pursuant to Court order

FILED
SEP 24 2014
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2014-SC-000062-WC & 2014-SC-000066-WC

RONNIE HALE — APPELLANT/ CROSS-APPELLEE

VS.

CDR OPERATIONS, INC. — APPELLEE/ CROSS-APPELLANT

AND

HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD — APPELLEES

COMBINED REPLY BRIEF AND RESPONSE BRIEF OF APPELLEE RONNIE HALE

MC KINNLEY MORGAN, ESQ.
MORGAN BRASHEAR COLLINS & YEAST
921 SOUTH MAIN STREET
LONDON, KY 40741
(606) 864-6451

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Brief was served by mailing same, with first-class postage pre-paid thereon, to James B. Cooper, Esq., Guillermo A. Carlos, Esq., Boehl, Stopher & Graves, 444 West Second Street, Lexington, KY 40507, the Hon. William J. Rudloff, Administrative Law Judge, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, KY 40601; and Workers' Compensation Board, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, Kentucky 40601. Ten copies were mailed to Susan Clary, Clerk, Kentucky Supreme Court, Room 235 New Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601, all on this the 3d day of September, 2014.

M^c Kinnley Morgan
MC KINNLEY MORGAN, ESQ.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES I

APPENDIX III

STATEMENT CONCERNING ORAL ARGUMENT 1

INTRODUCTION 1

Gibbs v. Premier Scale Co., 50 SW3d 754, 762-63 (Ky.2001) 1

STATEMENT OF THE CASE 2

Roberts Brothers Coal Co. v. Robinson, 113 SW 3d 181 (Ky.2003) 5
Finley v. DBM Technologies, 217 SW3d 261, 265 (Ky.App.2007) 8
Gibbs v. Premier Scale Co., Id. 9

ARGUMENT REGARDING HALE'S REPLY BRIEF ON THE ISSUES APPEALED BY HALE 10

A. THE BOARD EXCEEDED ITS STATUTORY AUTHORITY BY RULING SUA SPONTE ON ISSUES WHICH HAD NOT BEEN PRESERVED OR PRESENTED 10
Southern Kentucky Concrete Contractors, Inc. v. Campbell, 662 S.W.2d, 223 (Ky. App. 1983). 10
Larson's Workers' Compensation Law § 153.01 11
Injurious Exposure Rule 11
KRS 342.285 12
KRS 342.285(1) 12
KRS 342.281 12
KRS 342.285(2) 12
Doctrine of Substantial Evidence 12
Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979) 12
Whittaker v. Reeder, 30 S.W. 3d 138 (Ky 2000) 12
Eaton Axle Corp v. Nally, Ky., 688 S.W.2d 334 (1985) 13
Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601 (Ky. 2006) 14
American Printing House for the Blind v. Brown, 142 S.W.3d 149 (Ky., 2004) 14
KRS 342.730(b) 15
KRS 342.285 15
Last Injurious Exposure Rule 15
Owens Corning Fiberglass v Parrish 58 SW3d 467 (Ky 2001) 15
Made Whole Doctrine 15

B. THE NEW STANDARD APPLIED BY THE BOARD TO CUMULATIVE TRAUMA CASES IS IMPROPER AND IMPRUDENT 15
AMA Guides to Permanent Impairment 16
Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) 16
Roger Tudor v. Industrial Mold & Machine Co., Inc., et al., Claim 2009-79389 17
Gibbs v. Premier Scale Company/Indiana Scale Co., 50 S.W.3d 754 (Ky., 2001) 17
Guides to AMA Impairment 17
Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (1992) 18
Chrysalis House, Inc. v. Kenneth Tackett, et al., 283 S.W.3d 671 (Ky. 2009) 18
Hilen v. Hayes, 673 S.W. 2d 713 (1984) 18
Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (2003) 18
Haycraft v. Corhart Refractories Co., Ky., 544 S.W.2d 222 (1976) 18

ARGUMENT REGARDING RESPONSE OF HALE TO ISSUES APPEALED BY CDR **19**

Snawder v. Stice, 576 SW2d 276 (Ky.App.1979) *20*
1996 Workers' Compensation Act *20*
KRS 342.0011(1) *20*
KRS 342.0011(33) *20*
KRS 342.730 ..... *21*
Fifth Edition of the AMA Guides *21*
Gibbs v. Premier Scale, Id. *22*
Finley, Id. *23*
KRS 342.285 ..... *24*
Eaton Axle Corp v. Nally, 688 SW2d 334 (Ky.1985) *24*
CR 52.04 ..... *24*

CONCLUSION **24**

APPENDIX

A. Fifth Edition of the AMA Guides, pages 405-409

B. Fifth Edition of the AMA Guides, pages 417-422

STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Ronnie Hale (hereinafter "Hale"), strongly agrees with the request of the Amicus Curiae, KY AFL-CIO, that oral argument be scheduled in this case. The decision by this Court on the cumulative trauma issue which is the subject of the appeal of Hale is being watched very carefully by the workers' compensation community. The decision by this Court in this case will profoundly affect large numbers of Kentucky workers, now and in the future.

