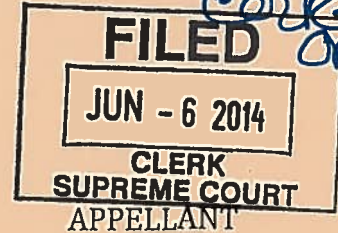


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
NO. 2014-SC-000062  
(COA NO. 2013-CA-001030-WC)



RONNIE HALE

Vs.

CDR OPERATIONS, INC.,  
WORKERS' COMPENSATION BOARD,  
And  
HON. WILLIAM J. RUDLOFF, ALJ

APPELLEES

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**AMICUS CURIAE BRIEF ON BEHALF OF THE KENTUCKY CHAPTER OF AMERICAN  
FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
(KENTUCKY AFL-CIO)**

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**CERTIFICATE**

This is to certify that on this 23rd day of May, 2014, the original and 9 copies hereof have been served by an express mail courier upon Susan Stokley Clary, Honorable Clerk of the Supreme Court of Kentucky, 209 Capital Building, 700 Capital Avenue, Frankfort, KY 40601-3488, and that on this same day true and accurate copies hereof have been served by U.S. mail upon Hon. Samuel P. Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY, 40601; Workers' Compensation Board, % Commissioner Dwight T. Lovan, Prevention Park, 657 Chamberlin Avenue, Frankfort, KY 40601; Hon. William J. Rudloff, ALJ, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, KY 40601; Hon. James B. Cooper & Hon. Guillermo A. Carlos, Boehl, Stopher & Graves, 444 West Second Street, Lexington, KY 40507 and Hon. McKinnley Morgan, 921 South Main Street, London, KY 40741.

Respectfully submitted,



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## **INTRODUCTION**

This could be the most important Supreme Court decision in years in the workers' compensation field. The Workers' Compensation Board (sometimes referred to as "WCB") in its decision below has promulgated a new prerequisite to the establishment of a claim for workers' compensation benefits for cumulative trauma. Cumulative trauma injuries are common and frequent. Further, the WCB has exceeded its statutory authority in suggesting a change in a longstanding well established law which would deny a worker injured by cumulative trauma benefits for the component of the injury apportioned to the cumulative trauma secondary to work for prior employers.

Because of the magnitude of this case, the Amicus Curiae requests that the Court schedule an oral argument and allow the Amicus Curiae to participate, as is commonly done in other tribunals, such as the U.S. Supreme Court.

## **STATEMENT OF THE CASE**

The KY AFL-CIO agrees with the statement of the case of appellant Ronnie Hale ("Hale"), but provides a supplement. Hale had performed coal heavy manual labor in the coal mines for 32 years (see WCB Opinion, p. 7), but had been employed by respondent CDR Operations, Inc. ("CDR") for less than three months from 11/11/12 until he was laid off on 02/07/12 for reasons unrelated to the work injury (see WCB Opinion, p. 25), as of which time Hale was found based on medical evidence to have suffered a cumulative trauma injury which had become manifest on 02/07/12 (see ALJ Opinion, p. 8). Hale had preexisting accidents and symptoms

in his injured back (see WCB Opinion, p. 16-17), but was found by the ALJ not to have had any preexisting active disability (see ALJ Opinion,, p. 11-12). The ALJ awarded Hale permanent and total disability benefits for which CDR was held responsible without any carve-out.

On appeal, motivated by an apparent disagreement with the factual conclusions of the ALJ based on the evidence, the WCB vacated and remanded for findings that the ALJ cite medical proof which established that Hale's work at CDR contributed "in some degree to the effects of his overall cumulative trauma injury and then, with specificity, denote to what degree it contributed" (see p. 26). The WCB cited the previous decision of this Supreme Court in Southern Kentucky Concrete Contractors, Inc. v. Campbell, 662 S.W.2d 221, 223 (Ky. App. 1983), which assigns responsibility for the preexisting dormant component of a cumulative trauma work injury to the Special Fund, which has now been abolished, suggesting that Hale might not be able to recover the portion of the indemnity benefits which would have been paid by the Special Fund in prior days. In affirming, the Court of Appeals suggested that Southern Kentucky Concrete Contractors, Inc. v. Campbell, Id. may be resurrected some 18 years after a statute was adopted and case law decided which render it no longer relevant. Other significant issues involved in the decision below will be discussed herein as space permits.

