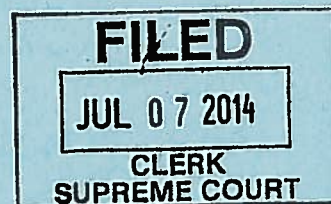


COMMONWEALTH OF KENTUCKY
SUPREME COURT
SC NO. 2014-SC-000062 and 2014-SC-000066



CDR OPERATIONS, INC.

APPELLEE/CROSS-
APPELLANT

V.

RONNIE HALE, HON. WILLIAM J. RUDLOFF and
WORKERS' COMPENSATION BOARD

APPELLANTS/CROSS-
APPELLEES

BRIEF OF CDR OPERATIONS, INC.

APPEAL OF COURT OF APPEALS
CA NO. 2013-CA-001030-WC
OPINION RENDERED JANUARY 31, 2014

Respectfully submitted by:

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CERTIFICATE OF SERVICE

Pursuant to CR 76.12(6) I hereby certify that a copy of the Brief for the Appellee/Cross-Appellant was served this the 7th day of July, 2014 by first-class mail, postage pre-paid, to Hon. William J. Rudloff, ALJ, Pushin Building, 400 East Main Street, Suite 300, Bowling Green, KY 42101; Hon. McKinnley Morgan, 921 South Main St., London, KY 40741; Workers' Compensation Board, Department of Workers' Claims, Prevention Park, 657 Chamberlin Ave., Frankfort, KY 40601 and the original and nine (9) copies hand delivered to the Clerk, Supreme Court of Kentucky, State Capitol, Room 235, Frankfort, Kentucky 40601.


COUNSEL FOR CDR OPERATIONS, INC

INTRODUCTION

This is a workers' compensation case in which the Appellee/Cross-Appellant, CDR, appeals from a decision of the Court of Appeals which affirmed the Opinion of the Workers' Compensation Board vacating and remanding an opinion of the Administrative Law Judge (ALJ) finding the Appellee, Ronnie Hale permanently and totally disabled. CDR had argued that the evidence did not support a finding of a cumulative injury as defined by KRS 342.0011(1) and KRS 342.0011(33) during Mr. Hale's employment from November 11, 2011 through February 7, 2014. The Workers' Compensation Board, found that the ALJ erred in determining that the date of manifestation of the cumulative trauma injury was the date that the Hale was laid off by CDR and in failing to analyze the claim as a cumulative trauma claim with multiple employers. As such, the Board vacated and remanded the claim to the ALJ for additional findings.

The Court of Appeals agreed that there was sufficient evidence from Dr. Madden to support the finding of a cumulative work injury during Mr. Hale's three months of employment and affirmed the Board's Opinion remanding the claim back to the ALJ for additional findings relating to the date of manifestation of injury and apportionment of liability for benefits.

CDR has appealed the determination of the Court of Appeals that the evidence was sufficient to support a finding of a cumulative injury during the period of the claimant's employment which was from November 11, 2011 through February 7, 2014.

Hale also appealed the determination of the Court of Appeals that CDR's liability for Hale's cumulative trauma award must be in proportion to the work performed while in its employment.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee/Cross-Appellant, CDR Operations, Inc., does not request an oral argument and believes that the issue may be adequately addressed by the parties in their respective briefs.

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STATEMENT OF THE CASE

By Opinion, Award and Order dated December 17, 2012, the ALJ found Ronnie Hale to be permanently and totally disabled as the result of a cumulative trauma injury which occurred over his over thirty (30) years of employment. Specifically, the ALJ determined that Mr. Hale "sustained cumulative trauma to his neck and back and also to both upper extremities and his left lower extremity as well as his right lower extremity as a result of working for a long period of time in the operation of heavy machinery and in the mines. (Opinion & Order, p. 7). CDR's Petition for Reconsideration was denied by the ALJ on the basis that it was merely a re-argument of the claim. The Board and the Court of Appeals determined that the evidence from Dr. Madden was sufficient to establish a cumulative injury occurred while Mr. Hale was employed from November 11, 2011 through February 7, 2012 as an equipment operator with CDR.

