

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 7, 2020

CLAIM NO. 201900871, 201900870 & 201900869

ALLIANCE COAL

PETITIONER

VS.

APPEAL FROM HON. RICHARD NEAL,
ADMINISTRATIVE LAW JUDGE

JOSEPH THOMPSON
and HON. RICHARD NEAL,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Alliance Coal (“Alliance”) seeks review of the February 4, 2020, Opinion, Award, and Order resolving Joseph Thompson’s (“Thompson”) claim for cumulative trauma injuries to his entire spine, left shoulder, and left knee allegedly

sustained while in the employ of Alliance.¹ The ALJ also resolved Thompson's claims for occupational hearing loss and coal workers' pneumoconiosis ("CWP"). Alliance also appeals from the March 21, 2020, Order overruling its petition for reconsideration and amending the date Thompson last worked for Alliance.

The ALJ found Thompson sustained work-related neck/cervical and lumbar cumulative trauma injuries and awarded income and medical benefits. The ALJ also found Thompson sustained occupational hearing loss based on the opinions of the university evaluator. Medical benefits were awarded for the worked-related hearing loss. All other claims were dismissed.

On appeal, Alliance charges the ALJ's award of income and medical benefits for cumulative trauma neck and lower back injuries is not based upon substantial evidence.

BACKGROUND

On July 18, 2019, Thompson filed a Form 101 alleging March 15, 2019, cumulative trauma injuries to his entire spine and left knee while in the employ of Alliance. Thompson attached a questionnaire completed by Dr. James Rushing as well as the documents generated during Dr. Rushing's April 24, 2019, examination. On that same date, Thompson also filed separate claims for work-related hearing loss and CWP. By Order dated August 29, 2019, all claims were consolidated. Thompson later amended his Form 101 to include an allegation of a left shoulder cumulative trauma injury. As the ALJ's decision concerning Thompson's claims for work-related CWP

¹ The decision reflects it was rendered February 4, 2019. This is incorrect since the claims were filed on July 18, 2019.

and hearing loss as well as the alleged injuries to the thoracic spine, left shoulder, and left knee are not relevant to Alliance's appeal, the evidence relating to those claims will not be addressed.

At his October 7, 2019, deposition, Thompson testified he is 62 years old and will be 63 in a few weeks. The record reveals Thompson's date birth is October 25, 1956. He possesses certifications in electrical, as a mine foreman, and a mine emergency technician. Thompson testified he last worked for Alliance on or near March 21, 2019.² The last six years he worked for Alliance was at Warrior Coal ("Warrior").³ He has not worked since March 2019. Thompson testified Elk Creek was the first Alliance owned company for which he worked. He worked at Elk Creek from 2005 to 2009. He was transferred from Elk Creek to River View where he worked from 2009 to 2013. He was then transferred from River View to Warrior where he worked from 2013 to 2019. His job at Warrior was project manager consisting entirely of underground construction work. Thompson testified he assisted with the planning as well as the work. Regarding his work at Warrior, Thompson provided the following:

Q: During the six years with Warrior, did you always do the same job?

A: Yes.

Q: What was it?

A: I was project manager, a lot of underground construction. Well, it was all underground construction work.

² The record reveals Thompson last worked for Alliance on March 19, 2019.

³ Although Alliance contended Warrior Coal was Thompson's employer and not Alliance, in his February 4, 2019, decision the ALJ found Alliance was Thompson's employer. Alliance does not contest that finding on appeal.

Q: What are you referring to when you say underground construction?

A: I was brought there to install slopes. The one seam of coal was working out, and they was going down to another seam. So we had to put some slopes in to be able to get down to that seam of coal. So a lot of rock mining, a lot of steel work, concrete work.

Q: Did you assist with both the plan and the work?

A: Yes.

Concerning the number of employees he supervised while working for Warrior, Thompson testified:

Q: How many men did you have working under you at Warrior?

A: It varied. There was times when I had three shifts of men. I would have a foreman on each shift, and then eight to ten men would be per shift. And then there's times when it would be just me and three other people.

