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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000918-WC

AUSTIN POWDER COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-12-01510 AND WC-12-01514

BILLY K. STACY;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

AND

NO. 2014-CA-000946-WC

BILLY KEITH STACY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-12-01510 AND WC-12-01514

AUSTIN POWDER COMPANY;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: COMBS, J. LAMBERT, AND TAYLOR, JUDGES.

J. LAMBERT, JUDGE: Billy Stacy and Austin Powder Company have both petitioned this Court for review of the decision of the Workers' Compensation Board (the Board). The Board affirmed in part, vacated in part, and remanded the decision of the Administrative Law Judge (the ALJ) awarding Stacy permanent total disability benefits and medical benefits for cumulative trauma injuries to his wrists and lumbar spine as well as medical benefits for his work-related hearing loss. In his petition, Stacy contends that the Board erred in *sua sponte* reversing the ALJ's decision for findings related to the date of manifestation of his cumulative trauma claims and for a determination of the percentage of his cumulative trauma that is related to his work for Austin Powder. In its petition, Austin Powder disputes the Board's determinations that Dr. Hughes's testimony was based upon substantial evidence of record; that the impairment rating assigned by Dr. Hughes was within the parameters of the *AMA Guides*, Fifth Edition; and that Stacy's hearing loss claim entitled him to medical benefits. Having carefully reviewed the record, the parties' respective arguments, and the applicable law, we affirm in part, reverse in part, and remand.

Stacy is currently a sixty-three-year-old resident of Perry County, Kentucky, who worked in the coal mining industry until April 16, 2012. He

worked as a drill operator at several coal mines from 1997 until 2012, and he worked for Austin Powder from May 3, 2005, until he stopped working in April 2012. He claimed to have been exposed to coal dust and loud noise during his various employments. On November 1, 2012, Stacy filed three separate workers' compensations claims. He filed a Form 101 Application for Resolution of Injury Claim, indicating that on April 16, 2012, he had injured his low back in the course and scope of his employment, due to cumulative trauma (Claim No. 2012-01510). He filed a Form 103 Application for Resolution of Hearing Loss Claim indicating that he became aware of this condition on his last day of work, April 16, 2012 (Claim No. 2012-01514). Stacy then filed a Form 102 Application for Resolution of Coal Workers' Pneumoconiosis Claim (Claim No. 2012-01516), citing his exposure to coal dust as a drill operator for over forty-two years. By order entered December 4, 2012, the ALJ considered Stacy's motion to join and bifurcate, in which he sought to consolidate his hearing loss, injury, and coal workers' pneumoconiosis (CWP) claims. The ALJ placed the CWP claim in abeyance pending a final resolution of the constitutionality of the current CWP claims process, and by separate order the ALJ consolidated Stacy's injury and hearing loss claims.

Austin Powder filed a notice of claim denial for the injury and hearing loss claims, arguing that the injuries did not arise out of and in the course of Stacy's employment and that Stacy did not provide due and timely notice. In a special answer, Austin Powder asserted a statute of limitations defense, stating that

Stacy had begun to experience problems five or more years ago and suspected he might have been told he had a work-related problem at that point. Austin Powder also filed a special answer with respect to the statute of repose. Both of these special answers were related to Stacy's low back and hearing loss claims.

Stacy was deposed on February 4, 2013. At that time, he drew \$2,285.00 per month in social security disability benefits and \$492.00 per month in retirement. Stacy stated that he left his work because he had been laid off, and at the time of the layoff, he was earning \$21.00 per hour. He drew unemployment benefits until he received his social security award. He said that prior to the layoff, he had been working forty hours per week, but the mining operations had been cut back because they lost some of their contracts. However, he stated that he did not know if he would have still been working there if he had not been laid off because his hands had been bothering him. Stacy went on to testify about the various medical providers he had seen related to his back and for knots on his hands.

Stacy testified that he had worked in various mines as a drill operator since 1997, but he had started his work in the industry in the early 1970s. He explained his duties as a drill operator at Austin Powder, which was a surface mine. He would use a tape measure to mark the pattern where the explosives would be set and then start drilling. He would also flip toggle switches and work levers using his arms while sitting in the cab. Regarding the drill cab, Stacy stated that it was enclosed and reduced some of the sound and dust from outside. He had worn hearing protection all of his life, but he noticed a hearing problem about three

years ago. Stacy stated that he had never been told by a doctor that any of his problems were related to his work. He had not told anyone at Austin Powder that he was filing a claim.