INTRODUCTION

This is a workers' compensation case in which both parties have appealed.

The decision of this Court regarding the cumulative trauma issues which are the subject of the appeal filed by Hale may be the most important workers' compensation decision in years, as it could have the effect of overturning decades of law well established by this Court consistent with the workers' compensation statute and the intent of the Legislature, pursuant to which a large number of workers are entitled to benefits for disabling and debilitating cumulative trauma work injuries.

In its appeal, CDR Operations, Inc. (herein after "CDR") is asking this Court to reverse the Kentucky Court of Appeals, the Workers' Compensation Board (hereinafter the "Board") and the ALJ on a ruling as to what evidence is sufficient to prove a workers' compensation cumulative trauma claim. The appeal of CDR must be understood as an effort to reverse the previous decision of the Kentucky Supreme Court in *Gibbs v. Premier Scale Co.*, 50 SW3d 754, 762-63 (Ky.2001), which correctly interpreted the

workers' compensation statute as requiring objective evidence to be offered to prove a claim, but not the type of objective evidence which CDR contends is necessary.

STATEMENT OF THE CASE

Hale does not agree with the statement of the case of CDR, which avoids and circumvents acknowledgement of objective medical findings in the record on which the ALJ predicated his decision that Hale suffers from totally disabling work-related cumulative trauma.

Because of the huge significance of this case and the interrelationship between the issues of this appeal by CDR and the appeal by Hale, Hale provides herein a more complete statement of the facts than he did in his own appeal brief. Whether CDR is correct in its position on appeal that Hale has not proven his case with objective medical findings is dependent upon what it is that Hale was required to prove.

Hale filed a workers' compensation Form 101 seeking benefits for permanent and total disability as a result of cumulative trauma brought into disabling reality by his previous employer, CDR. Hale testified in his Form 104 Employment History, at his Deposition and at the Final Hearing about the rigorous job he performed operating a bulldozer for more than 30 years, including the three (3) months at CDR. Hale presented evidence of cumulative trauma which caused injuries to his neck, back, extremities, hemorrhoids and hearing loss.

Objective medical findings (which as discussed below is sufficient to meet the standard provided for in the statute) was introduced as necessary to support the case of Hale. The Form 107 from Dr. Jared Madden served for filing on July 12, 2012 contained findings of a limited range of motion and degenerative disc disease confirmed by

radiographic testing and on examination by Dr. Madden. The findings of significant osteoarthritis and limited ranges of motion in his lumbar, thoracic and cervical spine were discussed and noted in the physical examination section on page 3 of the Form 107, and were further discussed at page 6 of the Form 107 in the evaluation of the applicable impairment calculated in accordance with the AMA *Guides*.

These objective findings (as to range of motion and the degenerative arthritis in multiple regions of the spine) were further discussed and referenced in the sections regarding diagnoses, causation and the explanation of the causal relationship on page 7.

Dr. Madden also testified by deposition, and although he had not reviewed all of the evidence which ultimately would be filed by CDR, he was aware of Hale's work history of operating heavy equipment for more than 30 years as well as diagnostic studies. Although there was evidence of prior injury and symptomatology, Dr. Madden testified that the medical records were consistent with Hale being quite stable and then having his condition exacerbated and brought into reality while performing heavy equipment operating duties at CDR. Dr. Madden also testified through his Form 107 (see Sec. J, p. 12) that Hale did not have a pre-existing active impairment at the time he became employed by CDR. At his deposition, Dr. Madden reiterated there was no pre-existing active impairment.

Hale testified that while he had sought medical treatment prior to his employment with CDR, no doctor told him he had a work-related condition or recommended that he stop operating heavy equipment until he saw Dr. Madden. According to the record, he saw Dr. Madden on May 17, 2012. (Hearing Tr., December 12, 2012, p. 8).

At the Benefit Review Conference (hereinafter "BRC"), a list is made of the contested issues. CDR did not list the statute of limitations as an issue. Therefore the date when the injury became manifest to Hale was not placed at issue, as that issue relates as discussed below only to a statute of limitations defense. At the BRC, CDR did not list as contested issues whether the layoff of Hale was related to his work-related injuries, whether Hale had proven his injury through objective medical findings, whether Hale a preexisting active AMA impairment, whether Hale had a dormant condition triggered into disabling reality during his employment at CDR or whether Hale had proven to "some degree" that his injuries were caused by his work at CDR.

The procedure before this ALJ is to file what are called Position Statements at the Final Hearing rather than Post-Hearing Briefs. In its Position Statement served on December 12, 2012, CDR presented no argument that Hale's claim was barred on grounds of statute of limitations, or regarding the date of manifestation or the reason for Hale's layoff.

