Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 22, 2021

CLAIM NO. 201901321, 201901223 & 201901221

RICHARD LANE PETITIONER

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

TENNCO ENERGY INC.[1]
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * * *

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

STIVERS, Member. Richard Lane ("Lane") seeks review of the September 28, 2020, Opinion and Order of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") dismissing his claims for cumulative trauma injuries, hearing loss, and coal workers' pneumoconiosis ("CWP") alleged to have arisen out of his

[1] The parties have spelled the name of the Respondent as Tennco and Tenneco throughout the claim. We will refer to the Respondent as Tennco herein as that is the spelling used in its brief to the Board.

employment with Tennco Energy Inc. ("Tennco"). Lane also appeals from the October 19, 2020, Order overruling his Petition for Reconsideration.

On appeal, Lane challenges the ALJ's dismissal of his CWP claim for failure to give due and timely notice. As this appeal pertains only to the dismissal of Lane's CWP claim, only the evidence and the ALJ's finding concerning the CWP claim will be addressed.

BACKGROUND

On October 4, 2019, Lane filed a claim for cumulative trauma injuries against Tennco listing the date of injury as January 21, 2019. On that same date, Lane filed a claim for work-related hearing loss against Tennco. Lane filed numerous documents with his claims including a July 11, 2019, letter from his attorney to Tennco advising he would be filing, on Lane's behalf, a claim for CWP, cumulative injuries due to wear and tear, and hearing loss sustained while employed by Tennco in the coal mines. By Order dated October 28, 2019, the ALJ consolidated the two claims.

On October 29, 2019, Lane filed the CWP claim. Among the documents attached are his work history and a PFT report of Dr. Aqeel Mandiwala setting forth his findings concerning Lane's FVC/FEV1. Lane also filed a "B" Reading Interpretation of Dr. Kathleen DePonte, a Board Certified Radiologist and NIOSH Certified B Reader, performed on September 11, 2019. Dr. DePonte read the x-ray as revealing a radiographic classification of category 3/2. She opined as follows: "classic diagnostic findings of severe simple and mild complicated coal workers' pneumoconiosis. CT may reveal other large opacities obscured by the high

profusion." Lane also attached the July 11, 2019, letter from his attorney advising Tennco of the intent to file three workers' compensation claims.

Lane testified at a November 19, 2019, deposition and at the July 30, 2020, hearing. At the time of his deposition, Lane was 53-years-old and was last employed by Tennco.[2] He is a high school graduate.

Lane testified he last worked for Tennco on January 21, 2019, as a shuttle car operator in an underground coal mine, and he worked for Tennco approximately ten years. At the time he quit, Lane had worked from 3:00 a.m. to 3:00 p.m. six days a week earning $21.00 an hour, and he worked approximately 70 hours a week. Lane testified that except for the period from 2003 to 2005 when he hauled mail from London to Lexington twice a day, he continuously worked in the coal mining industry from 1984 through January 21, 2019.[3] As of January 21, 2019, Lane possessed an underground mining certificate, foreman's papers, and a Medical Emergency Technician (MET) designation. He stopped working because of a mine fatality. He explained as follows:

> Q: What was the reason that you stopped working at that time?
>
> A: Well, we had a mining fatality.
>
> Q: Someone at Tenneco?
>
> A: Yes.
>
> Q: What type of accident was it?

[2] His birth date is July 6, 1966.

[3] Lane's 5-page Form 104 work history sets forth the employers for whom he worked from 1984 through January 21, 2019, and reveals he spent far more time working in the coal industry for Tennco than any other employer.

A: Jeff Slone got run over by a shuttle car.

Q: Were you involved in the accident?

A: Yes.

Q: Were you the operator?

A: Yes.

Q: So did you resign or were you terminated or specifically what was the reason that you stopped working?

A: Want me to tell him?

Mr. Morgan: Yeah.

A: Well, I don't know how to put this. Well, when I run over the guy, evidently I failed a drug test and they took all of my certifications away.

Q: Was that an MSHA investigation?

A: Yes, but the investigation was ruled that it wasn't my fault through the federal.

Q: Did you get interviewed by the investigators and cooperate with them?

A: Yes.

Q: Were you taken somewhere for that drug test?

A: Yes, I was took to Doctor Dahhan.