### **ARGUMENT**

In an apparent effort to find a way to protect a short term employer such as CDR from the entirety of liability for a cumulative trauma work injury, the WCB has

disregarded long established and well considered principles of law which have been developed by the Courts and the Legislature.

The point of departure is the decision of the Supreme Court in Haycraft v. Corhart Refractories, 544 S.W. 2d 222 (Ky., 1976), in which Justice Palmore, writing for the Court, interpreted the then new 1972 Legislative definition of the word injury as set out in former KRS 342.620(1) now repealed. Justice Palmore noted from the outset (Id. at p. 223) the "unusual importance" of the case. Justice Palmore discussed (Id. near top of p. 224) that under prior law it had been "... recognized that causation need not be localized in a single event. It is enough that the disability be fairly traceable, wholly or in part, to work", holding that:

"It has been observed many times that arthritic changes in the spine or a part of the normal aging process, or "wear and tear," which is common to the general public regardless of one's individual occupation. Nonetheless, just as constant exposure to the dust and dampness of underground coal mining is certain to increase the risk of emphysema and chronic bronchitis, so are the rigors of strenuous manual labor bound to hasten toward its breaking point the debilitating process of the degenerative spinal disc. We are therefore of the opinion that if it be found, or should be found, that the nature and duration of the work probably aggravated a degenerative disc condition to the degree that it culminated in an active physical impairment sooner than would have been the case had the work been less strenuous, to that extent the pre-existing condition is itself an injury as now defined in KRS 342.620(1)." Id. at 225.

The ruling in Haycraft v. Corhart Refractories, Id. was consistent with a decision by the Supreme Court just four years before in Yocum v. Jackson, 554 S.W.2d 891 (Ky., 1977), in which Justice Palmore held that when a preexisting condition which is not an occupational disease<sup>1</sup> becomes disabling, the employer

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<sup>1</sup> There are three types of claims for each of which the statute provides a separate set of rules. One is a traumatic injury claim, including cumulative trauma. The second is occupational disease and

through the agency and the work connects to the injury alone, which takes the man as it finds him, is liable.

At the time Haycraft v. Corhart Refractories, Id. was decided, KRS 342.120 provided that a special entity created by the workers' compensation statute, the Special Fund, was liable for the portion of the disability attributable to the arousal of a dormant, non-disabling condition brought into disabling reality by a subsequent compensable injury or occupational disease. In Southern Kentucky Concrete Contractors, Inc. v. Campbell, Id., the Court held that the Special Fund was liable pursuant to statute for the apportionment of the preexisting, dormant component of a cumulative trauma injury. This is consistent with the intent of Haycraft that the injured worker obtain a remedy which makes him whole.

The decisions in Haycraft v. Corhart Refractories, Id. and Southern Kentucky Concrete Contractors, Inc. v. Campbell, Id. are consistent with principles of law followed nationally. The leading workers' compensation treatise, Larson's, Workmen's Compensation Law § 95.20, recognizes that the carrier who is "on risk" when a disease condition results in disability will be assigned the liability. This rule is known as the "Last Injurious Exposure Rule" and has been adopted and followed in leading cases in other states in deciding the rights of workers who are subjected to prolonged exposure to conditions which result in disability at one moment {see Russo v. Despatch Shops, Inc., 280 A.D. 1008, 116 N.Y.S.2d 788 (1952) and Lumsden v. Despatch Shops, 5 A.D.2d 242, 171 N.Y.S.2d 189 (1958)}. This rule has been

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the third is a specific type of occupational disease, hearing loss, which is a specific type of occupational disease. Sometimes the right to pursue such claims overlap. As to all of these claims, case law has established that the last employer is to be held responsible for the entirety of the benefits for permanent injury.

adopted in Kentucky. In Gregory v. Peabody Coal Co., Ky. 355 S.W.2d 156 (1962), although a miner had been employed at a previous company for 30 years and at the present company for 25 days, the second company's carrier was held solely liable for his pneumoconiosis {see also Henry Vogt Machine Co. v. Quiggins, 596 S.W.2d 17 (Ky. App. 1979)}.