Thompson estimated he completed approximately thirteen slopes while working for Alliance. His work at River View was comprised of opening up a new mine which entailed significant construction work. He denied reporting any injuries at Elk Creek, River View, and Warrior. Prior to working for Alliance, Thompson worked for Willow Lake in southern Illinois for approximately six months. Before working for Willow Lake, he worked for Pyro Mining in Kentucky. He obtained his foreman papers while working for Pyro Mining. He denied any previous injuries to his neck, upper and lower back, and left knee. Thompson saw a doctor in 2004 for back pain but did not recall being informed he had a work-related back problem.⁴ He

⁴ Thompson believes the doctor was located in Evansville, Indiana, but he could not remember the doctor's name.

believed the doctor prescribed medication because he was in significant pain. He did not undergo physical therapy or injections. Because the doctor discussed surgery, Thompson did not return to him. He has not seen a doctor for treatment of his back condition since then.

At the time of his deposition, Thompson was not under the care of a doctor for a medical condition and did not have a family doctor. He also denied undergoing treatment for work-related upper back problems and/or being advised he had such problems. A doctor has never advised him he has work-related neck problems, nor has he previously been treated for neck problems. Thompson is unable to turn his neck to either side very far without experiencing pain.

Thompson's lower back problems are more noticeable when walking and getting out of bed in the morning. He takes over-the-counter medication which he identified as Tylenol.

Thompson testified that since 1990 he has had a pool installation business. April, May, and June are the only months in 2019 that he participated in the pool business.

At the December 16, 2019, hearing, Thompson testified he worked for Alliance from 2005 to 2019. He worked in the coal mines for approximately 40 years. He provided the following concerning the various jobs he has performed in the mining industry:

Q: What has been some of the jobs you've done in the mining industry?

A: Maintenance, maintenance foreman, a lot of longwall work, longwall foreman, a longwall maintenance foreman, longwall coordinator, mine foreman.

Q: Well, now I understand a longwall miner is an underground mining device, correct?

A: Correct. It's all underground. Sir.

Q: And all of the 40 years was underground?

A: That's correct.

...

Q: Okay. Tell me what a maintenance person does to a longwall miner, kind of the physical requirements of it, what you're trying to accomplish and how you do it?

A: Well, longwall, it means you have what's called shields. You have like 140, 150 of them and they run off of hydraulics and have a lot of jacks that you would have to change out. And of course, I know you guys don't know mining but longwall is very cramped and a lot of dragging of heavy parts and trying to change parts out.

It's a lot of -- a lot of hard, heavy dragging and lifting. I mean, these -- these parts are several hundred pounds that you're dragging down and trying to change out during -- during the time that you're also running coal.

Q: And those parts are necessary to keep that longwall operation going, correct?

A: That's correct.

Q: So you try to keep the coal moving, even if you're working on equipment, correct?

A: Correct. Yeah, because you, you known, you have a shear that runs down a pan line and it may take 30 minutes. So if you try to change a part out, you can -- well, you may have 30 minutes to try to get it changed out before it gets back.

Thompson recounted the type of work he performed as a project manager for Alliance:

Q: Now when you were in those -- in that job with Alliance, did you have to use your back to lift a lot and be in different posterior positions as you worked?

A: Yes, sir. Sometimes it was low, you know, low cramped type places that you lifted heavy objects, dragging heavy objects.

Q: When you were working in a low coal environment that you're describing here today, do you frequently hit your head on the roof bolts and ribs and everything else?

A: Several times.

...

A: Sometimes you'd be in a hurry running because you've got a piece of equipment down. And you'd hit your head and it would literally knock you on the ground.

Q: Were you in all positions utilizing your body to accomplish these tasks?

A: Yes, sir.

Q: All right.

A: Yes, sir. A lot of the work was done, you know, on my knees because of the height.

Q: All right. Now, you have alleged that your back bothers you. Are you still having difficulty with your back?

A: Yes, sir.

Thompson primarily experiences back pain in the lower left side just above the belt line. He also has pain on the right side of the lumbar region which is not as severe. Sometimes his pain extends down his legs into his feet. His low back pain is constant. When he experiences severe back pain, he is unable to walk.

