

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 13, 2015

CLAIM NO. 201400041

TECO COAL CORP./
PERRY COUNTY COAL CORP.

PETITIONER

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

GLEN JOSEPH
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING AND REMANDING**

* * * * *

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

ALVEY, Chairman. Teco Coal Corp/Perry County Coal Corp ("Teco") appeals from the Opinion and Award rendered August 26, 2014 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), awarding Glen Joseph ("Joseph") temporary total disability ("TTD") and permanent total disability ("PTD") benefits for work-related cumulative trauma. Teco

also seeks review of the October 2, 2014 order denying its petition for reconsideration.

On appeal, Teco argues substantial evidence does not support a finding of a work-related neck or back injury. It also argues the ALJ erred in awarding TTD benefits prior to the date of manifestation. For the reasons set forth below, we vacate the ALJ's decision and remand for additional findings.

Joseph filed a Form 101 on January 6, 2014 alleging injuries to his "neck, back, right upper extremity and sensory deficit" due to cumulative trauma manifesting on December 12, 2012. At the time of his injuries, Joseph was working for Teco as a roof bolter. Joseph's employment history indicates he has worked in the coal mining industry for thirty-five years.

Joseph testified by deposition on March 26, 2014 and at the hearing held June 27, 2014. Joseph was born on September 13, 1958 and resides in Yeaddiss, Kentucky. He completed the eleventh grade and has no specialized or vocational training. Joseph has worked in underground coal mining since 1980, operating a bolt machine, shuttle car, scoop, miner and bridge carrier. He began working for Teco in 2003, primarily as a roof bolter, but he also ran the scoop, ram car, miner and bridge carrier.

Joseph testified he began experiencing back problems while working for Teco in 2009, and sought medical treatment. He underwent a course of conservative treatment, including injections, physical therapy, and diagnostic studies. Joseph is unable to take pain medication due to an unrelated kidney condition. Most recently, Joseph underwent radio frequency treatments beginning in August 2013. Another physician recommended back surgery which Joseph declined since there was no guarantee it would completely resolve his symptoms. Despite his pain, Joseph continued his regular job without restriction or missing any work until December 12, 2012.

Joseph denied he sustained a specific traumatic back injury explaining, "It was just work, I mean, everyday work. And it got till I couldn't - - I couldn't hardly stand it." He agreed his back pain gradually worsened as he continued working for Teco. On December 12, 2012, he was assigned to setting timber, a task he normally did not do. Joseph had to carry, saw, and set timbers weighing up to two hundred pounds. Joseph testified his back simply gave out, stating "A lot of them we had to carry and it was coal about fifty - - about fifty-eight inches and I just - - I just couldn't handle it, and I went down." Joseph stated he experienced pain and a tingling sensation in his low back

radiating into both legs and feet. Joseph completed his shift and sought medical attention the next day. His treating physician restricted him from work, and Joseph has not returned to any employment since that time. Joseph testified he notified his supervisor on several occasions, including his last day of work, about his ongoing back problems.

Joseph also indicated he developed neck problems while working for Teco since he had to stay bent over the majority of the time due to the low height of the coal. He indicated he notices his neck symptoms more when he lies down at night.

Joseph testified he began experiencing numbness in his right hand and wrist in 2010 while working for Teco. He was ultimately diagnosed with carpal tunnel syndrome, and a release procedure was performed in January 2013. Since then, his numbness has resolved, but he still experiences weakness and lack of grip strength.

Joseph testified he did not experience any back problems prior to his employment with Teco. He indicated his position with Teco was the most physical job he has held because the coal was at a lower height, he had to set timber, and it involved daily heavy lifting while in a bent position.

After he stopped working on December 12, 2012, Joseph applied for and received short term disability ("STD") benefits funded by Teco. He also indicated he receives Social Security disability benefits. All bills for Joseph's medical treatment have been submitted to his personal health insurance.

