild age-related neck and back symptoms." He noted Pence's history and examination were unremarkable

in terms of revealing any significant pathology in his cervical or lumbar spine. His examination and MRI scan did not show any unusual findings for a person of his age group, regardless of his occupation. He found no evidence of a work-related condition, injury, or impairment, and disagreed with the opinions expressed by Dr. Jared Madden. Dr. Primm stated as follows regarding the allegation of a cumulative trauma injury:

> I can find absolutely no evidence of any type of cumulative injury or disorder produced by his work as a coal miner. In addition, there is no report in the medical literature that has found there is a significant increased incidence of these same symptoms in coal miners, compared to individuals across all occupations. Neck and back pain symptoms in his age group are basically ubiquitous, regardless of occupation and are felt to be due to the degenerative process, as well as being influenced by the patient's own genetics.

Teco submitted the July 8, 2013 report of Dr. John Vaughan, who noted Pence reported low back pain from gradual wear and tear due to his lifetime employment in the coal mining industry as a flowman/repairman. Dr. Vaughan noted Pence had no mid-back or neck complaints. After performing an examination and reviewing the medical records, Dr. Vaughan diagnosed chronic low back pain by

symptomatic history and stated "It would be fair to say that almost anybody at 68 years old would have some degenerative changes of his back due to wear-and-tear, so I think he most likely has lumbar spondylosis/degenerative changes." Dr. Vaughan declined to recommend surgical treatment or assign permanent restrictions, and assessed a 0% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides").

In support of his claim, Pence filed the March 29, 2013 Form 107 of Dr. Madden, D.O., who reviewed records and evaluated him on March 9, 2013. Dr. Madden noted Pence reported a history of musculoskeletal issues due to a thirty-eight year history of mining. He noted Pence's chief complaint is low back pain with episodic radicular symptoms, as well as neck and upper back pain, which has gradually worsened over the last fifteen years. He diagnosed cervical, thoracic and lumbar degenerative disc disease, chronic neck and back pain, chronic pain syndrome due to cumulative trauma, lumbar radiculopathy and spinal stenosis. Dr. Madden concluded Pence's injuries caused his complaints and found as follows:

> His current medical status was a direct result of his work history in the mines, with advanced degenerative

> changes in the lumbar spine and expected hearing loss issues. One may expect a certain amount of degenerative changes with age . . . but I believe that in Mr. Pence's case, his work environment led to accelerated loss of a permanent nature.

He later reiterated Pence's complaints are caused by the cumulative nature of recurrent and chronic trauma associated with his reported work environment. Under the explanation of casual relationship section, Dr. Madden stated as follows:

> Pence suffered a workplace trauma over the course of 38 years in the mining industry, resulting in low back pain with radiculopathy, neck and thoracic pain due to degenerative changes and significant hearing loss. His reported work environment and complaints are consistent with the abnormal findings on physical examination.

Dr. Madden recommended pain management, such as a minimally invasive lumbar decompression, pain pumps or spinal cord stimulators, as well as some form of chronic pain management. Pursuant to the most recent edition of the AMA Guides, Dr. Madden assessed an 8% impairment for the lumbar spine, a 5% impairment for the cervical spine, and a 5% impairment for the thoracic spine, yielding a combined 17% impairment rating. Dr. Madden stated Pence had attained maximum medical improvement at the time of the evaluation and had no prior active impairment.

Pence reported his job consisted of heavy manual labor, frequent heavy lifting of 80-100 pounds, bending, twisting, pushing, pulling, crouching/stooping, prolonged standing, climbing, and some heavy equipment operation. Dr. Madden opined Pence does not retain the physical capacity to return to the type of work performed at the time of injury. He restricted Pence from lifting over twenty pounds, and no twisting, pushing, pulling, crouching, stooping, prolonged sitting or standing, overhead work and repetitive hand/wrist motion. He stated Pence could do minimal bending and should be allowed to change positions frequently.