Thompson provided the following testimony regarding his neck problems:

Q: You also are asking the judge to find that you have a neck or cervical spine problem. What sort of problems are you experiencing in your neck?

A: Well there, when I go to turn my neck, you know, like I can just turn it a little bit and I start feeling pain. And that's in both directions, up and down. But then, it travels down my shoulder blades and just sometimes I'll lay in bed and it's just – it's just hard to go to sleep because – because it hurts so much.

Q: And is that pain again there all of the time or does it come and go?

A: It comes and goes.

Q: Do you experience discomfort in the neck every day, or is that a weekly occurrence, or how frequent would it be?

A: Well, if I turn my neck like someone's behind me, and says something and I go to turn my neck to – to try to hear them, you know, I have – I have a pain in my neck. So it's, you know, it's daily.

Thompson experiences sporadic daily neck pain. Tylenol is the only medication he takes for pain. Regarding his ability to return to his work at Alliance, he testified:

Q: Okay. Do you think you could go back today and do your job at Alliance fully and completely with the physical problems you've got?

A: Not – not fully, no, sir.

Thompson acknowledged his work at the longwall occurred while working for Pyro from 1983 to 2002. His work as a project manager at Warrior only pertained to slope construction. "Engineering" drew up plans for the slope and he worked with that department in implementing the slope. The average height of the coal when he was working for Warrior was approximately six feet. Thompson retired approximately one year after the last slope was completed. Thompson never came under a doctor's care while working for Warrior and after leaving Warrior.

Thompson testified he had a pool installation business which entailed the operation of a backhoe/excavator and a small tractor. Thompson did not operate the backhoe because he rented the backhoe with an operator supplied. He only operated the small tractor to move gravel.

Concerning the alleged cumulative trauma injuries, Thompson submitted Dr. John Gilbert's August 29, 2019, Form 107 report and Alliance submitted Dr. David Muffly's November 11, 2019, report.

In finding Thompson sustained cumulative trauma cervical and lumbar injuries, the ALJ provided, in relevant part, the following findings of fact and conclusions of law which are set forth *verbatim*:

The instant claim involves, in part, an alleged cumulative trauma injury to multiple body parts. In a cumulative trauma claim, the employer on the date of manifestation of impairment and disability is solely liable for the entirety of a claimant's cumulative trauma injuries, despite the fact prior employment may have contributed to those injuries. *Hale v. CDR Operations, Inc.*, 474 S.W.3d at 138 (Ky. 2015). In this claim, Alliance Coal was the Plaintiff's last employer on the date of manifestation and is, therefore, solely liable for the cumulative trauma injuries should they be found compensable. The ALJ notes that there is some level of discrepancies as to the Plaintiff's actual job duties for his last employer. The ALJ believes that the discrepancies partially stem from the somewhat interchangeable use of the parties of the terms Alliance Coal and Warrior Coal. The Plaintiff worked at the Warrior Coal mine during his approximate last six years of employment, and was apparently a Project Manager for the entirety of that time. However, he testified that he worked for Alliance Coal for his last 14 years of employment, and that period included work performed at the River View, Elk Creek, and Warrior Coal coalmines. Again, Alliance Coal is the named Defendant, and the Plaintiff testified that he worked for Alliance Coal for the last 14 years of his employment. As for his job duties at Alliance Coal, the

Plaintiff credibly testified that his job required use of his back to lift. He stated that he had to lift and drag heavy objects in confined places. He stated that he worked in a low coal environment, and would hit his head on roof bolts and ribs so hard with such force that it would knock him to the ground. He stated that he had to work with his body in various positions to accomplish his job tasks, and that a lot of his work was performed on his knees. While acknowledging some of the ambiguities in the record, the ALJ finds that the above statement by the Plaintiff is a credible description of the job that he performed by the Defendant, and that his job required the lifting and dragging of heavy equipment in confined spaces, as well as required him to work in multiple positions, often on his knees.