In support of his claim, Joseph filed the reports of Dr. Robert Hoskins and David Muffly, as well as the January 28, 2013 x-rays of his cervical and lumbar spine. The cervical x-ray revealed disc space narrowing and osteophyte formation at C5-6 and C6-7 with probable neural foraminal encroachment related to osteophytes at C5-6. The lumbar x-ray demonstrated mild bilateral SI joint sclerosis, multilevel disc space narrowing and osteophyte formation particularly between L3-4 and L5-S1, and a mild chronic benign appearing wedge deformity of L1 with less than 10% loss of height.

Dr. Hoskins prepared a Form 107-I and an addendum both on October 4, 2013, after he evaluated Joseph on October 2, 2013. Dr. Hoskins noted Joseph complained of low back pain, stiffness and weakness, pain and paresthesia in his lower extremities, neck pain and stiffness, headaches and weakness of grip in his right hand with diminished sensation in his thumb, and multiple positional intolerances

and limitations. Joseph attributed his complaints to his thirty-five year work history in coal mining. Dr. Hoskins reviewed medical records, including diagnostic studies, and he performed an examination. Dr. Hoskins diagnosed Joseph with 1) cervical sprain/strain; 2) cephalgia; 3) C5-6 and C6-7 degenerative disc disease; 4) C6-7 central canal and bilateral foraminal stenosis-severe; 5) status-post right carpal tunnel release (January 2013) with residual median neuropathy at wrist-electrophysiologically and clinically verified; 6) history of electrophysiologically verified left median neuropathy at wrist, now asymptomatic; 7) lumbosacral sprain/strain; 8) left S1 radiculopathy; 9) multilevel lumbar disc bulging; 10) multilevel lumbar spondylosis; 11) left L2-3 central disc herniation; 12) L4-5 disc herniation; and 13) left L5-S1 neuroforaminal stenosis-severe.

Dr. Hoskins opined Joseph's injuries caused his complaints. In the absence of surgical intervention, Dr. Hoskins stated Joseph attained maximum medical improvement ("MMI") on October 2, 2013. Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Hoskins assessed a 19% impairment rating for the lumbar spine, 7% for the cervical spine and 11% to the right upper extremity, yielding a combined 33% impairment rating. Dr. Hoskins

opined Joseph does not retain the physical capacity to return to the type of work performed at the time of injury. He assigned multiple permanent restrictions and recommended ongoing pain management treatment. In addressing causation, Dr. Hoskins stated as follows:

Within a reasonable degree of medical probability, Mr. Joseph's impairments are secondary to cumulative trauma and repetitive strain associated with the physical job demands encountered over his approximately 35 years of employment in the coal-mining.

One might argue that Mr. Joseph's spinal condition is entirely due to the natural aging process. I have to disagree. His impairment is the result of the cumulative trauma encountered performing work in the coal-mining industry. The degenerative changes producing Mr. Joseph's impairments are considerably greater than would be expected of an average person aged fifty-five years. Mr. Joseph's degenerative changes were exacerbated by his job demands as a coal miner for approximately 35 years over which time he performed heavy labor and worked in awkward positions. His job required frequent forceful bending, extension and flexion of his lumbar spine and the frequent carrying of heavy objects. Such occupational demands involved the three main risk factors that contribute to the development of cumulative trauma disorders: Force, repetition, and awkward postures. Mr. Joseph's degenerative changes are primarily in his spine, localized to the parts of his body that received the greatest use during his performance of heavy manual labor tasks. The active and advanced nature of Mr. Joseph's

degenerative changes bears a direct correlation of his work activity.

It has long been accepted by medical science that occupations like mining with heavy physical demands increase degenerative changes. There is a wealth of literature in the field of occupational medicine relating advanced degenerative changes in the spine and joints to stresses imposed by work activity.

Dr. Hoskins referred to several medical publications supporting his conclusion of causation.