Stacy attached the medical statement of chiropractor Dr. Dale Williams to his Form 101. In the August 12, 2012, report of his examination, Dr. Williams found low back pain, pelvic imbalance, right ilium posterior inferior, and severe degeneration and radiculitis. He diagnosed lumbalgia with severe degeneration from L1-L5, and L4-L5 disc causing radiculitis. In Dr. Williams's medical opinion, on the basis of his history, subjective, and objective findings, Stacy's severe degeneration "is a result of the physical stresses of 41 years in the mining industry."

Stacy filed the Physical Capacities Evaluation of Dr. Michael Raichel dated September 12, 2012. Dr. Raichel indicated that Stacy had been under his care for seven years for hypertension and gout, among other diagnoses. The onset date for gout was 2009. Dr. Raichel listed several limitations to Stacy's ability to work, including restrictions for standing, sitting, bending, manipulating his hands, and operating equipment. He indicated that Stacy suffered from severe pain and would miss fifteen days of work per month due to his conditions.

Stacy also filed the Form 107 medical report and supplemental medical questionnaire of neurologist Dr. Arthur Hughes dated November 28, 2012. Dr. Hughes took a history that Stacy had been employed in surface mining as a drill operator and reported the gradual onset of lower back pain while standing and

walking five years ago. He did not report any leg pain or tingling of the legs. He was laid off on April 12, 2012. Dr. Hughes noted a past history of hypertension and gout affecting his right foot. Stacy reported pain in his hands for the past seven years. Surgery had not been recommended, and Stacy was told that he had arthritis of the wrists, hands, and fingers. Stacy also reported hearing loss. Dr. Hughes reviewed the August 12, 2012, report of Dr. Williams, Dr. Raichel's September 12, 2012, evaluation, and an audiogram dated September 6, 2012. Dr. Hughes then performed a physical examination and reviewed x-rays of the lumbar spine dated September 15, 2012, showing multilevel degenerative disc disease and spine disease. He did not recommend any surgery, and his diagnosis was lower back pain and bilateral hand and wrist pain as well as reduced range of motion and strength.

Dr. Hughes stated that Stacy's injury was causally related to his "long history of repetitive injuries as a consequence of his occupation as a heavy equipment operator for the past 41 years[.]" He indicated that Stacy's bilateral hand pain was also "a consequence of long term repetitive trauma as a consequence of his occupation." Dr. Hughes assigned a 16% whole person impairment, comprised of a 5% impairment to his low back pursuant to DRE Category II, a 5% impairment due to reduced range of motion of the right wrist, a 1% impairment due to restricted range of motion of the left wrist, and a 6% impairment due to reduced grip strength. Dr. Hughes stated that Stacy did not have a prior active impairment, indicating that he had "had gradual worsening

lower back pain and bilateral hand pain over many years and there was no specific single injury producing this as it was a consequence of accumulating trauma as a part of his job.” Finally, Dr. Hughes imposed several restrictions related to his ability to work, including that Stacy avoid prolonged standing or walking and a ten- to twenty-pound lifting limitation. He did not retain the physical capacity to return to the work he performed at the time of his injury. In the supplemental questionnaire, Dr. Hughes indicated that Stacy had reached maximum medical improvement (MMI).

The cross-examination deposition of Dr. Hughes was taken on February 6, 2013. Dr. Hughes testified that Stacy told him about his history of gout during the physical examination. Dr. Hughes stated that gout could produce a condition called gouty arthritis, but that it was predominantly an abnormality of uric acid metabolism. He was not sure that it could occur in the hands and create nodules or cysts, as gout typically affects the toes and feet. However, he stated that he was not an expert on gout or on arthritis. Dr. Hughes identified the nodules in Stacy’s hands as arising from an unknown origin. Dr. Hughes received a history from Stacy, including his work requirements. Stacy described his work requirements, which included operating a drill. This allowed him to sit down, and he was able to do that comfortably. The other aspects of the job that did not involve sitting down caused him difficulty. Dr. Hughes admitted that he had not seen a picture of the crane or drill that Stacy worked with and did not know how many steps he had to climb to get into the drill. From the perspective of his low

back problems, Dr. Hughes noted that Stacy's job involved more than just sitting down. His job included getting under the drill, laying out patterns, and walking around the site. Dr. Hughes admitted that he had never seen Stacy or anyone else operate the drill.