Q: How did you get there? Somebody from Tenneco or did you go on your own or how did you –

A: The inspector drove me.

Q: So the MSHA agency got the drug test and took some sort of action against you?

A: Yes.

Q: So without the certification you were not allowed by your employer to return to work?

A: Yeah, I was forced out.

Lane denied filing any previous workers' compensation claims.

At the hearing, the parties identified the following evidence upon which they relied.

> Mr. Morgan: … The CT scan of July 8, 2020 as interpreted by Dr. Westerfield, which is not the CWP examiner, but a different Dr. Dr. Westerfield. The PFTs dated May 30th, 2019 by Dr. Mandiwala, M-A-N-D-I-W-A-L-A, of Saint Joseph Hospital, which was attached to the Form 102 Application. The ILO Report dated September 11, 2019 as interpreted by Dr. De Ponte and which was attached to the Form 102 Application. The CT reports dated February 7th, 2020, as interpreted by Dr. De Ponte, which was filed via Notice of Filing of February 14, 2020. And, finally, the medical treatment of Dr. De Ponte regarding the use of CT scans for diagnosing Coal Workers' Pneumoconiosis, as well as the Notice Letters, which were also filed via LMS relative to notice to the employer.
>
> ...
>
> Mr. Lewis: … In the State Black Lung Claim, report of Dr. Jarboe, J-A-R-B-O-E, and report of Dr. Kendall, K-E-N-D-A-L-L, as records of the Kentucky Department of Workers' Claims and Mine Safety and Review Commission. …

Lane testified he has not worked since January 21, 2019. He worked 34 years in the coal industry, all of them underground. During this 34-year period, he was exposed to coal dust. Regarding the previous CWP claim he filed, Lane offered the following testimony:

> Q: Now, you've known you've had Coal Workers' Pneumoconiosis for a while; is that correct –
>
> A: (Interrupting) Yes.
>
> Q: -- Black Lung?

A: Yes.

Q: And I think you actually pursued a retraining incentive benefit claim years ago with the state of Kentucky, correct?

A: Yes.

Q: And so that claim was of record then, on record. And did you collect in that claim?

A: Yes.

…

Q: Now, the State department of Workers' Claims has a record on you of a previous State Black Lung Claim filing No. 2003-01409. Richard Lane vs. Simpson Mining. Did you file a previous State Black Lung Claim against a prior employer?

A: Yes, that was back in 2003.

Q: Yeah. And the case file states you were represented by counsel, Mr. Ronald Cox in Harlan?

A: Yes.

Q: And the settlement agreement states that you had some X-rays interpreted as positive for Black Lung Disease by Dr. Michael Alexander and Dr. Matthew Vuskovich. That's V-U-S-K-O-V-I-C-H. Do you remember those X-rays coming back?

A: Yes.

Q: And the settlement agreement also states that you had a May 7, 2004 Black Lung exam with Dr. Glen Baker, a pulmonary specialist in Corbin?

A: Yes.

Q: So you had those positive X-rays and that exam with Dr. Baker back in 2003 and 2004?

A: Yes.

Dr. B.T. Westerfield's December 5, 2019, report, generated as a result of a referral by the Commissioner of the Department of Workers' Claims, was introduced. Dr. Westerfield's opinions are as follows:

> 1. It is my opinion Mr. Richard Lane suffers from Simple Coal Workers' Pneumoconiosis at this time. Mr. Lane certainly has adequate history of exposure to coal mine dust to develop Black Lung and I interpret his chest x-ray as showing opacities in all lung fields at ILO Profusion Category 2/3.
>
> 2. Based on pulmonary function testing it is my opinion that Mr. Lane has no pulmonary impairment and no respiratory disability at this time. He should certainly have no additional exposure to coal mine dust.

Tennco introduced Dr. Thomas Jarboe's May 12, 2020, medical report in which he assessed a radiographic classification of category 2/2 and Dr. William Kendall's June 21, 2020, report in which he assessed a radiographic classification of category 2/3.