Dr. Muffly evaluated Joseph on May 1, 2014. After reviewing the medical records and performing an examination, stated as follows:

Marked lumbar stenosis at L4-5 and L5-S1 with radiculopathy associated with neurogenic claudication. He has multilevel advanced degenerative disc disease. The cervical spine has advanced cervical degenerative disc disease at C5-6 and C6-7. He has mild residual right carpal tunnel syndrome after release. These conditions are caused, in part, by cumulative trauma from his occupation.

Pursuant to the AMA Guides, Dr. Muffly assessed an 11% impairment rating to the lumbar spine, 5% impairment rating to the cervical spine, and a 1% impairment rating for residual carpal tunnel syndrome, yielding a combined 16% impairment rating. Dr. Muffly opined Joseph's impairment is "related in part to cumulative trauma disorder associated

with his occupation as an underground coalminer for 37 years." Dr. Muffly stated Joseph attained MMI on May 1, 2014. Dr. Muffly opined Joseph does not retain the physical capacity to return to the type of work he performed at the time of injury and assigned permanent restrictions.

Teco filed the reports of Dr. Ronald Burgess and Dr. Timothy Kriss. Dr. Burgess' March 13, 2014 report addressed Joseph's carpal tunnel syndrome only. After reviewing the medical records and performing an examination, Dr. Burgess stated Joseph is at MMI regarding his right upper extremity following the carpal tunnel release procedure. He assessed a 3% impairment rating pursuant to the AMA Guides for his right carpal tunnel, but declined to assign permanent restrictions. Dr. Burgess opined, based on the history of working as a roof bolter for ten years, the changes in Joseph's carpal tunnel are work-related.

In his May 7, 2014 report, Dr. Kriss noted Joseph reported developing gradual low back and bilateral leg pain, and intermittent electrical right arm pain due to his thirty-five year history as a roof bolter in the coal mining industry. After reviewing the medical record and performing an examination, Dr. Kriss opined Joseph's chronic low back pain "is a consequence of rather formidable osteoarthritis, degenerative disc disease, and spondylosis in the lumbar

spine. These naturally occurring degenerative processes are readily apparent at every lumbar level." Dr. Kriss opined Joseph's bilateral leg tingling complaints are due to symptomatic high-grade lumbar spinal stenosis, particularly at L4-5 and L5-S1. Like the chronic low back pain, Dr. Kriss opined the stenosis is a "direct consequence of long-standing osteoarthritis, degenerative disc disease, and spondylosis" Dr. Kriss stated Joseph also has peripheral neuropathy and is status-post right carpal tunnel release, with near-complete resolution.

Regarding Joseph's lumbar spine, Dr. Kriss stated he has not attained MMI since his symptomatic lumbar stenosis is treatable with surgical decompression. Whether or not Joseph undergoes the decompression surgery, Dr. Kriss would place him in the DRE category III. Therefore, pursuant to the AMA Guides, Dr. Kriss estimated his degree of impairment is in the 10%-13% range. Dr. Kriss assigned a 5% impairment rating for Joseph's cervical complaints.

Dr. Kriss opined Joseph's symptoms are not work-related. Dr. Kriss found the medical records contemporaneous with Joseph's employment with Teco devoid of any cumulative work-related onset of symptoms, work-related cumulative aggravation of symptoms or work-related cumulative injury. Rather, Dr. Kriss opined Joseph's

symptoms are due to the natural aging processes, present in all adult humans. In support of his conclusion of causation, Dr. Kriss cited to several scientific studies. He also critiqued the opinions of Drs. Hoskins and Muffly.

In the August 26, 2014 opinion, after determining Joseph provided due and timely notice of his alleged injuries, the ALJ stated as follows under subsection "Injury as Defined by the Act/Pre-existing Active Disability or Impairment Benefits Per KRS 342.730/Work-Relatedness and Causation:"

12. The Plaintiff has testified to his 35 years of work in the coal mines and that he worked the final ten years for the Defendant. The Plaintiff credibly testified that his work for the Defendant was the most physically demanding and that his problems gradually arose during his time there.