In an Opinion rendered December 17, 2012, the ALJ found Hale to be permanently and totally disabled secondary to performing heavy physical labor operating a bulldozer over a period of thirty (30) years of employment which became manifest and was triggered into a disabling reality while Hale was employed by CDR from November 11, 2011 through February 7, 2012. The ALJ determined that the cumulative trauma had caused injuries to the neck, back, upper extremities and lower extremities in addition to hearing loss and hemorrhoids (Opinion, p. 7). The ALJ cited the testimony from Dr. Madden on which he relied in making these findings.

The ALJ found that Hale had no work restrictions which preexisted his employment at CDR and did not render an award with an exclusion for active or non-work related conditions, citing *Roberts Brothers Coal Co. v. Robinson,* 113 SW 3d 181 (Ky.2003) (Opinion, pp. 11-12). The ALJ found that Hale had no prior active disability at the time of his cumulative trauma injury with CDR (*Id.*, pp. 10-12). This is consistent with a finding that that Hale had no preexisting AMA impairment based on the opinion of Dr. Madden (*See*, Madden Form 107 at p. 7). Even though the manifestation date was not raised as an issue, as the statute of limitations was not being argued at this point in the proceedings, the ALJ found that the testimony of Hale was credible that he did not learn of the work-relatedness of his cumulative trauma injury until the time when Hale gave the employer notice thereof, and thus CDR had not been prejudiced by the notice not having been given at an earlier time (Opinion, pp. 9-10). The ALJ also mentioned in passing that the painful conditions manifested themselves on or about February 7, 2012 (*Id.*, pp. 7-8), but that finding played no role in the decision made by the ALJ.

In its Petition for Reconsideration, CDR did not make requests for findings essential to many of the issues which have been raised on appeal to this Court. CDR did not request findings on the limitations issue (i.e. that Hale filed his Form 101 more than two years after he learned of the work-relatedness of his condition), when Hale learned of the work-relatedness of his condition (i.e. when it became manifest), that his layoff was unrelated to his work injuries, that he did not prove his case with objective medical findings, that he had a preexisting active impairment, that he did not have a dormant condition which was triggered into disabling reality while working at CDR or that he had failed to prove to "some degree" that his injuries were caused by his work at CDR. Many

of these issues have become issues only because they were raised *sua sponte* by the Board on appeal. In fact, in its Petition for Reconsideration, CDR did not request any specific findings; it merely reargued its case.

Not having been requested to make any additional specific findings, the ALJ did not make such findings. For example, had the ALJ been requested to do, there was a basis in the record for the ALJ to make findings of the specific date when Hale was advised of the work-relatedness of his injury. Based upon the record and Hale's uncontradicted testimony, Dr. Madden was the first physician to inform him of the work-relatedness of his injury, and he was examined by Dr. Madden on May 17, 2012.

On appeal to the Board, CDR did not raise or preserve as issues defenses based on the statute of limitations, the manifestation date, the relatedness of the layoff of Hale to his work injuries, whether a finding of preexisting active impairment was compelled, any failure of Hale to prove that he had a dormant condition triggered into disabling reality at CDR or that Hale had failed to prove to "some degree" that his work injuries were caused at CDR.

On appeal to the Board, CDR argued that Dr. Madden had not made observations which comprised objective findings ignoring the objective medical findings of the degenerative condition, herniated disc and deficits on range of motion found by Dr. Madden (see pp. 33-37 of brief filed by CDR with the Board served on March 4, 2013).

In its opinion vacating and remanding, the Board did not agree with the position of CDR that Hale had failed to offer objective evidence as necessary to prove an injury pursuant to the workers' compensation statute. The Board did not hold that a finding was

compelled that Hale had work restrictions prior to his employment by CDR or that Hale has a preexisting active impairment prior to his employment with CDR.

However, the Board vacated and remanded the ALJ decision on other grounds, not raised as issues by Hale at the BRC, on petition for reconsideration, or on his appeal. It discussed on pages 21-22 of its Opinion that the date upon which the obligation to give notice to the employer is triggered by the date of manifestation. The Board made a finding *sua sponte* on an issue not raised on appeal (at p. 3 and p. 22) that Hale had stopped working at CDR because another company had bought out CDR and made a statement at p. 22 as part of its *sua sponte* factual finding, that the last day Hale worked on February 7, 2012 "does not comprise a date of manifestation." The Board did not discuss any reason why the last day of work could not have been the date of manifestation (i.e. the day when Hale recognized the work-relatedness of his physical ailments or the cumulative trauma). Workers sometimes come to realize at the time when they lose their job that their weakened condition is a reason why an employer or a new company which has bought out the employer, does not want them to work, as the moment of truth arrives.

The Board did not discuss that the ALJ had found that Hale had timely notified CDR within two (2) years of the date of manifestation (i.e. the date when he learned of the work-relatedness of his condition at pages 9-10 of the Opinion), and thus that the date of manifestation which had not been raised from the BRC order through the time of the appeal was really a non-issue.