Dr. Hughes stated that he used the DRE category of the *AMA Guides* to rate Stacy's back condition, noting that the range of motion test was not reliable: "[T]he reason I like it is that so often when you're examining a patient, the range of motion is not reliable. You can have bad pain on the day that you're examining the patient and maybe he doesn't have pain the day before, and if you had done the exam when he didn't have pain, you get a completely different impression. So the DRE system eliminates that kind of uncertainty and that is why I prefer it." Dr. Hughes used DRE lumbar category II because Stacy had complaints of pain without radiculopathy. However, he admitted that if he had strictly followed the *AMA Guides*, Stacy would fit in DRE lumbar category I.

In addition to his back, Dr. Hughes determined that Stacy had a reduced range of motion in his wrists. He assumed that it was due to the arthritis someone advised Stacy that he had. In terms of causation, Dr. Hughes noted that Stacy had had the symptoms for seven years, and because his job involved repetitive use of his hands, he "assumed the hand issue was probably due to repetitive use as there wasn't any alternative explanation that made any sense." Dr. Hughes then testified about the grip strength evaluation as described in §16.8a under Principles, and he stated that he assigned an impairment rating of 6% for loss

of strength. That section provides that a physician is only to use that and combine it with other impairments if it is based on unrelated etiological or pathomechanical causes. Here, Dr. Hughes had been trying to determine the impairment to Stacy's upper extremities using other sections of the *AMA Guides*, including the reduced range of motion. However, Dr. Hughes did not know if the two issues – reduced range of motion and loss of strength – were linked and caused by the same problem. He also agreed that §16.8a states that a physician is not to use grip strength if decreased motion or pain was present, but he did not “always agree with the way that the *AMA Guides* are phrased.” He agreed that strictly under the *AMA Guides*, Stacy had a 0% impairment for his low back and a 6% impairment for his wrists, which represented the addition of 1% and 5%.

Dr. Hughes testified that based on his experience, patients who have physically demanding coal mining jobs have a higher incidence of back injuries and other problems with their knees and hands than other people might have who work more of a light duty job. When asked to define “repetitive,” Dr. Hughes stated that was doing the same manual task over and over, but he was unable to provide a number. He stated that Stacy had been operating heavy equipment for forty-one years, which would meet the definition of heavy repetitive work from a common sense standpoint. But he was unable to say exactly what Stacy did every day. Any information he had, he obtained from Stacy. Dr. Hughes had reviewed the medical information provided, and none of these provided that Stacy had work-related arthritis.

Turning back to the range of motion testing, Dr. Hughes stated that he only did active tests, not passive tests, on Stacy's wrists. Dr. Hughes stated that he did not want to overstretch a particular joint and that by using active range of motion, he could let the patient define what the range of motion is until pain became an issue. Based on the testing, Stacy had a 15% restriction on one side and a 20% restriction on the other side, neither of which represented a full range of motion. He disagreed that a passive range of motion test was required because a physician would run the risk of hurting the patient. Technically, Dr. Hughes agreed that his evaluation of Stacy's range of motion and impairment rating were not based upon the *AMA Guides*.

Stacy filed the medical report from Baptist Southeast Orthopaedics dated August 22, 2012, when he saw Dr. Ronald Belhasen for his hand problems. Stacy had been seen three weeks earlier and was placed on NSAIDs (non-steroidal anti-inflammatory drugs) for "significant swelling and pain of both hands." Dr. Belhasen noted mild improvement, but he still had swelling and pain. Stacy had also stopped all activity around his home. Dr. Belhasen diagnosed Stacy with localized primary osteoarthritis of the wrist. Later, Austin Powder filed the report from Stacy's first visit with Dr. Belhasen on July 24, 2012. The report indicated that Stacy was known to have a history of gout and that his wrist problems had been progressively worsening over the past eight years. Dr. Belhasen noted Stacy's forty-one year history as a heavy equipment operator, including his work as a drill operator, and that he had "a number of levers to operate and this at times

makes his hand pain quite severe.” His physical examination revealed large fluid collections over the dorsal aspect of both wrists and the dorsal portion of his hand. X-rays of both wrists showed irregularity of the distal radial ulnar joint consistent with gouty arthritis.