13. The Plaintiff has produced the medical opinion of Dr. Muffly who noted that the diagnostic imaging revealed multi-level degenerative disc disease with severe spinal stenosis at L4-5 and L5-S1 with marked foraminal narrowing on the left side. The MRIs and X-rays also showed disc space narrowing at C5-6 and C6-7 with neuroforaminal stenosis right greater than left. Dr. Muffly credibly concluded that the Plaintiff has sustained a cumulative trauma disorder associated with his occupation as a coal miner for 37 years.

14. Dr. Kriss has dismissed the opinions of Dr. Muffly as lacking a sufficient causal nexus to the

Plaintiff's work history. Dr. Kriss appears to be ignoring the Plaintiff's own explanation of the origin of his pain and difficulty. The objective medical evidence provided by Dr. Muffly as corroborated by the testimony of the Plaintiff, has convinced the ALJ that the Plaintiff has sustained an injury as defined by the Act.

15. The Plaintiff has also presented the medical opinion of Dr. Hoskins who has opined that the Plaintiff's degenerative changes are considerably greater than would be expected of an average person of his age. Dr. Hoskins credibly assessed a 33% whole person impairment, assessed significant restrictions and determined that the Plaintiff does not retain the ability to return to the same type of work. This opinion has convinced the ALJ and the ALJ consequently finds that the Plaintiff has suffered a 33% whole person impairment as a result of work related cumulative trauma suffered while in the employ of the Defendant and which became manifest as of the date of the examination by Dr. Hoskins on October 2, 2013. The ALJ also finds in accordance with the opinion (sic) of Dr. Hoskins that the Plaintiff reached maximum medical improvement as of that date.

The ALJ determined Joseph is permanently totally disabled. The ALJ found Teco entitled to a credit for the amount of STD benefits paid to Joseph after stating, "The Plaintiff has testified that he received short-term disability payments and the Defendant has produced evidence indicating that the short-term disability plan is entirely employer

funded." The ALJ awarded Joseph TTD benefits from December 12, 2012 through October 2, 2013, and PTD benefits commencing on October 3, 2013. As noted above, the ALJ awarded Teco a credit for STD benefits paid. He also awarded medical benefits for the cure and relief from the effects "of the work-related injury."

Teco filed a petition for reconsideration requesting the ALJ reconsider his finding of the occurrence of an injury as defined by KRS 342.0011(1). It generally stated the opinion contained insufficient findings of fact to permit meaningful review. Teco requested the ALJ reconsider the period of TTD benefits awarded stating they cannot be awarded prior to the manifestation date of October 3, 2013. Finally, Teco requested the ALJ to reconsider whether any portion of the PTD award should be carved out due to Joseph's non-work-related kidney condition. Finding no patent errors on the face of the award, the ALJ denied Teco's petition.

On appeal, Teco argues substantial evidence does not support a finding of a work-related injury to the back and neck. It asserts Joseph claims degenerative changes to his neck and back. In order to be compensable, the changes must be "brought into disabling reality" by Joseph's work activities. McNutt Construction v. Scott, 40 S.W.3d 854

(Ky. 2001). Teco asserts the medical evidence does not support a finding "that age related changes were a dormant degenerative condition, proximately caused by work, to bring them within the definition of an injury." Teco also challenges the ALJ's finding of causation, relying upon the opinion of Dr. Kriss.

Teco also argues the ALJ's award of TTD benefits is not in accordance with the law since he awarded benefits prior to the date of manifestation on October 2, 2013. Teco does not challenge the ALJ's determination Joseph's injuries manifested on October 2, 2013, the date of Dr. Hoskins' examination. It essentially argues "one cannot be disabled from an injury until it has occurred or 'manifested.'" Therefore, Teco argues Joseph is not entitled to any type of indemnity benefits, permanent or temporary, until after his manifestation date of October 2, 2013.