Concerning the Plaintiff's low back, this condition is clearly giving him the most difficulty at this time. The Plaintiff testified his low back pain is constant, and can range from a 4/10 to 10/10 in severity. He indicated his back pain makes it difficult for him to even get out of bed on some mornings. Dr. Gilbert, on examination of the Plaintiff's lumbar spine, found the Plaintiff had muscle spasms, tenderness, and limited range of motion. The Plaintiff also had a positive straight leg raising test on the left. Dr. Gilbert has opined the Plaintiff's lumbar degenerative joint disease with muscle spasm was secondary to cumulative trauma at work. Further, Dr. Rushing documented that the Plaintiff had diminished range of motion in lumbar flexion, lumbar extension, lateral flexion, and rotation. He diagnosed lumbar disc bulge, and opined that the condition was related to the Plaintiff's job activities. Even Dr. Muffly appeared to find on examination that the Plaintiff had a positive straight leg raising test at 80°, as well as tenderness of lumbar spine over the left posterior iliac crest. Given the totality of the circumstances, including the Plaintiff's credible testimony about his lumbar symptoms, the ALJ finds Dr. Gilbert to be most persuasive, and finds that the Plaintiff has met his burden of proof of a work-related cumulative trauma lumbar spine injury. The ALJ acknowledges that Dr. Gilbert, in discussing the Plaintiff's job duties, generally discusses the heavy manual labor that the Plaintiff has performed in the coalmines over last 40 years, and specifically mentioned the Plaintiff's primary work as a mechanic with heavy parts. However, it was

Dr. Gilbert's general belief that the Plaintiff was required to work with heavy parts, and this general assessment is consistent with the Plaintiff's credible testimony as to his job duties for the Defendant. As such, the ALJ finds Dr. Gilbert's opinion to be valid and reliable.

Concerning the Plaintiff's cervical spine, the Plaintiff continues to have neck pain when he rotates his head to the right and left. He also stated that the pain travels down his neck and into his shoulders. Further, while the pain is intermittent, it does occur on a daily basis, and the pain makes it difficult for him to fall asleep at night. Dr. Gilbert, on examination, found that the Plaintiff had tenderness, muscle spasm, and limited range of motion of the cervical spine. The Plaintiff also had a positive Spurling's test on the left (test for radiculopathy). Dr. Gilbert diagnosed the Plaintiff with degenerative disc disease with muscle spasm and radiculopathy secondary to cumulative trauma. Further, Dr. Rushing noted, on examination, that the Plaintiff had diminished range of motion with cervical extension, lateral flexion, and lateral rotation. He diagnosed the Plaintiff with cervical degenerative joint disease, and opined the condition was related to the Plaintiff's job activities. Dr. Muffly found the Plaintiff had tenderness at the posterior C5 area of the cervical spine, but no spasm. Again, given the totality of the circumstances, including the Plaintiff's credible testimony regarding his symptoms, the ALJ finds Dr. Gilbert to be most persuasive, and finds that the Plaintiff has met his burden of proof of a work-related cumulative trauma cervical spine injury.

Based on the report of Drs. Raleigh Jones and Abby Mattingly, the university evaluators, the ALJ found Thompson sustained work-related hearing loss. Since the doctors' assessed a 4% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") for the hearing loss, the ALJ only awarded medical benefits.

Relying upon the impairment ratings of Dr. Gilbert, the ALJ found Thompson retains an 8% impairment rating for the cumulative trauma lumbar spine

injury and an 8% impairment rating for the cumulative trauma cervical spine injury. The ALJ concluded Thompson is unable to perform the job he performed for Alliance because of his work injuries and enhanced his benefits pursuant to KRS 342.730(1)(c)1 and 3. The ALJ also concluded Thompson is not totally occupationally disabled. The ALJ awarded 425 weeks of permanent partial disability (“PPD”) benefits and medical benefits for both work injuries.