Notwithstanding that no finding had been requested and no issue raised by CDR in its Petition for Reconsideration regarding the date of manifestation, the Board ordered at page 23 that the ALJ must determine on remand the date when the cumulative trauma

injury was manifest. "On remand, the ALJ must determine the date of manifestation of Hale's alleged cumulative trauma injury." The Board did not explain any reason why the manifestation date was material to any dispositive issue in the case, the Board itself having discussed at page 22 that Hale filed his Form 101 within the statute of limitations.

The Board discussed (in what may have been dicta on page 23) that all liability for cumulative trauma does not necessarily fall on the last employer. The Board did not discuss the Rule of Law promulgated in *Finley v. DBM Technologies*, 217 SW3d 261, 265 (Ky.App.2007) that an employee is entitled to recover PTD/PPD benefits commensurate with the amount by which his AMA impairment rating after the work injury exceeds any prior active AMA impairment rating proven by the employer. The Board did not discuss that the ALJ had found that Hale had no prior active impairment and thus, clearly, that all of his impairment became active while employed by CDR. The Board did not indicate that a finding of preexisting active AMA impairment was compelled or cite any evidence that supports such as a position.

At page 25, the Board discussed that there had been no finding that Hale had a preexisting dormant condition that was aroused to a disability reality by the work he performed during the three (3) months at CDR, notwithstanding that Hale alleged and offered proof through his own testimony and the testimony of Dr. Madden continuing cumulative trauma during the time of his employment. The Board made its own finding *sua sponte* notwithstanding that the finding of the ALJ based on substantial evidence that Hale did not have prior active disability, that somehow Hale had not proven that he had a dormant condition triggered into disabling reality during his employment at CDR. The statute does not limit recovery for cumulative trauma injuries or any other injuries to

workers with purely dormant conditions triggered into disabling reality while employed by the last employer. Often a condition is partially active and at the same time has a dormant component which can be aroused or exacerbated by additional cumulative trauma.

The Board discussed at page 26 that "simply because Hale was last employed by CDR, does not place the entirety of the liability for Hale's alleged total occupational disability on CDR," and stated that there must be evidence of record establishing that Hale's work activities performed during his last three (3) months of employment with CDR contributed to his overall permanent condition, producing "some degree" of harmful change to the human organism. The Board cited no case establishing a "some degree" standard of proof in workers' compensation, and no section of the workers' compensation statute provides for such a standard of proof.

The Court of Appeals affirmed the Board both as to the issues raised by the appeal of CDR and the issues raised on appeal by Hale. Regarding the issues raised on appeal by CDR, the Court of Appeals noted that pursuant to *Gibbs v. Premier Scale Co.*, *Id.*, as it is not required that harmful change "be both directly observed and apparent on testing in order to be compensable as an injury". The Court of Appeals noted the discussion by Dr. Madden on his examination of the degenerative disc and joint disease of the patient and cervical disc herniation, and that his symptoms support the cumulative trauma scenario which Dr. Madden found exacerbated the chronic osteoarthritic degenerative changes through cumulative, repetitive pedal motion driving a bulldozer. As the Court of Appeals noted, in his deposition Dr. Madden discussed that the operation of the bulldozer was the straw that broke the camel's back and that Hale's breakdown could have occurred during

the three (3) month period he worked for CDR. However, the Court of Appeals affirmed the Board also on its decision on the cumulative trauma issue as if the Last Injurious Exposure Rule (discussed in the Amicus Curiae brief and in the brief filed by Hale on his appeal) does not apply in Kentucky.

ARGUMENT REGARDING HALE'S REPLY BRIEF ON THE ISSUES APPEALED BY HALE

CDR failed to preserve for appeal the issues on which the Board reversed and remanded sua sponte. As a matter of law, the outcome of this case will not be affected by any finding the ALJ makes on the issues on which he was instructed to make further findings on remand. Regardless of whether or not the Board had the authority to raise the issues which it reversed and remanded sua sponte, the interpretation of the law of Kentucky regarding cumulative trauma by the Board is incorrect.

A. The Board Exceeded Its Statutory Authority By Ruling Sua Sponte On Issues Which Had Not Been Preserved Or Presented

There should be no mistake that the decision rendered by the Board below would have the effect of changing the law of workers' compensation in Kentucky, as it has been established for decades. In its brief filed in response to the appeal of Ronnie Hale, CDR contends that the decision of the Board was consistent with the decision of the Supreme Court in *Southern Kentucky Concrete Contractors, Inc. v. Campbell*, 662 S.W.2d, 223 (Ky. App. 1983). This is not so. As is well explained by the Amicus Curiae in its brief, and shall not be reiterated herein in this brief limited to but 25 pages, it has long been established in Kentucky that an injured employee has the right to recover workers' compensation indemnity benefits for cumulative trauma secondary to and suffered as a

result of work for multiple employers. Cumulative trauma injuries are common in the coal mines, as well as other work places. Cumulative trauma injuries result from a worker repeatedly performing the same tasks over and over again for a period of time to a point that something happens that becomes the "straw which breaks the camel's back" and the injury is precipitated into disabling reality.

