

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 26, 2018

CLAIM NO. 201701756 & 201602747

HOPKINS COUNTY COAL LLC

PETITIONER

VS.

APPEAL FROM HON. ROLAND CASE,  
ADMINISTRATIVE LAW JUDGE

CHARLES MICHAEL SYERS  
and HON. ROLAND CASE,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION & ORDER  
PLACING APPEAL IN ABEYANCE

\* \* \* \* \*

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

**STIVERS, Member.** Hopkins County Coal (“Hopkins County”) appeals from the June 4, 2018, Opinion, Award, and Order and the June 19, 2018, Order of Hon. Roland Case, Administrative Law Judge (“ALJ”).<sup>1</sup> The ALJ awarded Charles Michael Syers (“Syers”) permanent partial disability (“PPD”) benefits for his

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<sup>1</sup> It appears Hopkins County is a subsidiary of Alliance Coal, and most pleadings in the litigation name Alliance Coal as the defendant/employer and not Hopkins County.

cumulative trauma lumbar injury claim, retraining incentive (“RIB”) benefits for his coal workers’ pneumoconiosis claim, and medical benefits. The ALJ dismissed Syers’ work-related cumulative trauma injury claim with respect to his cervical spine and knees. Syers’ award was subject to the limitations set forth in KRS 342.730(4) “as amended in 1994,” and interest was assessed at the rate of 12% on all unpaid benefits due through June 28, 2017, and 6% on unpaid benefits due on or after June 29, 2017.

On appeal, Hopkins County asserts the ALJ erred by subjecting Syers’ PPD benefits to the 1994 version of KRS 342.730(4). Instead, the ALJ should have limited his benefits pursuant to the recently amended version of KRS 342.730(4). Hopkins County also asserts the ALJ should have assessed 6% interest on all past due benefits.

The Form 101 for Claim No. 2017-01756, filed October 13, 2017, alleges Syers sustained work-related cumulative trauma injuries to his knees, elbows, back, feet, and ankles on July 3, 2014.<sup>2</sup>

The Form 102 for Claim No. 2016-02747, filed December 12, 2016, alleges Syers sustained work-related coal workers’ pneumoconiosis, with a last date of exposure on July 3, 2014. By order dated July 2, 2017, the claims were consolidated.

In the March 28, 2018, Benefit Review Conference (“BRC”) Order and Memorandum, the following contested issues were listed: date of last exposure and physical capacity to return to the type of work performed at time of injury. Under

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<sup>2</sup> At the March 28, 2018, Hearing, in lieu of a separate motion to amend, Syers amended his Form 101 to include a work-related cumulative trauma injury to his neck and withdrew all injury claims except for back, neck, and bilateral knees.

“other contested matters” is the following: “KRS 342.732,” “parker [sic] decision,” and “HB 2.”

In the June 4, 2018, Opinion, Award, and Order, the ALJ set forth the following findings of fact and conclusions of law:

The issue of benefits under KRS 342.730 involves the determination of whether the plaintiff has a permanent disability and if so whether it is total or partial in nature. In this case the ALJ finds the plaintiff is not totally disabled. The plaintiff worked until he voluntarily retired. He is not under any treatment for any of his alleged conditions. He is obviously not totally disabled.

The plaintiff's disability must be considered partial in nature. This begins with the determination of the appropriate impairment rating under the AMA Guides. Jones v. Brash-Barry General Contractors, 189 SW3d 149 (Ky. App. 2006). In this case Dr. Madden assigned a 8% impairment to the cervical spine and 6% to the lumbar spine with an additional 7% for arthritis of the knees for a combined 19%% [sic] whole person impairment. Dr. Madden placed the plaintiff at maximum medical improvement as of February 3, 2018. Dr. Lyon opined the plaintiff has no permanent impairment resulting from cumulative trauma attributing his complaints to prior specific injuries occurring in 1999 and 2000 and indicated the plaintiff had long ago reached maximum medical improvement in regards to those injuries.

The ALJ is not persuaded that the plaintiff sustained cumulative trauma to his knees or cervical area. The plaintiff had a specific injury to the knee. The cervical condition was not listed in the original application or in Dr. Rushing's report. The ALJ adopts the opinion of Dr. Lyon that the plaintiff did not sustain cumulative trauma to the cervical spine or knees.

The ALJ finds the plaintiff to be a very credible witness who was obviously an excellent worker with a long work history. Consistent with the testimony of the plaintiff, the ALJ is persuaded by the opinion of Dr. Madden that the plaintiff sustained a 6% impairment to the lumbar area.

The ALJ has reviewed the medical records along with the arguments of the parties presented in their briefs as well as the AMA Guides. The ALJ feels the 6% is an adequate representation of the plaintiff's impairment based on the AMA Guides.

In this case the ALJ finds Dr. Madden correctly indicated the plaintiff would have 6% impairment which carries a multiplication factor of .85 for a 5.1% permanent partial disability under KRS 342.730(1)(b).

However, the analysis does not end there as the ALJ must also determine whether the provisions of KRS 342.730(1)(c)1 or 2 apply. Subparagraph one applies when the plaintiff lacks the physical capacity to return to the type of work he was performing at the time of his injury and has not returned to earning same or greater wages. If the plaintiff is earning same or greater wages a determination must be made as to whether the plaintiff will be able to continue doing so for the indefinite future. If employment is found to be not likely then the three multiplier would apply. See Fawbush vs Gwynn, 103 SW3d 5 (KY 2003).