Alliance filed a petition for reconsideration raising a number of issues and requesting a plethora of additional findings of fact relating to the findings Thompson sustained work-related cumulative trauma neck and back injuries. The March 21, 2020, Order corrected the date Thompson last worked, and overruled the remainder of the petition for reconsideration. The ALJ’s additional findings are set forth *verbatim*:

The Defendant next asks for clarification regarding the named employer responsible for the payment of the hearing loss award. The named Defendant in this claim is Alliance Coal. The Defendant is correct that a motion was filed early on to amend the name of the Defendant to Warrior Coal; however, the motion was made prior to this ALJ being assigned the claim, it never entered his work queue, and the caption was never amended. Nevertheless, as inferred by the ALJ in his Opinion, and as agreed by the Defendant in the Petition, the Plaintiff has worked during the last fourteen years (from 2005 through 2019) for three affiliates of the Alliance Coal (Elk Creek, River View, and Warrior). In essence, he worked for Alliance at these facilities.

The Defendant has requested that the ALJ make additional findings of fact in the issues of manifestation date, injurious exposure, and proper employer relative to the claim for hearing loss, noting that the Plaintiff performed some work for his own business subsequent to his last date of employment with the Defendant. The ALJ agrees the Plaintiff worked after his employment with the

Defendant. Specifically, he worked a side business installing pools during the summer months. However, there is no persuasive evidence that this work caused any continued injurious exposure to the Plaintiff's hearing, and certainly no physician has given that opinion. The ALJ continues to find that the last injurious exposure was with the Defendant, and the manifestation date was his last day of work for the Defendant - March 15, 2019. Further, the ALJ finds that the Defendant was not aware that he sustained a work-related hearing loss until he was advised by his evaluating physician - then timely sent out a certified letter to the employer stating the same. Further, the Plaintiff filed his hearing loss claim within a couple of weeks of the hearing evaluator's opinion letter.

The Defendant has requested additional findings as to the Plaintiff's job duties for the Defendant. The Plaintiff was clear on direct examination at the Hearing about the job duties he had for the Defendant Alliance Coal. The Plaintiff's testimony did get somewhat blurred when he was asked about work performed at specific facilities such as Warrior. However, the Plaintiff specifically testified that his work for the Defendant Alliance, included the following:

Q. Now when you were in those -- in that job with Alliance, did you have to use your back to lift a lot and be in different posterior positions as you worked?

A. Yes, sir. Sometimes it was low, you know, low cramped type places that you lifted heavy objects, dragging heavy objects.

Q. When you were working in a low coal environment that you're describing here today, do you frequently hit your head on the roof bolts and ribs and everything else?

A. Several times.

WALTERS: Objection to the leading.

A. Sometimes you'd be in a hurry running because you've got a piece of equipment

down. And you'd hit your head and it would literally knock you on the ground.

Q. Were you in all positions utilizing your body to accomplish these tasks?

Yes, sir.

A. All right. A. Yes, sir.

Q. A lot of the work was done, you know, on my knees because of the height.

The ALJ found the Plaintiff to be a very credible witness. The ALJ specifically finds that the above testimony accurately reflects some of the job duties the Plaintiff performed for the Defendant Alliance. His job involved working in awkward positions and on his knees. He also had to lift, drag, and move heavy objects in cramped places. He was very specific in his testimony that he performed these job duties for Alliance. Clearly, the Plaintiff's job was very physically demanding at times. The Plaintiff might also have done very physical longwall work for other coalmines prior to his work for the Defendant, but the ALJ has not considered those job duties in reaching his conclusion that the Plaintiff sustained a cumulative trauma work-related injury while working for the Defendant Alliance. As such, the ALJ continues to find the Plaintiff's last injurious exposure was with the Defendant Alliance, and the manifestation date was his last day of work for the Defendant - March 15, 2019.

Concerning the basis for Dr. Gilbert's finding on causation, certainly his stated description of the Plaintiff's job duties could have been more detailed in his report. However, the ALJ finds that Dr. Gilbert had a sufficient understanding of the Plaintiff's job duties to render a reliable and persuasive opinion as to causation.