In its response brief, CDR suggests incorrectly that the law of Kentucky is inconsistent with the law nationally, citing Larson's Workers' Compensation Law, Section 153.01 as applying the Last Injurious Exposure Rule only for the purpose of allocating liability as between successive insurance carriers[1]. On the other hand, Larson's discussed as Section 153.02(1) three alternative solutions, including a first solution which is to impose all liability on the first employer, a second solution of imposing liability solely upon the employer on risk at the time of the last injury and a third solution of apportionment as between successive employers. Larson's discusses that "... the second solution, assigning liability on the employer on risk at the time of the last injury, is easier to administer than the apportionment solution and in most instances will provide the highest level of benefits for the claimant ..." and that the second solution "... as a majority rule successive insurer cases, either by judicial adoption or by express statutory provision ...". In any event, as discussed herein and by the Amicus Curiae, Kentucky has

---

1 Hale cited this Section as Section 95.20 in his brief, which is the former Section in which these issues were discussed in Larson's.

adopted the last Injurious Exposure Rule, except for a significant compromise excluding prior active disability from the indemnity portion of liability. .

In any event, the Legislature has enacted a statute which has in effect adopted the Last Injurious Exposure Rule in cumulative trauma cases, including the 1996 statute, which has not been modified as to the Last Injurious Exposure Rule since that time, even though new statutes have been adopted several times since 1996. This is well explained by the Amicus Curiae in its brief. It is within the province of the Legislature to adopt statutes regarding the cumulative trauma injuries which adversely affect so many of the constituents of the Legislature in this Commonwealth.

The Board has not been granted the power to change the statute. Conspicuous by its absence from the powers of the Board enumerated in KRS 342.285 is any authority to reverse an ALJ or promulgate new law sua sponte or de novo on issues which have not been preserved or even raised on appeal.

Pursuant to KRS 342.285(1), an Order of an ALJ is final, inclusive and binding as to all questions of fact not raised in a petition for reconsideration properly filed pursuant to KRS 342.281. Pursuant to KRS 342.285(2), no new evidence is to be introduced before the Board (except when fraud has occurred). Review by the Board is limited to the record. The Board does not have the authority to substitute its judgment for the judgment of the ALJ as to the weight of the evidence. The Board has review limited to and based on the Doctrine of Substantial Evidence and the correction of legal errors (see e.g., *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979).

The Board in its Opinion below did not acknowledge that it was ruling on issues not preserved for appeal sua sponte. In *Whittaker v. Reeder*, 30 S.W. 3d 138 (Ky. 2000),

it was held that the Board could exercise authority sua sponte to correct an error in the calculation of an award, but that does not mean that the Board can raise new issues sua sponte, such as it has in this case by reversing on the issues of the manifestation date and the motive of the employer for the layoff of the employee. The decision in *Whitaker v. Reeder* should be read as allowing the Board to correct mechanical errors, and not as granting the Board sweeping power to revise the law adopted by the Legislature.

As discussed in the statement of the case provided herein, and as this Court can determine from a review of the record, the issues on which the Board reversed regarding the manifestation date of the injury and the motivation of the employer for the laying off the employee were not preserved or argued by CDR in the issues listed at the Benefit Review Conference (BRC), in the position statements CDR filed in lieu of briefs, in the petition for reconsideration CDR filed as was required by *Eaton Axle Corp v. Nally*, Ky., 688 S.W.2d 334 (1985) or in the petition for review filed by CDR with the Board. The rationale for KRS 342.281 and the decision in *Eaton Axle Corp v. Nally, Id.* is to obviate appeals burdening the parties and the Appellate Courts in seeking to establish what findings would have been made on an issue on which the finder of fact may have provided clarification prior to appeal, if the party initiating the appeal had made a proper request for such findings.

Further, in this case, the Board has reversed sua sponte on issues which cannot impact the outcome of this case. In its Opinion at pages 20-22, the Board criticizes and reverses the ALJ for a failure to find the date when his injury became manifest and for finding that the date he was laid off was the manifestation date, stating that the layoff date "... does not comprise a date of manifestation". That this is immaterial in this case is

clear from the decisions of this Court *Manalapan Mining Co., Inc. v. Lunsford*, 204 S.W.3d 601 (Ky. 2006) and *American Printing House for the Blind v. Brown*, 142 S.W.3d 149 (Ky., 2004). The manifestation date is the date when the employee first recognizes and learns of the work relatedness of his injuries. The manifestation date has a bearing only on the statute of limitations defense and only if the employee fails to file a Form 101 within the two years of the date when the injuries first becomes "manifest". Had CDR raised the issue of the manifestation date below or even as late as when it filed its petition for reconsideration, the ALJ could have and likely would have ruled that the manifestation date was on 05/17/12, when Hale first learned of the work relatedness of his condition from Dr. Madden. The ALJ found at page 9-10 of the Opinion and Award that the testimony of Hale in this regard was credible.