In the October 9, 2013 opinion and award, the ALJ summarized the medical and lay evidence. The ALJ found Teco failed to meet its burden of proving the existence of a pre-existing, active condition pursuant to Finley v. DBM Technologies, 217 S.W.3rd 261 (Ky. 2007). Under the heading "Work-Relatedness and Causation/Benefits Per KRS 342.730," the ALJ found as follows:

> 16. The Plaintiff presented as especially credible and sympathetic in this matter. He testified to the years of hard work that he has endured in the coal industry and the effect that it has had on his body. He also credibly testified to his desire to continue working if that were possible and to

> his inability to do so because of his work injures.
>
> 17. The Plaintiff's testimony is supported by the medical opinion of Dr. Madden who opines that the Plaintiff has suffered a 17% whole person impairment related to his work activities over the last 38 years and that he is unable to return to the same type of employment.
>
> 18. The ALJ therefore finds based upon the credible testimony of the Plaintiff and the supporting medical evidence that the Plaintiff has suffered a 17% whole person impairment and that he is unable to return to the same type of employment.

The ALJ awarded PPD benefits based upon a 17% impairment rating, increased by the 3.8 multiplier, and medical benefits for his "work-related injury and hearing loss." Teco filed a petition for reconsideration, requesting the ALJ reconsider his reliance upon Dr. Madden's assessment of impairment and/or requested additional findings of fact as to why he did not find Drs. Vaughan or Primm more persuasive. In the October 7, 2013 order denying Teco's petition, the ALJ stated as follows:

> 1. The ALJ reiterates the finding that the Plaintiff presented as especially credible in recounting his 30 years of hard labor in and around the coal mines.
>
> 2. The ALJ further finds that the Plaintiff was credible in his testimony that he was physically unable to

> continue the hard physical labor in which he had been consistently engaged.
>
> 3. The ALJ also reiterates the finding that Dr. Madden was credible and reliable in providing the impairment rating relied upon.

On appeal, Teco argues substantial evidence does not support the ALJ's decision. It asserts the medical evidence does not support a finding age-related changes to the spine were a dormant degenerative condition proximately caused by work. It points out Pence did not produce evidence establishing degenerative disc disease is a common characteristic among coal miners or that they have more instances of the disease than the general population. Teco asserted Dr. Madden's finding of work-relatedness is plagued with deficiencies of proof and the ALJ erred in accepting his conclusory finding "over the contrary opinions from physicians'[sic] trained and licensed to diagnose and treat orthopedic injuries." Teco attacked Dr. Madden's qualifications stating he "is not medically competent to conduct this type of examination and thereafter render 'expert' medical opinions on causation that are outside his area of practice and expertise as a Family practice physician." Teco also argues the ALJ did not sufficiently summarize the conflicting evidence,

permissibly weigh the evidence to make findings of fact and inferences, and reasonably determine the legal significance of those findings. Therefore, the opinion contains insufficient findings of fact to permit meaningful review. Teco argues the ALJ should have relied upon the opinions of Drs. Primm and Vaughan.

As the claimant in a workers' compensation proceeding, Pence had the burden of proving each of the essential elements of his cause of action, including the extent of his occupational disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful, the question on appeal is whether substantial evidence supports 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 rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). An ALJ may reject, 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

With that said, the ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining

Co., supra. This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the claim was remanded to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

Although the ALJ clearly infers Pence sustained some type of work-related injury during the course of his employment, he is unclear as to the scope of the injury. In the opinion, the ALJ concluded Pence has "suffered a 17% whole person impairment and that he is unable to return to the same type of employment." In reaching this conclusion, the ALJ relied upon Pence's testimony regarding the years of hard work he has endured in the coal industry, the resulting effects of his work on his body, his desire to continue working if possible and his inability to do so due

to his work injures. The ALJ also relied upon the opinion of Dr. Madden who “opines that the Plaintiff has suffered a 17% whole person impairment related to his work activities over the last 38 years and that he is unable to return to the same type of employment.” Therefore, the ALJ awarded PPD benefits based upon the 17% impairment rating assessed by Dr. Madden and enhanced by the 3.8 multiplier, and medical benefits “for the cure and relief from the effects of the work-related injury and hearing loss.” In the order on reconsideration, the ALJ reiterated his reliance on Pence’s testimony and on Dr. Madden’s assessment of impairment.

Based upon the above-referenced limited findings of fact, we cannot discern whether the ALJ intended to adopt the entirety of Dr. Madden’s opinion or just portions of it. This is especially true in light of the conflicting evidence regarding the scope of injuries allegedly sustained by Pence due to cumulative trauma.