The Defendant has requested that the ALJ identify any evidence in the record that established the Plaintiff stuck his head on a roof bolt while working for the Defendant given the average coal height was 6 feet. Again, the ALJ notes that the Plaintiff credibly testified that he would hit his head on roof bolts and ribs so hard that it would knock him to the ground. The ALJ would note that the 6 foot

seems are the average, and infers from the testimony as a whole that the height of the coal would sometimes be greater than that distance, and would sometimes be less.

The Defendant referenced the Plaintiff's personal business through the Petition and requests various finding of fact regarding the impact of that business on the claim. The ALJ specifically finds there is no persuasive evidence that the Plaintiff's limited self-employment had any contribution to either his hearing loss or cumulative trauma injuries. The Plaintiff only did this side-job for a limited period over the summers. He specifically denied that he operated the backhoe that was sometimes used in the construction of the pools, and that he only operated a small tractor. Further, he also had a couple of teenagers help him perform some of the more physical tasks. The ALJ notes that no physician, even the Defendant's IME physician, has credibly opined that the limited pool work contributed in any way to the Plaintiff's current conditions.

Lastly, the Defendant raises several other issues that either have already be dealt with in the Opinion, amount to a re-argument of the case, or otherwise are not appropriate on a Petition for Reconsideration.

CONCLUSION

The Defendant's Petition for Reconsideration is sustained in part and overruled in part. The correct date that the Plaintiff last worked for the Defendant is March 15, 2019, not March 15, 2018, and the Opinion is amended to reflect that correction. All other issues are overruled.

Alliance timely filed a notice of appeal and the parties submitted briefs.

Because Alliance's brief was non-compliant and the Board concluded the parties should address the applicability of KRS 342.730(4), by order dated June 5, 2020, Alliance was granted twenty days to file a compliant brief and address the applicability of KRS 342.730(4). Thompson was granted twenty days to file a response brief. All briefs have been submitted.

In asserting the ALJ's findings of work-related cumulative trauma neck and back injuries are not supported by substantial evidence, Alliance contends Dr. Gilbert, upon whom the ALJ relied, possessed an inaccurate history regarding the nature of Thompson's job. It notes Dr. Gilbert believed Thompson worked as a mechanic dealing with heavy parts instead of realizing Thompson was a project manager. Thus, it argues Dr. Gilbert did not provide a causal relationship between his findings of cumulative trauma neck and back injuries and the nature of Thompson's work.

Alliance observes Dr. Gilbert found degenerative changes in Thompson's cervical and lumbar spine without the benefit of diagnostic testing. Consequently, it posits Dr. Gilbert was unable to determine whether the condition of Thompson's spine was more advanced than one would expect of an individual Thompson's age who had engaged in less strenuous work.

Alliance also notes Dr. Gilbert opined Thompson was suffering from radiculopathy due to the low back and neck conditions, neither of which was corroborated by another examination or testing. In Alliance's view, Thompson's testimony provides tenuous support for Dr. Gilbert's opinions. It maintains Dr. Gilbert's report does not provide support for his diagnosis of work-related injuries, as his opinions are based on subjective complaints. Alliance contends there is not one statement within Dr. Gilbert's report supporting a conclusion that but for his work, Thompson's physical examination would not be any different from an individual age 62 or 63. Alliance stresses as follows:

Standardized testing with Dr. Gilbert would presumably be his motion testing and a check for tenderness and

spasms, both of which are clearly general complaints/findings and in the absence of a date specific injury, insufficient to support a claim for cumulative trauma injury which requires a showing of findings in excess of what would otherwise be expected but for the work of the employee.

Alliance also argues Drs. Gilbert and Rushing did not provide evidence meeting the standard set forth in Haycraft v. Cohart Refractories Co., 544 S.W.2d 222 (Ky. 1976) supporting a finding of cumulative trauma neck and low back injuries. Alliance maintains Thompson did not have a chronic condition and there was no finding of an “acceleration of disk disease arising out of and in the course of employment.” It again stresses Dr. Gilbert’s diagnosis of spinal degenerative joint disease with spasm and radiculopathy is unsupported by diagnostic tests. It observes Thompson was never treated by a doctor for any of his complaints. That being the case, there is a lack of objective medical evidence supporting Dr. Gilbert’s diagnoses. Alliance suggests objective medical evidence establishing cumulative trauma injuries “must be shown by proof that has some level of difference as to non-cumulative trauma claims,” and “there must be an associated conclusion that the radiculopathy is sourced from a condition that can be reasonably determined from objective medical evidence, associated with the work performed.”