For reasons related to the manner in which occupational disease cases are practiced, employee attorneys sometimes reference the manifestation date in cumulative trauma cases as being the last day when the employee worked. This is a misnomer. The ALJ in his Opinion and Award referenced in passing that the manifestation date was Hale's last day of work, as Hale had stated in some of his paperwork. However, it is clear from the statement of the ALJ at pages 9-10 of the Opinion and Award that if requested to do so, on petition for reconsideration, the ALJ would have found that 05/17/12 was the date of manifestation for Hale.

Although the Board is correct in stating that the date when an employee such as Ronnie Hale last works, which is the date when he was laid off, does not necessarily comprise the date of manifestation. This is immaterial. Had counsel for Hale been aware that the motivation for the layoff in reference to the layoff date as being a date of

manifestation was contested, counsel for Hale might have introduced evidence connecting Ronnie Hale's layoff to the learning of his injury becoming manifest to him. Employees who change jobs such as Ronnie Hale did often develop cumulative trauma or other injuries within a few months after working the new job because of the different manner in which the new job is performed and with different stress it puts on the body. Employers commonly layoff employees for reasons related to their injuries without acknowledging that. The date of a layoff can be the date of an awakening for the employee of the weakening of his condition and the work relatedness thereof. It is not necessary for the employee to prove the motive for a layoff, unless the employee is awarded a Two Multiple pursuant to KRS 342.730(b), which was not the case here.

That the Legislature did not intend for the Board to have the power to review de novo is clear from KRS 342.285. Other administrative agencies and departments are granted sua sponte and de novo powers, such as the Kentucky Division of Unemployment Insurance, which is given that authority in part because referees are not necessarily attorneys.

The use of the Last Injurious Exposure Rule in cumulative trauma cases is consistent with the decision in civil cases for purposes of civil cases in *Owens Corning Fiberglass v Parrish* 58 SW3d 467 (Ky 2001), in which it was held that the injured party is to be made whole, and that it is not appropriate for liability to be apportioned to a defendant who bears no responsibility. It is consistent with the Made Whole Doctrine which is applied in Kentucky law in other injury cases.

B. The New Standard Applied By The Board To Cumulative Trauma Cases Is Improper And Imprudent

As well explained by the Amicus Curiae, the Board has applied a new standard to cumulative trauma cases based on whether the injuries arise "to some degree" from the work at the last employer. The "some degree" standard is not the standard adopted by the Legislature, which has carefully provided for workers' compensation cases to be determined by the objective standards as set out in the AMA Guides to Permanent Impairment.

The decision of the Board is in conflict with the previous decision in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007), which allows the employee to recover for cumulative trauma from the last employer. Per *Finley, Id.*, the employer has the burden of proving the preexisting rating. This is consistent with the Doctrine that a party should not bear the burden of proving a negative[2].

As was well explained in the statement of the case provided herein and by the Amicus Curiae, there was substantial evidence to support the decision of the ALJ that CDR failed to meet its burden of proof that Hale had a preexisting active disability at the time when he became employed by CDR.

The decision of the Board based on a theory that there had been no showing that it had not been established by Hale that his injury was caused to "some degree" by his employment at CDR is non sequitur. It necessarily follows that if Hale had no preexisting active AMA impairment rating at the time when he came to work for CDR and was totally and permanently disabled on the date when he was last employed by CDR, Hale

---

2 The 25 page limit for this brief constrains more fully discussing some issues.

has shown to "some degree" that his cumulative trauma injury was caused and brought about by his employment at CDR. As the ALJ found based on substantial evidence, the work at CDR was a substantial factor in causing and bringing about the total disability of Hale.

The decision of the Board is also inconsistent with the decision of this Court in *Roger Tudor v. Industrial Mold & Machine Co., Inc. et al.,* Claim 2009-79389, in which it held that the employee is entitled to recover indemnity benefits in an amount equal to the difference between the AMA rating prior to the work injury and subsequent to the work injury.

The Board meets itself coming and going in its decision on the issues appealed by CDR requiring the objective medical findings to support an award and the decision regarding cumulative trauma. CDR appealed to the Board and ultimately has further appealed to the Court of Appeals and this Court on the grounds that the injuries suffered by Hale were not supported by objective medical findings as is required by the statute. The Board correctly ruled citing *Gibbs v. Premier Scale Company/Indiana Scale Co.,* 50 S.W.3d 754 (Ky., 2001) that the requirement for objective medical findings is satisfied based on the type of findings required by the Guides to AMA Impairment, which have been established by the Legislature as the standard for calculating awards of indemnity benefits for work injuries.

The decision of the Board in this same case that these objective findings are not sufficient to satisfy any requirement to prove that an injury has resulted to "some degree" as a result of work at the last employment is inconsistent with the decision of this Board

based on substantial evidence that there were objective findings that the condition of Hale was triggered into disabling reality during his employment at CDR[3].