University evaluators Dr. Raleigh Jones and Dr. Persis Ormond performed a comprehensive audiometry evaluation on February 8, 2013, pursuant to a request from the Department of Workers’ Claims. The audiograms established a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. Stacy’s hearing loss was related to repetitive exposure to hazardous noise over an extended period of employment, not due to a single incident of trauma. Dr. Jones assigned a 2% whole body impairment pursuant to the *AMA Guides* for Stacy’s work-related hearing loss based upon his forty-one year history as a driller in strip mining operations and his non-significant exposure to noise outside of his work.

Austin Powder filed the medical report of board certified orthopedic surgeon Dr. Martin G. Schiller dated February 14, 2013. Because Stacy was late to the appointment, Dr. Schiller reviewed the records from Dr. Williams, Dr. Raichel, and Dr. Hughes. Dr. Schiller disagreed with Dr. Hughes’s assessment that cumulative trauma disorder can cause degenerative arthritis. Based upon an article from an *AMA Guides* newsletter, Dr. Schiller stated that there is no mining work that causes disc disease and back pain. The article also described “cumulative trauma” as a non-existent syndrome. Dr. Schiller also disagreed with Dr. Hughes’s

statement that Stacy's history of repetitive injuries was caused by his occupation; "[t]here is no known cumulative stress disorder that gives degenerative arthritis of the spine. This is a normal aging process and is related to genetic predisposition of the patient. The bilateral hand pain likewise is attributed not to a work injury, but to arthritis." Dr. Schiller was unable to make a diagnosis to explain Stacy's complaints and could not, therefore, assign an impairment rating.

In a February 28, 2013, addendum to his report, Dr. Schiller detailed his physician examination of Stacy. Based upon his examination, Dr. Schiller did not agree with Dr. Hughes's assessment that Stacy had a 16% permanent partial impairment, disputing his use of the DRE method because Stacy had not had a distinct injury. Even if the DRE method were used, Stacy would only be considered DRE lumbar category I with a 0% impairment rating. Dr. Schiller also disagreed with Dr. Hughes's impairment ratings for Stacy's wrists because Dr. Schiller's examination revealed identical, normal range of motion of both wrists and because Dr. Hughes inappropriately used the grip strengths measurements. Dr. Schiller ultimately diagnosed age-related degenerative changes of the lumbar spine and stated that Stacy may have arthritis of the wrists. He assigned a 0% impairment rating for his back condition, but he did not have enough information about his wrists. He stated that it was likely a gouty arthritis problem.

The parties filed witness lists and stipulations, and the ALJ held a benefit review conference on March 12, 2013. The parties stipulated as to coverage under the Act; the existence of an employment relationship; that Stacy

had sustained a work-related injury on April 16, 2012; notice; Stacy's date of birth; and his educational background. Contested issues remained benefits; causation; notice; average weekly wage; medical expenses; injury as defined by the Act; credit for unemployment, short term disability, and pension; exclusion for pre-existing disability/impairment; temporary total disability benefits; whether Stacy had reached the threshold for his hearing loss claim; statute of limitations or repose; and whether Dr. Hughes properly applied the *AMA Guides*. A final hearing was scheduled for later in the month, but was canceled when Stacy's motion to amend his claim to allege bilateral wrist injuries was granted. The ALJ extended proof time for both parties, and another benefit review conference was to be scheduled once proof was completed.

Stacy filed a report from M&G Neurophysiology dated April 29, 2013, which included the results from his nerve conduction velocity study. This test revealed evidence of bilateral carpal tunnel syndrome.