Mr. Hale's employment with CDR began on November 11, 2011 after which he continued to perform his regular and customary job duties operating a bulldozer until he was laid off on February 7, 2012. (Hale depo., 8, 9). He drew unemployment benefits and was applying for jobs, including jobs operating heavy equipment. (Id., 13, 14). When he first began working for CDR, he was taking Klonopin and Oxycodone or Percocet for his neck and back. (Id., 15). He had been in a few accidents and had been experiencing neck pain for about fifteen (15) years and low back pain since 2008. (Id., 19, 22). He had seen a physician for injections for his low back once or twice a year and received Tramadol and Percocet 5 for low

back pain prior to 2008. (Id., 27, 28). His upper, mid and low back had been hurting to some extent since a motorcycle accident in the mid 1990's. (Id., 29). He had to stop treatment after he was laid off by CDR as he no longer had health insurance (Id., 30). He sustained no specific injury while employed with the CDR. (Id., 32). The symptoms he has are the same he has experienced prior to his employment with CDR. (Id., 40). The medicine he had been taking prior to his employment with CDR had been helping but he had not been able to take his medication since his health insurance ran out. (Id.). After he was laid off, he did not seek out treatment by the chiropractor Ched Morgan, and was referred to him by his attorney. (Id., 31).

The evidence from Dr. Madden consisted of a Form 107 medical report and a deposition taken by counsel for the Appellant. Dr. Madden evaluated Mr. Hale on May 17, 2012, within approximately three months after Mr. Hale was laid off. History received from Mr. Hale was of cumulative trauma occurring over the course of 30 years working in heavy machinery operation and mining. Of note, Dr. Madden indicated that prior medical records indicated a gradual progression of increasing neck and back problems due to chronic degenerative changes from 2004 to 2012. (Madden Form 107, Section C). No diagnostic testing results were reviewed other than those which pre-dated Mr. Hales employment with CDR.

In addressing the causal relationship of Mr. Hale's conditions to his work with CDR, Dr. Madden in his Form 107 indicated "The patient's degenerative disc and joint disease, as well as the cervical disc herniation, are a direct result of repetitive, heavy lifting trauma on concrete. The patient's symptoms and available

diagnostics/treatment support a cumulative trauma scenario consistent with the reported workplace environment." (Id., Section I).

Dr. Madden was deposed on August 23, 2012. He agreed that Mr. Hale gave no history of any specific work-related injury. (Madden depo., 5). Dr. Madden could not recall whether he read a medical report dated March 22, 2010 in which Mr. Hale complained of chronic cervical pain and low back pain due to a fall off a bulldozer. (Id., 5, 6). Dr. Madden agreed that such history would be important in determining the cause of any back pain. Dr. Madden agreed that Mr. Hale had a fairly severe compression fracture as the result of a motor vehicle accident which predated his work with CDR and which resulted in ongoing back pain and pain management treatment. (Id., 7). Dr. Madden believed it fair to say that prior to November 2011, that Mr. Hale had an active condition in his lumbar spine which would have warranted an impairment rating. (Id., 8). He believed that the impairment he assessed to the cervical and lumbar spine based upon a history of the problems which Mr. Hale had, would have pre-dated November 11, 2011. (Id., 10). While Dr. Madden indicated that he received a history of Mr. Hale having epidural injections, he did not know when those were performed. (Id., 13). The fact that Mr. Hale had received epidural injections would mean that he had severe back pain. (Id., 14). While there was a history from Mr. Hale that he had a herniated cervical disc, he had no studies or reports to review and did not believe that Mr. Hale's operation of a bulldozer for CDR would have lead to that injury and probably pre-dated that employment. (Id., 15). It was Dr. Madden contention that the cervical problem was exacerbated by Mr. Hale's 30-year work history. He agreed that if a

CT scan taken before November 2011 showed cervical disc protrusions, that based upon same and the history of continuing neck pain, Mr. Hale would have had an impairment rating for his cervical spine prior to November 2011. (Id., 16). Dr. Madden testified that he was not sure if he had a specific employment history and if he had been advised that Mr. Hale's employment with CDR began in November 2011 and ended when he was laid off on February 7, 2012. Dr. Madden stated that the history was related to him as more of a 30-year history of construction and heavy equipment operation. (Id., 19). Dr. Madden, while aware that Mr. Hale took prescription medications, was not aware that Mr. Hale had taken Klonopin, Oxycodone, and/or Percocet for approximately a period of ten to fifteen years before November 2011 for back and cervical pain. (Id., 20). He agreed that had he seen Mr. Hale prior to November 2011, he would have placed the same physical restrictions on him as he now recommended. (Id., 21). Dr. Madden indicated that an acute injury causes tissue texture changes and stated that acute texture changes have a different feel than chronic texture changes. Acute texture changes develop into chronic texture changes within a three months of an acute injury. He felt Mr. Hale had chronic texture changes at the time he was evaluated but could only say that such changes had been present three or more months. (Id., 22-24). Dr. Madden was of the opinion that in most cases of cumulative trauma, where for no specific reason and no additional specific trauma, the human organism is unable to continue performing heavy manual labor. (Id., 27).