This Court has held time and again that the interpretation of statutes is within the authority of the Appellate Courts, rather than the Board. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (1992). This case illustrates why it is this Court and not the Board which should provide the necessary interpretation of the statute consistent with the intent of the Legislature. This Court took great care in using the proper techniques to interpret the workers' compensation statute in *Chrysalis House, Inc. v. Kenneth Tackett, et al.*, 283 S.W.3d 671 (Ky. 2009).

There are occasions when it is necessary and proper for new law to be promulgated, as was done by this Court in *Hilen v. Hayes*, 673 S.W. 2d 713 (1984), and *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (2003). It is this Court and not an Administrative Body such as the Board which has the responsibility and authority to make decisions changing the law. There are no grounds to change the law of cumulative trauma, as it has been adopted in accordance with statutes enacted by the Legislature for years and as carefully developed by this Court through *Haycraft v. Corhart Refractories Co.*, Ky., 544 S.W.2d 222 (1976) and its progeny.

---

[3] The lengthy decisions made by the Board such as the one below are inconsistent with the bare bones philosophy of Justice Palmore and have resulted in ALJ's also writing lengthy decisions, such as this ALJ did. The best practice is for the finder of fact and the Appellate Courts to write Opinions sufficient to identify the salient facts and legal theories, rather than expound upon the record in its entirety. The lengthy decisions by the Board and ALJ's in workers' compensation cases unnecessarily burden the record on appeal. A practice of streamlining the decisions in workers' compensation cases as is done in other cases would be a welcomed development.

In any event, in this particular instance, the decision which has been made below is not only inconsistent with the statute, it is not based on sound legal principles which are equitable to the working man. Ronnie Hale and other coal miners and employees across Kentucky have worked hard through time based on a belief that they would be fairly compensated if brought down as Hale was by work related injuries which are the risk of their employment. Findings of the ALJ that Ronnie Hale is permanently and totally disabled based on substantial evidence are binding. Ronnie Hale has suffered great hardship pending these appeals. The ALJ has found as often happens that Ronnie Hale suffered a permanently disabling change of condition during his employment with CDR, albeit that that employment was relatively short in nature. The laws adopted by the Legislature should be upheld. The decisions of the Board and the Court of Appeals should be reversed with instructions to reinstate the Opinion and Award rendered by the ALJ.

ARGUMENT REGARDING RESPONSE OF HALE TO ISSUES APPEALED BY CDR

Regarding the cumulative trauma injury issues raised by Hale in his Brief, the statement of facts and statement of the case as supplemented here make clear that CDR failed to preserve for appeal in the BRC Order, in its Petition for Reconsideration and in its Brief on appeal, the issues on which the Board reversed and remanded *sua sponte*. On appeal, CDR ignores the objective findings on which Dr. Madden relied, which comprises substantial evidence on which the ALJ reached his opinion. Instead, CDR shifts the focus to other evidence which the ALJ did not find persuasive.

The ALJ has the discretion to make findings of fact which should not be reversed on appeal, if they were made based on substantial evidence. *Snawder v. Stice*, 576 SW2d 276 (Ky.App.1979).

Dr. Madden was not required to review all of the medical records and medical reports about which he was asked by the attorneys for CDR at his deposition. Dr. Madden was required only to take the history that he thought was pertinent and which the ALJ has ruled was pertinent and sufficient. CDR had the right, as it chose to do, to take his deposition in an effort to persuade the doctor or the ALJ to reach different conclusions. CDR failed to convince either Dr. Madden or the ALJ of this.

Dr. Madden took a history, examined Hale, measured his range of motion and reviewed medical records. The testimony and findings of Dr. Madden regarding the range of motion, degenerative osteoarthritis and the herniated cervical disc was sufficient to comprise objective medical findings on which a proper evaluation and AMA rating could be provided. Dr. Madden discussed in his Form 107 the objective medical findings on which he relied in reaching his opinions.

In the 1996 Workers' Compensation Act, the Legislature included at KRS 342.0011(1) a definition of "injury" as being "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." CDR, in its appeal, suggests that the findings of Dr. Madden do not rise to the level of objective medical findings required by the Act at KRS 342.0011(33), which provides that objective medical findings means

information gained through *direct observation* and testing the patient applying objective or standardized methods.

As part of the same 1996 Act, the Legislature included provisions at KRS 342.730 that a publication of the American Medical Association entitled "Guides to the Evaluation of Permanent Medical Impairment" (latest edition available), is to be used in workers' compensation as the basis for rating permanent partial impairment. This was done for the purpose of establishing more objective and consistent criteria for evaluating work injuries.

The Legislature has adopted new Acts in 2002 and 2010, both of which have continued the use of the AMA *Guides*, although the 2010 Act provided that the Fifth Edition is to be used in Kentucky.

According to the Fifth Edition of the AMA *Guides* at pages 405-409 (attached as Exhibit A hereto), the criteria for evaluating injuries to the lumbar spine include measures of the range of motion, which the AMA considers to be objective.