Finally, Alliance argues the award of income benefits is subject to KRS 342.730(4). Since Thompson will attain the age of seventy on October 25, 2026, and the 425-week award, unaltered, terminates on May 7, 2027, the award must be vacated and the claim remanded for “inclusion of the appropriate language of KRS 342.730(4).”

ANALYSIS

Thompson, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including establishing the existence of work-related cumulative trauma injuries. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Thompson 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).

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); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In contending substantial evidence does not support the findings of work-related injuries, Alliance focuses almost exclusively upon the inaccurate job description Dr. Gilbert recounted in his report and his failure to obtain diagnostic or imaging studies to support his findings upon examination. This argument has no merit. Notably, the ALJ specifically addressed Dr. Gilbert's statement that Thompson's job duties primarily involved work as a mechanic moving heavy parts. However, he chose to attribute more weight to the heavy manual labor Thompson performed for forty years in the coal mines as recounted to Dr. Gilbert by Thompson and corroborated by Thompson's "credible testimony as to his job duties for [Alliance]." The ALJ concluded Dr. Gilbert possessed a sufficient understanding of the nature of Thompson's job duties while working for Alliance and his previous employers in underground coal mines. We will not disturb the ALJ's conclusion Dr. Gilbert had a sufficiently reliable history of Thompson's work duties.

Similarly, we find no merit in Alliance's assertion that Dr. Gilbert did not establish a relationship between the neck and low back conditions and Thompson's work because his diagnosis was not confirmed by diagnostic testing. Alliance maintains that in the absence of such testing, Dr. Gilbert's findings based solely upon his physical examination cannot constitute substantial evidence. We reject that premise. In Gibbs v. Premier Scale Company/Indiana Scale Company, 50 S.W.3d 754, 762 (Ky. 2001), the Kentucky Supreme Court specifically addressed what constitutes objective medical evidence as set forth in KRS 342.0011(33) explaining as follows:

In view of the evidence which was presented in this particular case, a question has arisen concerning whether a harmful change must be, or is capable of being, documented by means of sophisticated diagnostic tools such as the x-ray, CAT scan, EEG, or MRI in order to be compensable. Contrary to what some have asserted we are not persuaded that it must. Furthermore, at least to some extent, we view that question as being off the mark. Likewise, we are not persuaded that a harmful change must be both directly observed and apparent on testing in order to be compensable as an injury.

...

We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrated the existence of symptoms of such a change. Furthermore, we know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods would not comply with the requirements of KRS 342.0011(1).

The above firmly demonstrates Dr. Gilbert's opinions were not required to be supported by diagnostic imaging. The relevant results of his physical examination

were as follows: "... muscle spasms, tenderness, limited range of motion in the cervicothoracic and lumbar spine. A positive Spurling's test to the left and positive straight leg raise test to the left." His diagnosis was "Spinal degenerative joint disease with spinal muscle spasms. Cervicolumbar radiculopathy." As outlined in Gibbs, Dr. Gilbert's personal observations and findings upon examination comprise objective medical evidence. Dr. Gilbert believed the work event as described to him was the cause of Thompson's impairment. Pursuant to the AMA Guides, Dr. Gilbert assessed an 8% impairment rating for each cumulative trauma work injury. Alliance's assertion to the contrary, Dr. Gilbert linked the cervical and lumbar impairment ratings to the work activities described to him. In explaining why he believed Thompson did not retain the physical capacity to return to the same type of work performed at the time of the injury, Dr. Gilbert stated, "His spinal pain, spinal muscle spasms, cervicolumbar radiculopathy and left greater than right knee and shoulder pain and weakness preclude that type of work." Dr. Gilbert recommended Thompson perform sedentary to light duty work only.