Even before the Special Fund was abolished by the 1996 workers' compensation statute, it has been held that when the Special Fund is not liable for a preexisting component of an injury, the last employer is liable. In Windchy v. Wray, 919 S.W.2d 534 (1996), it was held that "(w)hen a preexisting condition for which the Special Fund is not liable under KRS 342.120 becomes an active disability through the agency of a work connected injury the employer alone, which takes the trained employee as it finds (her)". The Windchy Court cited as authority Yocom v. Fayard, 515 S.W.2d 614 (1974) and Adams & Mulberry Corporation V. Milton Bolston, 487 S.W.2d 680 (1972).

During the time leading up to the adoption of the 1996 workers' compensation statute, and thereafter, a well reasoned structure and system for resolving cumulative trauma cases has evolved through the Courts and the Legislature, which applies to some extent to other types of work injuries. These established principles are discussed here, because of the potential impact thereon by the new Rule of Law promulgated below by the WCB.

In Alcan Foil Products v. Huff, 2 S.W3d 96 (Ky., 1999), it was held that a work related gradual injury becomes manifest, when a physician informs the worker of the injury and its cause, triggering the notice obligation and limitations period of the

workers' compensation statute. This remains true even though the worker has had symptoms of a degenerative condition developing over the years, but was not informed by a physician of the cause of his symptoms. Hill v. Sextet Mining Corp., 65 S.W. 3d 503 (Ky., 2001). When a worker continues to perform the same duties after an injury becomes manifest, impairment is compensable to the extent that it results from a trauma within two years before a claim is filed. The two year period provided for in KRS 342.185(1) operates both as a period of limitations and repose for gradual injuries and the claim may expire before the worker is aware of the injury. Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999). Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601, 605 (Ky. 2006). However, since the worker frequently becomes aware of the injury (i.e. the injury becomes manifest) before the statute of repose expires, the worker can recover benefits provided that the rule of last injurious exposure applies to the last employer.

Pursuant to the 1982 workers' compensation statute at KRS 342.730(b), objective standards promulgated by the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides") were established as the standard which is required to be applied for rendering awards for permanent indemnity benefits to an injured worker. This mandates the application of the objective standards developed by the AMA for determination of the extent of compensation to which an injured worker is entitled<sup>2</sup>.

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<sup>2</sup> This concept was carried forward into the 1996 Act at KRS 342.730(c) provided that the latest edition available of the AMA Guide applies. This was amended in the 2010 Act with a provision that the Fifth Edition of the AMA Guides and Second Edition of the AMA Psychiatric Guides are controlling.



Hale's injury is governed by a new statute adopted in 1996, which abolished the Special Fund (i.e. repealed KRS 342.120) and at this same time adopted a definition of injury which specifically includes cumulative trauma by stating:

"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. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury; {KRS 342.0011(1)} [emphasis added].

The Legislature is presumed to know the previous decisions of this Court and certainly should have been aware that this Court has held in cumulative trauma cases, that the cause of action accrues on the date the condition manifests disabling reality. See Alcan Foil Products v. Huff, Id. and Randall Co. v. Pendland, 770 S.w.2d 687 (Ky. App. 1988). The 1996 Legislature amended KRS 342.120, abolishing the liability of the Special Fund. Since the Legislature at the same time amended the definition of injury to specifically include cumulative trauma, the Legislative intent was not to leave an injured worker without recourse against prior employers.

Any question that the 1996 Act applied the Last Injurious Exposure Rule was clarified by the decision of this Court in McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 859 (Ky., 2001), holding that when work related trauma

causes a preexisting, dormant degenerative condition to become disabling and result in functional impairment is measured by the applicable Edition of the AMA Guide, the worker is entitled to indemnity benefits without excluding the portion for which the Special Fund had previously been liable. In McNutt, this Court continued the principle of law as established in Haycraft that a worker is entitled to a remedy for the entirety of the effects of cumulative trauma<sup>3</sup>.