The Agreement as to Compensation entered into between Lane and Simpson Mining and approved by Hon. Kevin King, Administrative Law Judge, on December 22, 2004, was introduced by Tennco. That agreement reflects Lane had occupational dust exposure for approximately 18 or 19 years, and the last date of exposure was February 1, 2003. Five physicians assessed the following ILO classifications:

ILO Classification	Date of Report	Physician
1/1	06/07/2003	Alexander
0/0	12/02/2003	Jarboe

0/0	01/22/2004	Narra
1/0	01/14/2004	Baker
1/1	01/31/2004	Vuskovich

The May 7, 2004, FVC/FEV1 pulmonary function studies of Dr. Glen Baker revealed values of 103%/91%. Lane received a lump sum settlement of $12,500.00. The agreement reads, in relevant part, as follows:

> 1. This agreement represents a compromised settlement of all potential claims and defenses. In consideration of the payments set forth herein, this claim is to be settled and dismissed with prejudice against the Defendant/Employer. This agreement does not limit the Plaintiff's rights to payments by the Kentucky Coal Workers' Pneumoconiosis Fund. Under these terms, the settlement is final and neither the Plaintiff nor the Defendant retain any rights to reopen under KRS 342.125.
>
> 2. The Plaintiff is to receive a total lump sum payment of $12,500.00 from the Defendant/Employer. This section does not affect the Plaintiff's rights against the Kentucky Coal Workers' Pneumoconiosis Fund.
>
> a. $7,500.00 of this lump sum is consideration paid as full compensation for any and all disability claims of Plaintiff, including retraining incentive benefits, temporary total disability, permanent partial disability and permanent total disability benefits. This agreement is inclusive of Plaintiff's attorney fees.
>
> b. $1,000.00 of this lump sum represents full consideration for Plaintiff's waiver of all medical benefits and expenses in connection with this claim. This sum is deemed sufficient to pay those medicals which might otherwise be properly payable pursuant to KRS 342.020. The Plaintiff will be responsible for payment of all existing and future medical expenses otherwise payable under KRS 342.020. The Plaintiff

> waives and relinquishes entitlement to any additional payment for medical expenses in the future in connection with this claim.
>
> c. $1,000.00 of this lump sum represents full consideration for Plaintiff's waiver of his rights to reopen this claim under KRS 342.125.
>
> d. $3,000.00 of this lump sum represents full consideration for waiver by Plaintiff of entitlement to any vocation rehabilitation benefits related to this claim.

In dismissing Lane's CWP claim due to failure to provide due and timely notice, the ALJ entered the following findings:

> 21. KRS 342.316 (2)(a) provides that an employer be given notice of an occupational disease claim, "as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted such disease, or a diagnosis of such disease is first communicated to him, whichever shall first occur."
>
> 22. The Plaintiff admitted to a prior diagnosis of coal workers' pneumoconiosis in 2003 in his deposition and the notice filed as evidence herein is dated July 11, 2019.
>
> 23. The ALJ finds that this delay is not excusable and that notice was not given as soon as practicable per the statute. The ALJ thus finds that notice was not properly given for coal workers' pneumoconiosis. Accordingly, the Plaintiff's claim for benefits due to coal workers' pneumoconiosis must be **DISMISSED**.

Lane filed a Petition for Reconsideration making the same argument put forth on appeal and asserting he had given sufficient notice of contracting CWP. Finding no patent error, the ALJ summarily overruled the Petition for Reconsideration.

On appeal, Lane argues his 2003 claim against Simpson Mining revealed the early first stages of black lung with no pulmonary impairment. Lane

maintains there was no secret he had pursued a prior workers' compensation CWP claim. He observes that, at the time of hiring, Tennco could have inquired as to any existing heath or had Lane submit to a pre-employment physical which it chose not to do. Lane argues his obligation to provide notice to Tennco of contracting CWP did not arise until he was actually disabled.

Lane further argues that the fact he continued to work full-time with the same employer created a conclusive presumption of non-disability. Thus, Lane submits he provided sufficient notice of his CWP after his last date of employment. He argues Tennco's position that his claim is by barred by his failure to provide it with notice of his 2003 first-stage Retraining Incentive Benefits ("RIB") claim is without merit. Lane maintains he is not required to notify an employer of a first-stage condition which did not impair or disable him. Further, he points out that he was not working for Tennco in 2003 at the time of this diagnosis. Lane argues as follows:

> Here, Mr. Lane can meet the burden of showing that he had 'reasonable cause' for any arguable delay in giving Lone Mountain notice of his simple black lung diagnosis any sooner than he did, namely, because he was not working with Tennco at the time of his first diagnosis of black lung, but rather was working for Simpson Mining, and he did in fact give Tennco notice of his newly advanced black lung diagnosis approximately six months after his employment with Tennco ended. 'The nature of the injury is important on the question of notice in so far as it relates to the knowledge of the injured person of the extent of his injury.' *Marc Blackburn Brick Co. v. Yates*, 424 S.W.2d 814, 816 (Ky. 1968)(emphasis added). Thus, while Mr. Lane had indeed received a diagnosis of non-disabling, unimpaired first stage black lung in 2013, the **form** in which he received the information is important, which was through a 2013 RIB claim litigated several years

> before his employment with Tennco began. (Emphasis in original).