While in response to questioning by Mr. Hale's counsel, Dr. Madden testified that he believed that Mr. Hale would have had changes in human organism based

upon continued exposure to the forces of operating heavy equipment, he never identified or set forth what such changes were or what objective medical findings established or documented those changes. (Id., 25, 27). In fact, Dr. Madden admitted that he had no objective data in his possession or that he noted in his examination that would support the an objective change in the human organism. (Id., 28).

ARGUMENT

THE EVIDENCE FAILED TO ESTABLISH A CUMULATIVE INJURY BY OBJECTIVE MEDICAL FINDINGS

Appellee/Cross-Appellant, CDR, seeks review of the finding that the Appellee, Ronnie Hale, sustained a cumulative injury as defined by KRS 342.0011(1) and KRS 342.0011(33). CDR preserved such issue by having the issue listed at the BRC, filing a timely Petition for Reconsideration, filing its notice of appeal and brief before the Workers' Compensation Board, filing its Petition for Review before the Kentucky Court of Appeals and its timely filing of its notice of appeal to the Kentucky Supreme Court and payment of the filing fee. [See Appellate Court Record (AR), pp. 4-153; AR 180-181 and AR 182].

In order to find an injury, including cumulative trauma, KRS 342.0011(1), requires a harmful change in the human organism evidenced by objective medical findings. [KRS 342.0011(1)]. While the "harmful change" requirement need not be, nor capable of being, documented by objective diagnostic studies such as an x-ray, CT Scan, MRI or ultrasound, a physician's diagnosis of a work-related harmful change, must be evidenced by objective medical findings. "Objective medical

findings” has been statutorily defined in KRS 342.0011(33) as “information obtained through direct observation and testing of the patient applying objective or standardized methods.” [KRS 342.0011(33)].

The Supreme Court noted in *Gibbs v. Premier Scale Company/Indian Scale Co.*, 50 S.W. 3d 754 (Ky. 2001), that a particular diagnosis made in a standard manner will not render such diagnosis an “objective medical finding” and that a diagnosis of a harmful change which is based on complaints of symptoms may constitute a valid diagnosis for the purpose of treatment but that the statutory definitions of an injury “clearly require more...”. [Id., 761].

In the present claim, there were no abnormalities documented by way of any diagnostic tools which could be related to Mr. Hale's three month employment with CDR. No x-rays, CT Scans, imaging studies, EMG/NCV were admitted into evidence that were performed during or after his employment with CDR began and therefore there were no studies which could serve as evidence of a harmful change occurring during Mr. Hale's employment. Dr. Madden admitted that the Plaintiff had significant cervical and lumbar injuries and complaints prior to his work with the CDR and that Mr. Hale suffered from active conditions which pre-dated his employment with CDR for which he was being treated with prescription pain medications and periodic injections. Further, that Mr. Hale's pre-existing active conditions would have warranted impairment ratings and the same physical restrictions prior to Mr. Hale's employment with CDR. Dr. Madden could point to no findings obtained during his examination or from his review of any medical records, that supported an opinion that any harmful change occurred during Mr. Hale's three

month employment with CDR due to the existence of the prior injuries and physical complaints that were documented in the medical records. Finally, it is clear that Dr. Madden diagnosis of cumulative trauma occurring while in the CDR's employment is based solely on the Plaintiff's subjective symptoms. He stated that in most instances it is a scenario where for no specific reason or no additional trauma, the human organism cannot take it anymore.