Austin Powder filed the medical report of Dr. Thomas M. Gabriel dated May 14, 2013, which detailed his independent medical evaluation (IME) of Stacy's hand and wrist complaints. Dr. Gabriel reviewed the records from Dr. Raichel at Quantum Healthcare and from Dr. Belhasen at Baptist Southeast Orthopedics as well as Dr. Schiller's reports. Dr. Gabriel noted a past medical history remarkable for gout. X-rays were taken, which showed mild degenerative changes with multiple noted carpal bone cysts consistent with an inflammatory arthropathy. Dr. Gabriel reviewed the electrodiagnostic studies performed in

April, which were consistent with bilateral carpal tunnel. His diagnosis was chronic bilateral hand/wrist pain; gouty/degenerative arthritis, bilateral wrists/hands; and bilateral carpal tunnel syndrome. Dr. Gabriel agreed with Dr. Schiller's impression during his IME that cumulative trauma had not been confirmed as a reason to develop degenerative arthritis; rather, genetic factors and a significant past medical history of chronic disease "is more likely than not to be contributory to today's current hand/wrist complaints." Dr. Gabriel did not attribute Stacy's diagnosis to his work, and he stated that any further treatment would not be the result of a work-related injury or illness.

Austin Powder filed another report from Dr. Schiller detailing his second IME performed on May 8, 2013. Dr. Schiller reviewed additional records sent to him by counsel for Austin Powder. These included records from his osteopathic doctor at Quantum Healthcare and Dr. Belhasen, an orthopedic surgeon at Baptist Southeast Orthopedics who noted a known history of gout. Stacy told Dr. Schiller that he did not have any symptoms of pain that day, but if he used his hands at work, they would swell the next day and be painful. His physical examination did not show any objective clinical evidence of carpal tunnel syndrome, but Dr. Schiller stated that he would need to see the EMG report. Dr. Schiller found "very few objective findings of anything wrong with this patient but there is a significant amount of evidence that there was either anxiety state, psychosomatic illness or secondary gain complaints because he has already obtained Social Security impairment and now there is litigation involving work

relationship to these complaints.” Dr. Schiller dismissed any work-related causation for gouty arthritis or ganglion cysts.

In addition to filing his medical reports, Austin Powder obtained Dr. Schiller’s testimony by deposition. As he stated in his reports, Dr. Schiller testified that there was no such condition as repetitive cumulative trauma, citing a study involving twins. Rather, degenerative disc disease occurs as part of the aging process and genetics, which is what happened to Stacy. Regarding Stacy’s wrists, Dr. Schiller noted his history of gout and that he had had episodes of acute gouty arthritis in his foot, ankle, hands. He agreed with Dr. Gabriel’s assessment that Stacy’s hand symptoms were related to gouty arthritis, not trauma. He stated that gout is not a curable condition, but the symptoms are not constant. While gout usually manifests in the lower extremities, the most common location being the big toe, gout can also appear in the hands. Dr. Schiller did not find any evidence of carpal tunnel syndrome in his examination, and he did not assign any impairment or restrictions related to his work.

Austin Powder took the deposition of Hirley Smith on July 8, 2013. Mr. Smith was the blasting coordinator at Austin Powder when Stacy worked for the company. He stated Austin Powder was in the business of selling explosives and contract blasting and drilling. He testified about the enclosed, pressurized drill cabs and that employees wore ear protection. He stated that about 95% or more of Stacy’s job involved sitting in the pressurized cab manipulating levers with his hands.

Dr. Raleigh Jones testified by deposition on August 16, 2013. Dr. Jones is an otolaryngologist specialist at the University of Kentucky, and he had performed a University evaluation on Stacy the previous February. Based upon his examination, Dr. Jones testified that Stacy had an occupation-related, noise-induced sensory hearing loss for which he assigned a 2% impairment rating. However, Dr. Jones admitted that he did not have personal knowledge of what decibel level Stacy was exposed to during his work for Austin Powder. Pursuant to OSHA guidelines, for Stacy to have an injurious exposure to noise at his employment, he would have had to have been exposed to noise in excess of eighty-five decibels, eight hours per day. If he had been in an environment with noise no higher than seventy-three decibels, even without hearing protection, he would not expect him to have work-related hearing loss. Based on his more than forty-year history of noise exposure on a regular basis, Dr. Jones believed his hearing test was consistent with that history. Dr. Jones agreed that Stacy's hearing loss could have occurred any time over the last forty years and might not have been due to his work for Austin Powder.