The opinions of Gilbert as set forth in his report, though succinct, qualify as substantial evidence supporting the ALJ's findings of lumbar and cervical cumulative trauma injuries. While the contrary opinions pertaining to causation expressed by Dr. Muffly may have been articulated in greater detail, such testimony represented nothing more than conflicting evidence compelling no particular outcome. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). Moreover, Dr. Gilbert's perceived misunderstanding as to the type of work performed by Thompson and his failure to obtain diagnostic testing in diagnosing work-related injuries relate to the weight and

credibility to be afforded his testimony, a matter to be decided exclusively by the ALJ. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Hence, we find no error in the ALJ's reliance upon Dr. Gilbert's opinions.

Alliance also argues Dr. Gilbert's opinions do not establish the presence of cumulative trauma injuries as defined by Haycraft v. Cohart Refractories Co., supra. Alliance insists that based on Haycraft, there is no objective method to resolve a cumulative trauma spine claim without the benefit of a radiograph. However, subsequent to Haycraft, the Kentucky legislature defined what constitutes cumulative trauma within the statutory definition of an injury set forth in KRS 342.0011(1) which reads, in relevant part, as follows:

“Injury” means 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.

Thus, Thompson was only required to prove his employment proximately caused a cumulative trauma producing a harmful change in the human organism evidenced by objective medical findings. Upon examination, Dr. Gilbert observed muscle spasm, tenderness, and limited range of motion in the cervical and lumbar spine. He noted there was a positive Spurling's test to the left and positive straight leg raise test to the left. Those findings constitute objective medical evidence as defined by the statute and Gibbs, supra, which amply support Dr. Gilbert's opinions Thompson sustained work-related cumulative trauma cervical and lumbar injuries. Thompson was not required to establish through diagnostic testing the presence of cumulative trauma injuries.

Thompson's testimony and description of the type of work he performed for Alliance as a project manager demonstrated his work entailed heavy manual labor in close quarters. Thus, we find no error in the ALJ's finding that the history set forth by Dr. Gilbert, aside from his statement Thompson had worked as a mechanic with heavy parts, demonstrates a sufficiently accurate understanding of Thompson's job duties supporting his opinions.

We are cognizant that Thompson had the burden of proving cumulative traumas to his neck and back. However, we note that in offering an opinion as to the presence of work-related neck and low back injuries, Dr. Muffly did not rely upon diagnostic imaging in opining Thompson did not sustain cumulative trauma neck and low back injuries. His report reflects he relied upon the November 11, 2019, imaging to establish the absence of left shoulder and left knee cumulative trauma injuries but did not identify in his report any imaging he may have obtained or reviewed in arriving at a diagnosis of the cervical and lumbar spine. Utilizing Alliance's standard, Dr. Muffly's opinion as to the presence of work-related neck and low back injuries would not be based on objective medical evidence.

Finally, Alliance complains there is no consistency in Thompson's complaints and no evidence his symptoms interfered with his work or private activities of building pools and traveling to Europe. The ALJ determines the significance of Thompson's symptoms and the significance of his physical activities. This Board has no authority to usurp the ALJ's fact-finding. The ALJ chose to give no weight to these activities in light of Thompson's forty-year work life. Within his discretion, the ALJ found Thompson to be a credible witness, and this Board has no authority to invade

his discretion. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb his determination that Thompson sustained work-related cervical and lumbar cumulative trauma injuries.

That said, we vacate the award of income benefits for 425 weeks. The changes to KRS 342.730(4) reflected in House Bill 2 became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) to provide as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), the ALJ should have applied KRS 342.730(4) as amended in 2018. There the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive application. Therefore, Thompson's award is governed by the limitations set forth in the amended statute.

Accordingly, the February 4, 2019, Opinion, Award, and Order and the March 21, 2020, Order overruling the petition for reconsideration finding Thompson sustained cervical/neck and lumbar injuries and the amount of PPD benefits awarded are **AFFIRMED**. The duration of the award is **VACATED**. This claim is **REMANDED** for entry of an award in conformity with KRS 342.730(4).

ALVEY, CHAIRMAN, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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