In Coleman v Teco Coal Corp., Claim 05-01356 (2006), the then WCB reversed a workers' compensation ALJ who had strayed from this longstanding Rule of Law providing for an apportionment of all liability for a cumulative trauma injury to the last employer and in doing so stated (at about two pages from the end of its decision) that the general rule in cumulative trauma cases the last employer with whom a worker suffers a harmful change bears the liability for the entirety of the injury citing Hill v. Sextet Mining Corp. Id.; Alcan Foil Products v. Huff, Id.; Special Fund v. Clark, Id. The WCB held that "(w)here there is a gradual type of injury resulting from the nature of the actual work performed by the injured employee, regardless of the final timeframe of employment, it is the last employer who is liable for the entire award". In Coleman, the 2006 WCB stated that " ... prior to 1996, the argument of the employer had merit, as at that time the Special Fund shared liability with the last employer in those cases in which the apportionment provisions of KRS 342.120 were properly implicated. Since the 1996 amendments to the Act, the cases involving cumulative trauma, what was once the liability of the Special Fund now falls to the employer and who's employed the injured worker first experiences

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<sup>3</sup> Except when there is a prior active component of cumulative trauma, as discussed below.

manifestation of disability. It is the date of manifestation of disability, the date the employee discovers an injury has been sustained and learns from a physician that it is work related, that fixes respective rights and obligations of the party, including charge for the whole of the employee's disability up to and including that date", citing Brummitt v. Southeastern Kentucky Rehabilitation Industries, 156 S.W.3d 276, 279 (Ky. 2005).

In Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), it was held that when an injured employee has a prior active disability to which an AMA rating applies pursuant to KRS 342.730, the employer is not to be held responsible for the preexisting active component of the injury, but with the proviso that this is an affirmative defense for which the burden of proof falls on the employer. In following and applying Finley in the claim of Terry Parker v. Midwest Block & Brick, WCB No.: 2008-00398. COA No.: 2009-CA-000959-WC, the 2008 WCB reversed and remanded a decision of an ALJ dismissing a claim for cumulative trauma, instructing +that the ALJ on remand make the necessary findings per Finley.

Thus, the decision of the ALJ below, who was one of the counsel of record in Southern Kentucky Concrete Contractors, Inc. v. Campbell, Id., that the Last Injurious Exposure Rule applies, pursuant to which the last employer is to be assessed for the entirety of the effects of cumulative trauma (except for any preexisting active component for which the last employer meets the Finley burden of proof) is consistent with the practice of workers' compensation in all the years since Haycraft. For that reason, the experienced counsel for CDR did not challenge this legal conclusion as being an error at the ALJ level or on appeal.

There are other facets of the system which has been developed in workers' compensation over the decades which should be noted. A worker who establishes a temporary injury, as often happens, is entitled to recover from the employer medical benefits and TTD during the time the employee is off work. Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001). An employee who does not establish a right to recover indemnity benefits for a permanent injury may nevertheless be awarded benefits for future medical care. Calvin v. Lake Construction Co., 451 S.W.2d 159 (1970). When an employee suffers an injury while employed by one employer and is subsequently reinjured while working for another employer, the ALJ has discretion to render an award that the last employer is responsible for all of the medical expenses including even those caused by the first injury. Derr Construction Co. v. Bennett, Ky., 873 S. W. 2d 824, (1994).

The WCB sua sponte raised the issues on which it vacated and remanded the ALJ decision. In workers' compensation, as in civil cases, at least generally, appeals are to be decided based on issues preserved by making a request for essential findings pursuant to CR 54.02, which is incorporated into the workers' compensation system by Eaton Axle Corp v. Nally, Ky., 688 S.W.2d 334 (1985). Although KRS 342.285 allows the WCB to raise issues sua sponte, the WCB is not authorized in doing so to disregard controlling decisions made by the Supreme Court and statutes adopted by the Legislature.

In the decision below, the WCB has adopted as a new Rule of Law comprised of a vague and arbitrary standard inconsistent with the legal precedent discussed above and the mandates of the workers' compensation statute. Pursuant to this

standard, Hale must establish through evidence of record that "Hale's employment with CDR contributed to his overall permanent condition, producing some degree of harmful change to the human organism", and an amended Opinion and Order must be rendered by the ALJ citing "the medical proof which establishes that Hale's work at CDR contributed to some degree to the effects of his overall cumulative trauma injury and then with specificity, denote to what degree it contributed ... there must be evidence of records establishing Hale's work activity performed during his three months of employment at CDR contributed to his overall permanent condition, producing some degree of harmful change to the human organism".

Instead of the right to indemnity benefits being based and determined by the objective standard set out in the AMA Guides incorporated into the workers' compensation law pursuant to KRS 342.730, subject to the affirmative defense for the employer per Finley, Id., of a preexisting impairment, the employee now must prove something more. It will not be easy in many cases for the employee to jump this hurdle in any fashion not achieved below by Hale.