Lane notes that at the time he settled his RIB claim, no medical treatment or work precautions were required. Further, he asserts he was not experiencing a disability which kept him from working in the coal mines as he continued to work unrestricted until his work at Tennco ceased. We reverse and remand.

ANALYSIS

In Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001), the Kentucky Supreme Court explained that causation is a medical question and must be proved by expert medical testimony. An injured worker is neither required nor expected to self-diagnose the cause of a harmful change as being the result of gradual injury or repetitive trauma experienced at work as a prelude of the obligations required by KRS 342.185. Lane's previous filing of a CWP claim is irrelevant to the question of whether he gave due and timely notice in the case *sub judice*. Stated another way, whether Lane had CWP at the time the settlement agreement was approved on December 22, 2004, has no bearing on his right to assert a CWP claim against Tennco based on harmful exposure to CWP while in its employ.

KRS 342.316(4)(a) and (12) read, in relevant part, as follows:

> (4)(a) The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, whichever shall last occur; and if death results

> from the occupational disease within that period, unless a claim therefor be filed with the commissioner within three (3) years after the death; but that notice of claim shall be deemed waived in case of disability or death where the employer, or its insurance carrier, voluntarily makes payment therefor, or if the incurrence of the disease or the death of the employee and its cause was known to the employer. However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard, except that, in cases of radiation disease, asbestos-related disease, or a type of cancer specified in KRS 61.315(11)(b), a claim must be filed within twenty (20) years from the last injurious exposure to the occupational hazard.
>
> …
>
> (12) A concluded claim for benefits by reason of contraction of coal workers' pneumoconiosis in the severance or processing of coal shall bar any subsequent claim for benefits by reason of contraction of coal workers' pneumoconiosis, **unless there has occurred in the interim between the conclusion of the first claim and the filing of the second claim at least two (2) years of employment wherein the employee was continuously exposed to the hazards of the disease in the Commonwealth. (Emphasis added).**

KRS 342.316(12) permits Lane, without regard to his previous claim, to assert a separate claim once he incurred two years of additional employment where he was continuously exposed to CWP in the Commonwealth. Thus, as early as 2007 or 2008, Lane could have asserted a claim for CWP without regard to the claim he asserted against Simpson Mining. After working in the coal mines and being continuously exposed to the hazards of CWP for over 14 years, Lane certainly had the right to assert a claim against Tennco. Similarly, absent an inquiry from

Tennco, Lane had no obligation to advise Tennco he had previously filed a workers' compensation claim against Simpson Mining which he settled in 2004.

Moreover, we note there was never an adjudication in Claim 2003-01409 concluding Lane had any form of CWP. That fact aside, the ALJ's reliance upon Lane's previous claim in finding notice of CWP was not given as soon as practicable is erroneous.

Regarding notice, Lane's unrebutted testimony reveals he ceased working for Tennco because of the mine fatality. Lane offered no testimony suggesting that at the time he ceased working, he had symptoms reasonably sufficient to apprise him he had contracted CWP. Concerning his CWP symptoms, Lane testified at the hearing as follows:

> A: Oh, I'll have shortness of breath. I have to sit down sometimes just to catch my breath. You know, and as far as getting – I don't know how to say it here.
>
> Q: Take your time.
>
> A: I get really winded really quick as in walking and stuff. I have to stop and catch my breath and it – it takes a lot out of me.
>
> Q: Is there any treatment that you're able to take at this time for the Black Lung?
>
> A: I've been taking an inhaler, a rescue inhaler every day. And that's what I've been doing with that right now.
>
> Q: How frequently do you find yourself having to use a rescue inhaler?
>
> A: At least, once or twice a day.
>
> Q: Does that seem to provide you some relief?
>
> A: Yes.