While it is clear the ALJ relied upon Dr. Hoskins' opinion in determining Joseph suffered work-related cumulative trauma warranting an impairment rating, he failed to first determine whether Joseph suffered an injury or injuries as defined by the Act. In the Form 101, and as evidenced by his testimony, Joseph clearly alleged injuries to at least three specific body parts: his low back, neck and right upper extremity. In turn, medical evidence was

submitted by each party addressing the alleged injuries and their causation. The parties identified both work-relatedness/causation and injury as defined by the Act as contested issues in the June 27, 2014 benefit review conference order and memorandum.

The finding by the ALJ that Joseph "has suffered a 33% whole person impairment as a result of work related cumulative trauma suffered while in the employ of the Defendant and which became manifest as of the date of the examination by Dr. Hoskins on October 2, 2013" only addresses causation, without first establishing an injury as defined by the Act. Stated another way, "cumulative trauma" only addresses causation, and does not in and by itself establish an "injury" as defined by the Act. Therefore, the award is vacated and remanded to the ALJ for additional findings addressing whether Joseph sustained an injury as defined by the Act regarding each of the body parts alleged by him. Once the ALJ makes a specific finding of whether Joseph sustained an injury or injuries as defined by the Act, he can then determine whether this resulted from cumulative trauma or are the natural aging process, and therefore not work-related, as argued by Teco.

We also vacate and remand for an analysis to support his award of TTD benefits. The August 26, 2014,

opinion is devoid of any discussion regarding Joseph's entitlement to TTD benefits. Rather, the ALJ simply awarded TTD benefits from December 12, 2012 through October 2, 2013. On remand, the ALJ is directed to determine whether Joseph is entitled to TTD benefits pursuant to applicable statutory and case law, and for what time periods, and render an award accordingly.

We reject Teco's argument the ALJ is precluded from finding Joseph entitled to period of TTD benefits prior to the date of manifestation. The date a cumulative trauma injury manifests is relevant for purposes of notice and statute of limitations, not for a determination of the date of onset of disability. A cumulative trauma injury "manifests" for purposes of notice and statute of limitations when the injury is diagnosed and a physician informs the claimant the injury is work-related. See e.g. Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). On the other hand, TTD is the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). See also W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004). The date of manifestation for notice and

statute of limitation purposes is not one and the same as the date when one is entitled to TTD benefits. American Printing House for the Blind ex rel Mutual Ins. Corp. of America v. Brown, 142 S.W.3d 145 (Ky. 2004).

This Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). The ALJ failed to perform a complete and proper analysis in determining Teco is entitled to a credit for STD benefits paid to Joseph. KRS 342.730(6) states as follows:

All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

KRS 342.730(6) requires a three-part analysis. In the case of either STD or long term disability benefits, the plan must be exclusively employer funded, it must extend income benefits for the same disability covered by workers' compensation, and it must not contain an internal offset provision for workers' compensation benefits. In this

instance, in the August 26, 2014 opinion, the ALJ stated as follows:

Credit for Short-Term Disability

19. The Plaintiff has testified that he received short-term disability payments and the Defendant has produced evidence indicating that the short-term disability plan is entirely employer funded. The Defendant shall therefore be entitled to a credit for the amount of short-term disability paid to the Plaintiff against the benefits awarded herein.

The ALJ only addressed the first prong of the statutory requirement, but did not address either the second or third elements required by the applicable statute. Therefore, that portion of the ALJ's decision is vacated and remanded to the ALJ with instructions to address each of the three requirements in determining whether Teco is entitled to a credit for STD benefits paid.

Accordingly, the August 26, 2014 Opinion and Award and the October 2, 2014 order on petition for reconsideration by Hon. Jonathan R. Weatherby, Administrative Law Judge, are **VACATED**. The claim is **REMANDED** to the ALJ for entry of an opinion in conformity with the views expressed herein.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

COUNSEL FOR PETITIONER:

HON SARAH K MCGUIRE
P O BOX 351
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT:

HON PHILLIP LEWIS
P O BOX 915
HYDEN, KY 41749

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601