In order to have any significance, the requirement that objective medical findings must be present to establish an injury for the purpose of receiving workers' compensation benefits, must mean more than a conclusory opinion by a physician that an activity caused a harmful change in the human organism. At a minimum, it must require the medical expert to identify what change in the human organism occurred due to the work injury. In the present claim, Dr. Madden failed to identify any alleged change in the human organism occurring during Mr. Hale's employment with CDR. Dr. Madden merely rendered an opinion that being jarred while operating a bulldozer during the three months of employment with CDR caused a harmful change in the human organism. Dr. Madden was unable to state that the forces to which Mr. Hale may have subjected to while operating a bulldozer herniated a disc, caused accelerated degenerative change or resulted in a permanent strain/strain injury.

The Court of Appeals cited to the following conclusion of Dr. Madden in support of the finding that there were objective findings to support a cumulative injury.

"[t]he patient is suffering from the effects of over thirty years of cumulative workplace trauma. The patient's degenerative disc and joint disease, as well as his cervical disc herniation, are a direct result of repetitive, heavy lifting trauma on concrete. The patient's symptoms and available diagnostics/treatment support a cumulative trauma scenario consistent with the reported workplace environment." [Court of Appeals Opinion, p. 6]. Mr. Hale was an equipment operator and did not perform heavy lifting on concrete while employed by CDR. Further, Dr. Madden admitted in his deposition that the plaintiff's disc herniation was not likely caused by his work with CDR and that Mr. Hale had degenerative disc and joint disease as well as numerous prior specific injuries which resulted in active and pre-existing neck, mid and low back pain. The Court of Appeals also noted that Dr. Madden was of the opinion that Mr. Hale would have had a change in the human organism based upon the forces he was exposed to while operating a bulldozer. However, neither the purported change nor the objective medical findings supporting the opinion that such harmful change occurred has ever been identified by Dr. Madden. The Court of Appeals did not identify what change in the human organism was due to Plaintiff's employment with CDR and the Board's Opinion is also silent on the issue. No other medical evidence supports a finding that a harmful change in the human organism occurred during Mr. Hale's employment with CDR. As a result, the Court of Appeals erred in holding that the evidence satisfied the requirement that an injury, in order to be compensable, be evidenced by objective medical findings as required by KRS 342.0011(1) and KRS 342.0011(33) and as interpreted by this

Court and the claim of Mr. Hale for a cumulative injury during his three month employment with CDR should have been dismissed.

LIMITING CDR'S LIABILITY FOR HALE'S IMPAIRMENT/DISABILITY TO THAT CAUSED DURING HALE'S EMPLOYMENT WITH CDR WAS PROPER

The Workers' Compensation Board and Court of Appeals held that CDR's liability for benefits must be commensurate with the contribution of Hale's work to the overall cumulative trauma injury as set forth in *Southern Kentucky Concrete Contractors, Inc., v. Campbell*, 662 S.W.3d 221 (Ky.App. 1983). Hale has argued that CDR, as the last employer, should be held responsible for all of the award. Hale had no specific injury with CDR and this is not a claim where the disability resulted from a specific injury which aroused a pre-existing dormant condition. This is also not a claim for hearing loss or an occupational disease wherein the legislature has specifically mandated that the employer in whose employment the claimant was last injuriously exposed to the hazard shall alone be responsible for benefits. See *KRS 342.185(1)* and *KRS 342.316(10)*. Larson's Worker's Compensation Law §153.01¹, concerns the use of the "last injurious exposure" rule in successor insurer situations. This claim involves successor or multiple employers not successor insurance carriers.

In the present claim, the ALJ determined that the whole of Hale's employment in the operation of heavy equipment and in the coal mines resulted in his painful conditions. Under the dictates of *Southern Kentucky Concrete*

¹Previously §95.20.


Contractors, Inc., supra, apportionment of liability for Hale's cumulative trauma injury is appropriate.

CONCLUSION

For the reasons set forth hereinabove, the Appellee/Cross-Appellant, CDR Operations, Inc., would respectfully request that the Supreme Court of Kentucky reverse the Opinion of the Court of Appeals finding that the evidence supported a cumulative injury established by objective medical findings as required by KRS 342.0011(1) and KRS 342.0011(32) occurred during Ronnie Hale's, approximate three (3) month period of employment and enter an order dismissing the claim. In the alternative to affirm the opinion of the Court of Appeals requiring apportionment of liability for Ronnie Hale's cumulative injury claims.

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