However, later during the hearing, Lane testified:

> Q: Now, let's say during your last two years of employment at Tennco, were you on any restrictions in terms of ability to work for any doctor?
>
> A: No, not as I know of.
>
> Q: So you were doing full, unrestricted underground coal mine duty until January 21, 2019?
>
> A: Yes.

The records of Dr. Mandiwala attached to Lane's Form 101 do not demonstrate he exhibited pulmonary or respiratory disability. On June 5, 2019, Dr. Mandiwala wrote on the May 30 2019, PFT test results "normal spirometry." Dr. Mandiwala's reading is not commensurate with a diagnosis of CWP. The first interpretation by a B Reader indicating Lane had CWP is contained in the September 11, 2019, report of Dr. DePonte in which she interpreted the radiograph as revealing category 3/2 CWP. Before this diagnosis, on July 11, 2019, Lane's attorney provided Tennco notice that he would be filing a CWP claim. Because the first medical diagnosis of CWP occurred in September 2019, and Lane provided notice he was filing a CWP claim on July 11, 2019, approximately three months pre-dating Dr. DePonte's diagnosis, we conclude, as a matter of law, the notice provided by Lane was in compliance with the statute.

The Supreme Court's holding in American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004) is dispositive of this issue. While working for the American Printing House for the Blind, Brown began experiencing symptoms of carpal tunnel syndrome. Because she had previously suffered from this condition, she recognized the significance of her symptoms and reported her injury

to her employer prior to receiving a definitive diagnosis from a physician. The Supreme Court held the law did not prevent a claimant from reporting an injury before he/she receives a definitive diagnosis. However, Brown was not required to do so until she received that diagnosis.

KRS 342.316(2) requires the employee to give notice "as soon as practicable after the employee first experiences a distinct manifestation of occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has the disease or a diagnosis of the disease is first communicated to him or her, whichever shall first occur." In the case *sub judice*, Dr. Mandiwala's test results did not establish the presence of CWP. The first medical diagnosis of CWP occurred three months after Lane provided notice to Tennco of his CWP claim. Further, there was no testimony demonstrating that on January 21, 2019, or sometime shortly thereafter, Lane had experienced a distinct manifestation of CWP sufficient to apprise him he had contracted the disease. Thus, Lane complied with the statute by giving notice as soon as practicable.

Here, Lane continued to be exposed to coal dust in the underground coal mines from November 2005 until January 21, 2019. The medical evidence firmly demonstrates this additional exposure to coal dust resulted in Lane contracting CWP. Drs. Westerfield and Kendall placed Lane in category 2/3. Dr. Jarboe placed him in category 2/2, and Dr. DePonte placed him in category 3/2. All interpretations of the radiographs occurred after Lane's attorney had given notice of his CWP claim. We note the 2004 settlement agreement revealed no worse than a classification of 1/1. Thus, over the next 14 years, either Lane contracted CWP or it

had progressively worsened. In any event, KRS 342.316(12) permits the filing of Lane's claim irrespective of the outcome of his previous claim (2003-01409).

Also pertinent to the case at hand is Ann Taylor, Inc. v. McDowell, 2016-CA-001265-WC, rendered January 26, 2018, Designated Not To Be Published, in which the Kentucky Court of Appeals stated:

> Although it is mandatory that notice be given, Kentucky courts liberally construe the protections of the Workers' Compensation Act "in favor of the employee to effectuate [its] ... beneficent purposes[.]" *Marc Blackburn Brick Co.*, 424 S.W.2d at 816. "[T]he purpose of the notice requirement is not to create a technical barrier to meritorious claims[.]" *Smith v. Cardinal Const. Co.*, 13 S.W.3d 626, 629 (Ky. 2000). *See Bates & Rogers Const. Co. v. Allen*, 183 Ky. 815, 210 S.W. 467, 473 (1919) (interpreting "as soon as practicable" liberally to allow compensation for a meritorious claimant who "attempts to give the notice very shortly after he learns the nature and extent of his injury[.]")

Slip Op. at 7.