According to the Fifth Edition of the AMA *Guides* at pages 417-422 (attached hereto as Exhibit B), the criteria for evaluating injuries to the cervical spine include measures of the range of motion, which the AMA considers to be objective.

Although CDR suggests that the measures of the range of motion and other medical evidence considered by Dr. Madden are not sufficient to establish that the injuries are objective medical findings, the AMA *Guides* contemplate otherwise, and it is the AMA *Guides* which have been adopted by the Legislature as the method by which impairment ratings are to be determined.

In *Gibbs v. Premier Scale, Id.*, this Court held that objective medical findings such as that considered and relied upon by Dr. Madden satisfy the requirements of the workers' compensation statute.

In its decision, the Court of Appeals relied upon *Gibbs v. Premier Scale, Id.*, and agreed that Dr. Madden had considered and relied upon the necessary and proper objective medical findings. By implication, the Board reached the same conclusion.

In its appeal, CDR persists in advancing arguments which would have carried the day if they were persuasive to the ALJ, but they were not.

In its Brief, CDR argues that it is necessary that abnormalities be documented by diagnostic tools related to the three (3) month employment with it, such as x-rays, CT scans and EMG/NCV studies which serve as evidence of the harmful change occurring during the employment of Hale. However, it is clear from the decision of this Court in *Gibbs v. Premier Scale, Id.*, that this is not necessary. This Court may glean that one reason why the AMA *Guides* do not require that there be diagnostic radiographic testing which demonstrates an injury is that many injuries cannot be shown and cannot be confirmed by radiographic tests. Although an MRI or a CT scan may reflect the changes caused and brought about by an injury, the AMA has determined, as reflected in the *Guides* it has promulgated, that other diagnostic tools such as the ones used by Dr. Madden, are reliable.

Hale's diagnostic testing did indicate a degenerative condition. However, it is difficult to determine the extent of a degenerative condition or its precise effects in the critical areas of the spine through diagnostic testing. Medicine is an art, not a science.

CDR states incorrectly that Dr. Madden made no findings during his examination which supported a harmful change occurring during the three (3) months it employed Hale. On the contrary, Dr. Madden did make the findings which the Board and Court of Appeals have both held are necessary. The alternative CDR had was to establish a preexisting impairment pursuant to *Finley, Id.*, which it failed to do.

The Rule of Law is that Hale did what he was supposed to do, which was to establish that he had work-related cumulative trauma which caused him to be permanently and totally disabled. Hale was not required to prove the negative, which was that he did not have an AMA rating prior to his employment with CDR. On the contrary, pursuant to *Finley, Id.*, CDR had the burden of proving preexisting active impairment, which is an affirmative defense and it failed to meet its burden to the satisfaction of the ALJ. It is the nature of hard physical labor that causes cumulative trauma that at some point something happens which becomes the straw which breaks the camel's back. Consistent with the testimony of Dr. Madden, the ALJ found that the condition of Hale became disabling at CDR.

When an employee commences a new job performed in a different way, sometimes that is what brings to disabling reality cumulative trauma injuries such as Hale had.

When a new company takes over, employees like Hale are often laid off rather than younger, physically stronger employees. Hale was not obligated to prove why he was laid off. Hale did prove what he had to prove to the satisfaction of the ALJ.

The failure of CDR to request findings of fact which are essential to many of the issues it raised on appeal including those raised by the Board *sua sponte* in violation and

in excess of its powers pursuant to KRS 342.285 is an important issue on appeal. Pursuant to *Eaton Axle Corp v. Nally*, 688 SW2d 334 (Ky.1985), in workers' compensation cases as in civil cases, findings essential to the position taken on appeal must be requested by the party which appeals. *Eaton Axle Corp v. Nally, Id.* incorporates CR 52.04 into the workers' compensation system. The purpose of KRS 342.281 and CR 52.04, which is incorporated into the workers' compensation system thereby, is to obviate appeals which may have been unnecessary had the Court or ALJ just been asked on motion or petition for reconsideration to make the findings which are the gravamen to the appeal. For example, we should not be on appeal now regarding the manifestation date, when there was evidence of record on which the ALJ could have made a finding which would have obviated such an appeal, if he had been requested to do so.

CONCLUSION

Based on the forgoing, the Supreme Court should reverse and remand with instructions that the Opinion and Award be reinstated. On the issues raised on appeal by CDR, the Board should affirm the Court of Appeals. Although the Court could decide this case by holding simply that the issues on which the Board reversed and remanded were not preserved for appeal, a reported decision reaffirming that the law of cumulative trauma is what it has been for decades is important to the workers' compensation community, because of the precedents that are now being applied because the decision in this case is being followed as precedent in many other cases.

Respectfully submitted,

McKinnley Morgan, Esq.
Morgan, Madden, Brashear & Collins
Counsel for Ronnie Hale
921 South Main Street
London, KY 40741
Phone: (606) 864-6451