In this particular case, the issue is whether or not the plaintiff retains the physical capacity to return to the type of work performed at the time of the plaintiff's injuries. The plaintiff worked until he voluntarily retired and is under no treatment for his alleged injuries. Therefore, the plaintiff will not be entitled to the three factor.

Therefore, based on the plaintiff's credible testimony corroborated by the opinion of Dr. Madden it is found the plaintiff will be entitled to 6% impairment rating multiplied by .85 multiplied by 1 multiplied by \$576.80 or the sum of \$294.168 for a period of 425 weeks. The appropriate award will be entered.

#### **COAL WORKER'S PNEUMOCONIOSIS CLAIM**

Although the report of Dr. Chavda is not entitled to presumptive weight pursuant to KRS 342.315(2) since it was not performed by a University Evaluator, the Administrative Law Judge finds the report of Dr. Chavda to be the most persuasive. Dr. Chavda was independently selected by the Commissioner of the Department of

Workers' Claims for his evaluation. Dr. Baker was selected by the plaintiff with Dr. Broudy selected by the employer.

The Administrative Law Judge has considered all of the evidence in accordance with Magic Coal v. Fox, 19 SW 3d 88 (Ky. 2000). The Administrative Law Judge chooses to rely on and is persuaded by the opinion of Dr. Chavda who was independently selected by the Commissioner of the Department of Workers' Claims and found the plaintiff suffers from coal workers' pneumoconiosis category 1/2 with no large opacities and no plural disease. Dr. Chavda opined the plaintiff has no pulmonary impairment resulting from inhalation of coal dust.

Pursuant to KRS 342.732(2), the Administrative Law Judge must use either the highest FVC value or highest FEV1 value determined from the totality of all such spirometric testing. See Watkins v. Ampak Mining Inc., 834 SW2d 699 (Ky App. 1992). Additionally, pursuant to Fields v. Carbon Coal Company, 920 SW2d 880 (Ky App. 1996), the Administrative Law Judge does not have the discretion to choose between pre-bronchodilator or post-bronchodilator testing, but must accept the highest. The Administrative Law Judge can rely on either the highest FVC or highest FEV1.

Pulmonary function studies from Dr. Broudy revealed pre-bronchodilator FVC functions of 103% of predicted values with FEV1 function of 100% of predicted value and post-bronchodilator FVC functions of 101% of predicted values with FEV1 function of 101% of predicted value. Pulmonary function studies from Dr. Chavda revealed pre-bronchodilator FVC functions of 104% of predicted values with FEV1 function of 111% of predicted value.

Therefore, consistent with the above, the Administrative Law Judge must accept the pre-bronchodilator study performed by Dr. Chavda indicating FVC function of 104% and a FEV1 function of 111% of predicted values. Dr. Chavda found the pulmonary impairment to be due to exposure to coal dust.

Since the plaintiff's FVC and FEV1 functions were greater than 80%, as found by Dr. Chavda and Dr.

Broudy the plaintiff will only be entitled to a RIB award pursuant to KRS 342.732. However, since the plaintiff was 63 years of age at the time of his last exposure, he does have the option pursuant to KRS 342.732(1)(a)7 to elect to receive, in lieu of Retraining Incentive Benefits, a 25% disability rating from the date of last exposure July 3, 2014 until age 65.

In its petition for reconsideration, Hopkins County contested the ALJ's calculation of PPD benefits and also asserted the same arguments it now makes on appeal. In the June 19, 2018, order, the ALJ corrected the award of PPD benefits, and overruled Hopkins County's petition for reconsideration concerning the interest rate issue. The ALJ failed to address Hopkins County's argument regarding applicability of House Bill 2. However, we note the ALJ's order ruling on the petition for reconsideration was entered prior to the effective date of House Bill 2, July 14, 2018.

In 2018, the Kentucky General Assembly passed House Bill 2 which, in part, amended KRS 342.730(4) so as to terminate income benefits "as of the date upon which the employee reached the age of seventy (70) or four (4) years after the employee's injury or last exposure, whichever last occurs." This bill was signed by the Governor in March 30, 2018, and became effective July 14, 2018.

The Kentucky Court of Appeals recently held in Lafarge Holcim v. James Swinford, Claim No. WC 2016-90245, 2018-CA-000414-WC (rendered September 7, 2018) (Designated To Be Published), that the limitations contained in this recently enacted version of KRS 342.730(4) do not have retroactive application. Since the retroactive effect of the newly enacted version of KRS 342.730(4) is one of the issues raised in this appeal and Lafarge Holcim v. James Swinford, *supra*, is not final;

**IT IS HEREBY ORDERED AND ADJUDGED** the above-styled appeal is removed from submission and **PLACED IN ABEYANCE** pending the finality of Lafarge Holcim v. James Swinford, supra. The parties shall file Status Reports within 120 days from the date of this Order. The time for the further filing of briefs is suspended. The parties shall notify this Board when a decision in Lafarge Holcim v. James Swinford, supra, is final.

ALL CONCUR.

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FRANKLIN A. STIVERS, MEMBER  
WORKERS' COMPENSATION BOARD

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