Moreover, concerning the workers' obligation to give notice of CWP, the Supreme Court's predecessor, the Kentucky Court of Appeals, held in Mary Helen Coal Corporation v. Chitwood, 351 S.W.2d 167, 168 (Ky. 1961) as follows:

> In view of the fact that the notice requirement of KRS 342.316(2) is 'notice of disability,' it necessarily follows that no notice need be given until the employee has a disability from an occupational disease. Consequently, this subsection in substance means that before such notice is required to be given by the employee to his employer the following conditions must concur: (1) The employee has a disability from an occupational disease which impairs his capacity to perform his work, and (2) the employee knows or should know by the exercise of reasonable care and diligence that he is suffering from the disease.

> The contention of appellant that appellee's failure to give it timely notice after he had first experienced some discomfort in breathing is unavailing because there was insufficient proof that appellee had sustained a disability from an occupational disease which impaired his capacity to perform his work prior to February 3, 1959. Hence, we conclude that the Workmen's Compensation Board was amply justified in determining that the notice which appellant received from appellee on April 7, 1959, satisfied the requirements of KRS 342.316(2).

Two years later, in Stephens Elkhorn Coal Company v. Tibbs, 374 S.W.2d 504, 505 (Ky. 1963), the Court of Appeals reinforced its holding stating as follows:

> Under the rule hereinbefore stated, the requirement of giving notice was conditioned on Tibbs' having 'a disability which impairs his capacity to perform his work.' The characteristics of the disease of silicosis, and its effects on employability, are such that it is difficult to say with any certainty when 'disability' arises. Without attempting to lay down a set of rules or standards for determining when disability from silicosis shall be considered to exist, we shall say that in our opinion practical realities require the conclusion that so long as the employee, after first acquiring knowledge that he has the disease, continues to be employed in full-time employment by the same employer, he cannot be considered to be disabled within the meaning of the notice statute. If according to the *employer's* standards, the workman has sufficient capacity to be continued in full-time employment, it would seem that in practicality he is not disabled, even though by the employee's subjective standards he is not able to work to full capacity. So the fact that Tibbs testified, in the instant case, that for several months he had been unable to do a full day's work, did not establish that he was disabled within the meaning of the notice statute.

In Blue Diamond Coal Co. v. Stepp, 445 S.W.2d 866, 868 (Ky. 1969), the former Court of Appeals, citing to Chitwood, held as follows:

> Of course we are dealing with occupational disability, which relates to the employee's capacity to perform his work. See Mary Helen Coal Corporation v. Chitwood, Ky., 351 S.W.2d 167. Where the employee continues in full-time employment by the same employer he cannot be considered to be disabled. See *Stephens Elkhorn Coal Company v. Tibbs, Ky., 374 S.W.2d 504.* The troublesome problem arises, as in this case, where the workman is in a period of unemployment when, or enters upon a period of unemployment after, he is diagnosed as having silicosis. At what time during that period may he be considered to have become disabled, i.e., developed an impairment of his capacity to work?
>
> We are persuaded that the workman should be deemed to be disabled from silicosis, for the purpose of notice requirements, when circumstances exist from which the workman realizes or reasonably should realize that his capacity to perform his work is impaired by reason of silicosis.

Here, the record establishes Lane left Tennco and underground coal mining because of a mine fatality and not because he realized or should have realized that his capacity to perform his work was impaired by CWP. Consequently, he was not required to give notice of having contracting CWP prior to his cessation of work at Tennco. Further, the record uncontrovertedly demonstrates Lane was not required to provide notice of CWP until receiving Dr. DePonte's diagnosis.

Finally, Caldwell v. Yocom, 574 S.W.2d 913, 914-916 (Ky. 1978) dealt with a factual situation similar to the case *sub judice*. The Court of Appeals set forth the following background:

> The arguments of the various parties can best be understood by reference to the following chronology of Caldwell's work/health history extracted from the record before the board:
>
> | | |
> |---|---|
> | 1959-1970 | Self-employed with Caldwell Coal Company digging, hauling and |

	selling "house coal."
late 1969 or 1970	Applied for federal Black Lung benefits (denied).
1970	Entered employ of Cumberland Coal, a strip mining company, driving a road grader.
c. 1972	Duties changed to those of a "flunkie" (hauling supplies, servicing equipment, night watchman).
c. 1972	Noticed shortness of breath.
1973	Reapplied for Black Lung benefits; diagnosed by Dr. Boyce Jones as stage 1/1q (1971 ILO classification) pneumoconiosis,and by Dr. Harold Bushey as stage 1/2q pneumoconiosis.
July 16, 1975	Awarded Black Lung benefits.
August 8, 1975	Left Cumberland's employ.
September 8, 1975	Notified employer of disability.
September 22, 1975	Caldwell filed claim.