The new standard invites arbitrary and capricious decisions which are not to be made by an ALJ pursuant to Randy Bowerman v. Black Equipment Company, et al., 297 S.W.3d 858. The new arbitrary and capricious standard promulgated by the Board could make it difficult for an employee to recover established medical benefits and TTD benefits which employee has the right to recover according to the decisions in Robertson v. United Parcel Service, Id.; Calvin v. Lake Construction Co., Id. and Derr Construction Co. v. Bennett, Id.

The WCB does not have the authority to disregard the longstanding Rule of Law adopted by this Court nearly four decades ago in Haycraft v. Corhart Refractories, Id. and carried forward by the Legislature into the 1996 statute and its definitions of cumulative trauma and take away the right of the employee to recover for the dormant disabling component of a cumulative trauma injury. The WCB should follow the mandates of this Court in McNutt Construction/First General Services v. Scott, Id. and the other authority recognized by previous WCB's in Coleman v Teco Coal Corp., Id. and otherwise. Adoption of this rule would preclude the ALJ from obtaining benefits against all those employers prior for which the employee worked more than two years before filing a Form 101, because of the statute of repose set out at KRS 342.185(1).

Resurrection of the rule adopted in Southern Kentucky Concrete Contractors, Inc. v. Campbell, Id. at a time when the Special Fund was liable for the preexisting dormant component of cumulative trauma, could lead to decisions that an injured worker cannot recover benefits for an apportionment of the preexisting dormant component of cumulative trauma, and even injuries caused by individual incidents of trauma.

As Hale noted in his brief, the decision of the WCB is unworkable and impracticable for a number of reasons.

As Justice Leibson well articulated in a dissenting Opinion in Beale v. Stratton, Ky., 779 S.W.2d 201,203 (Ky., 1989), the Courts (as well as the WCB) "... must assume that the General Assembly knew what the statutory scheme was before it amended the statute, and that it intended the results of the changes it

made, not only the changes it made, and that the Court (as well as the WCB) are bound to defer to the wisdom of the Legislature and to the advisability of the policies enacted by the Legislature. These matters are not for the determination of the Courts (or the WCB). "We are therefore bound to effectuate that clearly expressed Legislative will".

This Court, under circumstances not applicable here, has a policy of deferring to the WCB in interpreting the workers' compensation laws. Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (1992). However, in Western Baptist Hospital v. Kelly, Id., the Court was presented with an argument that the WCB erred in concluding that the proof of a work related injury was uncontradicted and compelling. This is not a case in which the weight of evidence is at issue.

As recognized in Western Baptist Hospital. v. Kelly, Id., at page 687-688, there is a function for further review of the WCB by the Court where "... the Court perceives that the WCB has overlooked or misconstrued controlling statutes or precedent ..., so flagrant as to cause gross injustice. The function of further review in ... the Supreme Court ... is to address new or novel questions of statutory construction, or to reconsider precedent which appears necessary, or to review a question of constitutional magnitude". This is such a case.

The Appellate Courts have not hesitated in scrutinizing and reversing decisions by the WCB which involve the proper construction and application of statutes. Chrysalis House, Inc. v. Kenneth Tackett, et al., 283 S.W.3d 671 (Ky. 2009). In Wilson v. SKW Alloys, Inc., 893 S.W.2d 800, 801-802 (1995), this Court held that "the interpretation to be given a statute is a matter of law, and we are not required

to give deference to the decision of the WCB". The Court has reversed the WCB interpretation of statutes in cumulative trauma cases, including in the seminal case of Haycraft v. Corhart Refractories, Id., and other cases cited herein.

If the WCB can promulgate a new Rule of Law in this case, it can promulgate a new Rule of Law in other cases. The enactment of new laws is strictly within the province of the Legislature.

Considerations of space constrain the KY AFL-CIO from discussing its disagreement with the decision of the WCB reversing and remanding the decision of the ALJ based on substantial evidence regarding the manifestation date of the herein work injury and the agreement of the KY AFL-CIO with the decision of the WCB applying controlling precedent to dispose of the claim of the employer that Hale needed to produce objective evidence of a different nature than that which was produced, to obtain an award for his injury.

Respectfully submitted,



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