Pence initially testified at his deposition he only experiences back problems due to his employment in the coal mining industry. However, he later stated he also experiences neck pain and acknowledged he receives chiropractic treatment for both conditions. The chiropractic records of Dr. Morgan indicate Pence received

treatment for low back and neck pain and stiffness from June to December 2012. Dr. Primm diagnosed age-related neck and back symptoms and noted his examination of Pence's cervical or lumbar spine were unremarkable. He likewise found no evidence of a cumulative injury or disorder produced by his work as a coal miner. In the July 8, 2013 report, Dr. Vaughan noted Pence only complained of low back pain. He diagnosed chronic low back pain due to Pence's age, which did not warrant an impairment rating. On the other hand, Dr. Madden noted Pence complained for low back, upper back and neck symptoms. He diagnosed cervical, thoracic and lumbar degenerative disc disease, chronic neck and back pain, chronic pain syndrome due to cumulative trauma, and lumbar radiculopathy most likely due to neuroforaminal and spinal stenosis. He also found Pence's current conditions stem from cumulative trauma due to his work in the mines. He assessed an impairment rating for the cervical, thoracic and lumbar spine, yielding a combined 17% impairment rating, although he made no specific finding Pence sustained a work-related injury or injuries.

Based upon the above-referenced evidence of record, the ALJ's findings are equivocal. Because the ALJ made no specific finding regarding the scope of Pence's

injury or injuries, we are unable to perform a meaningful review. Kentland Elkhorn Coal Corp. v. Yates, supra; Shileds v. Pittsburgh and Midway Coal Mining Co., supra. On remand, the ALJ is directed to make additional findings regarding the scope of Pence's injury or injuries, as defined by the Workers' Compensation Act. The ALJ must specify the injuries Pence sustained, and the causation for each. The ALJ must also specify what evidence in the record he relied upon in making such finding. Although neither party directly raised this issue, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

The ALJ determined Pence has suffered a 17% impairment rating, without specifically stating he sustained an injury or injuries. On remand, the ALJ must determine whether Pence sustained work-related injuries. If so, he must identify what was injured, and the manifestation date for each injury. We note a finding of a cumulative trauma injury is supported by the report of Dr. Madden and Pence's own testimony which constitute substantial evidence because an injured worker's credible testimony is probative of his ability to labor post-injury. *See* Hush v. Abrams, 584

S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

In the March 29, 2013 opinion, Dr. Madden concluded Pence's current medical status directly resulted from his work history in the mines. He later reiterated Pence's complaints are due to the cumulative nature of recurrent and chronic trauma associated with his reported work environment. Dr. Madden then opined as follows:

> Pence suffered a workplace trauma over the course of 38 years in the mining industry, resulting in low back pain with radiculopathy, neck and thoracic pain due to degenerative changes and significant hearing loss. His reported work environment and complaints are consistent with the abnormal findings on physical examination.

Pursuant to the AMA Guides, Dr. Madden assessed a 17% impairment rating. He concluded Pence does not retain the physical capacity to return to the type of work performed at the time of injury and he assigned permanent restrictions.

Teco's arguments on appeal merely point to conflicting evidence of Drs. Primm and Vaughan, which does not constitute an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., supra. The ALJ, as fact-finder, has full discretion to determine the physician or physicians upon which he relies. We acknowledge the

differing medical opinions in the record. However, if "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The fact there is contrary evidence in the record does not compel a different result.

We find Teco's argument attacking Dr. Madden's qualifications unpersuasive. The AMA Guides, at page 18 states, "impairment evaluations are performed by a licensed physician." The AMA Guides do not require impairment ratings to be assessed only by certain specialties of practice. We likewise find no provision in the AMA Guides stating causation may only be assessed by certain specialties of practice. KRS 342.0011(32) states the following:

> "Physician" means physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting within the scope of their license issued by the Commonwealth;

Teco does not contend Dr. Madden is not a licensed physician. Therefore, Dr. Madden was qualified to render an opinion regarding whether Pence sustained

cumulative trauma injuries due to lifetime employment in the coal mining industry. The fact Dr. Madden's specialty is not orthopedic medicine does not render his medical opinion unsubstantial; it merely goes to the weight of the evidence which the ALJ could freely consider.

Accordingly, the opinion and award rendered September 9, 2013 by Hon. Jonathan R. Weatherby, Administrative Law Judge, and the October 7, 2013 order denying Teco's petition for reconsideration are hereby **AFFIRMED IN PART** and **VACATED IN PART**. This matter is **REMANDED** for additional findings of fact and for entry of an amended opinion in accordance with the views expressed herein.

ALL CONCUR.

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