In dismissing Caldwell's claim for disability resulting from an occupational disease, the board concluded that Caldwell failed to give notice "as soon as possible after his having a diagnosis of the disease communicated to him." The basis for this conclusion is not clear. The findings of fact are only a recapitulation of Caldwell's work/health history. They contain no finding designating the time when Caldwell first had a duty to inform his employer of his claim of occupational disease. The board indicated only that it believed Caldwell had been advised of his condition, first, by Dr. Smith Howard "at (the) time" of the initial Black Lung application "in 1970 or 1971," and again by Drs. Bushey and Jones on October 3, 1973. There is no finding specifying the time Caldwell became disabled.

The Court of Appeals held:

Although KRS 342.316[2][a] speaks in terms of a claimant's awareness that he has contracted an occupational disease, the obligation to give notice to the employer does not arise until the employee is in fact disabled. *Mary Helen Coal Corp. v. Chitwood, Ky., 351 S.W.2d 167 (1961)*; *Stephens Elkhorn Coal Corp. v. Tibbs, Ky., 374 S.W.2d 504 (1963)*. As a corollary to that rule, the continuation of the workman in full time employment by the same employer creates a conclusive presumption of nondisability. *Yocom v. Karst, Ky., 528 S.W.2d 697 (1975)*. Once there is a cessation of employment, the presumption of nondisability disappears. At that point in time, the question becomes whether circumstances exist from which the workman realizes or reasonably should realize that his capacity to work is impaired by reason of the disease. *Blue Diamond Coal Co. v. Stepp, Ky., 445 S.W.2d 866, 868 (1969)*.

…Because Caldwell was aware of the diagnosis of pneumoconiosis no later than 1973, the employer asserts that the board did not err in holding that his notice of claim was untimely. We disagree.

Because Caldwell was unemployed for a period of time in 1970, there was no presumption of nondisability at the time he commenced work for Cumberland Valley Coal Company. However, he was continuously employed by Cumberland Valley Coal Company for five years. During that period of time, he suffered further exposure to the hazards of pneumoconiosis. We conclude that there was a new presumption of nondisability which continued until Caldwell quit work on August 8, 1975. Because Caldwell gave notice of disability to his employer on September 8, 1975, the notice was timely. *Peabody Coal Co. v. Guthrie, Ky., 351 S.W.2d 168 (1961); Blue Diamond Coal Co. v. Blair, Ky., 445 S.W.2d 869 (1969)*.

Cumberland Valley Coal Company makes a persuasive argument that Caldwell was suffering from pneumoconiosis at the time it first employed him. The employer further argues that it is unfair to impose liability for compensation on it when Caldwell should have known he had the disease when first employed by Cumberland Valley. This argument ignores the fact that

> the legislature imposed the liability for compensation on the last employer in whose employment the workman was exposed to the hazards of the occupational disease. KRS 342.316(1) (a). The employer can protect itself by obtaining a comprehensive history of prior employment and health before determining to employ a workman. If a false history is given to obtain employment, the workman is barred from asserting his claim for disability from occupational disease. *Blanton v. Workmen's Compensation Board, Ky., 531 S.W.2d 518 (1975)*; KRS 342.316(9).

The above applies in the case *sub judice*. As long as Lane was working, the presumption of non-disability was present. The presumption disappeared when he stopped working after January 21, 2019. As previously pointed out, Lane did not stop working because of a perceived disability caused by CWP. Rather, he stopped working as part of a settlement with the Commonwealth of Kentucky.

Further, even though his spirometry test was normal, as reflected by the handwritten notation on the test results, Lane provided notice of his claim in July 2019. However, he was not diagnosed with CWP until Dr. DePonte read the radiograph on September 11, 2019. Thus, the ALJ erred in finding "notice was not properly given as soon as practicable per the statute."

Accordingly, the ALJ's findings concerning notice and the dismissal of Lane's CWP claim are **REVERSED**. This claim is **REMANDED** to the ALJ for a finding that Lane gave due and timely notice of his work-related CWP and a resolution of Lane's claim on the merits based upon the medical evidence in the record.

ALL CONCUR.

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