The ALJ held a second benefit review conference on October 22, 2013. The contested issues remained the same, with the addition of Stacy's last injurious exposure for his hearing loss claim.

The final hearing was held on October 22, 2013. Stacy updated his testimony and explained his job duties as a drill operator at Austin Powder. He said he had to toggle switches and pull levers. He also had to clean the tracks,

grease the drill, clean the inside of the cab, and measure drill holes. Stacy began experiencing pain in his low back five or six years previously and in his wrists six years previously. He reported that using his wrists would make them numb and swell. He stated that the doctors told him there was nothing they could do for his wrists or back. He reported that his pain was not as bad since he had stopped working. He did not believe he could go back to work for Austin Powder because he would miss too much work; “if I use my hands today, tomorrow I can’t do nothing.” He was taking pain medication for his back and hand problems. On cross-examination, Stacy stated that he had been laid off on April 16, 2012, and drew unemployment benefits until he received his Social Security disability award in October 2012. Regarding the drill cab he worked in, Stacy stated that it was enclosed, but not pressurized, and it only contained a heater and air conditioner.

Following the hearing, the parties filed their respective briefs, and the ALJ entered an opinion, order, and award on December 23, 2013, awarding Stacy permanent total disability (PTD) benefits for his injury claim at a rate of \$736.19 per week commencing April 17, 2012, and crediting Austin Powder for any unemployment benefits that may overlap. The ALJ also awarded medical benefits for his injury and hearing loss claims, although the ALJ found that Stacy had not met the threshold for monetary benefits for his work-related hearing loss.

After summarizing the lay and medical testimony, the ALJ addressed the contested issues. Regarding the hearing loss claim, the ALJ found the record established that Stacy had been exposed to hazardous noise while operating the

drill for Austin Powder, and Austin Powder submitted no proof that he was not exposed or not last exposed during his employment there.

Regarding his injury claims, the ALJ found the opinion of Dr. Hughes to be persuasive and that Stacy had met his burden of proving that he had sustained a cumulative trauma to his lumbar spine and both wrists, which manifested on April 16, 2012, while he was working for Austin Powder as a drill operator. The ALJ found Stacy's testimony and his complaints of pain to be credible. The ALJ specifically found that Dr. Schiller's opinions were not persuasive, particularly his opinion that cumulative trauma injuries did not occur. Likewise, the ALJ did not find Dr. Gabriel's opinion to be persuasive.

Regarding notice, the ALJ found that Stacy had been told on August 12, 2012, by Dr. Williams that his carpal tunnel syndrome and low back condition were caused by his work and that Stacy notified Austin Powder of this by certified mail on October 30, 2012. Therefore, Stacy timely filed his claim.

The ALJ next considered whether Stacy suffered from any prior active impairment or disability and whether Dr. Hughes properly assessed his impairment rating pursuant to the *AMA Guides*. The ALJ found that Dr. Hughes properly applied the *AMA Guides* in assigning an impairment rating for both his low back and upper extremity conditions. The ALJ went on to find that the record did not contain any medical or vocational proof that Stacy was suffering from any pre-existing occupational disability on April 16, 2012.

Austin Powder filed a petition for reconsideration requesting, in part, further findings related to why Dr. Hughes's testimony qualified as substantial evidence with regard to the impairment rating and how his rating was done within the parameters of the *AMA Guides*. Austin Powder also requested the correction of the impairment rating Dr. Hughes assigned to reflect 16% rather than 18% as well as correction of his average weekly wage. Stacy responded to the petition, acknowledging the mistaken impairment rating, but arguing that this was irrelevant based on the ALJ's determination that he was permanently and totally disabled. He also acknowledged the mistake in the average weekly wage calculation, but he again argued that this was irrelevant because it was higher than the maximum rate that could be awarded. Otherwise, Stacy did not believe the petition had any merit.

By order entered January 13, 2014, the ALJ granted the petition and amended the opinion, order, and award to reflect the correct impairment rating and average weekly wage, but otherwise denied the petition. The ALJ stated:

The Administrative Law Judge believes that he [] adequately set forth in the opinion as to why he ruled the way he ruled in relying upon Dr. Hughes and not relying upon the proof of the Defendant/Employer. In fact, the Defendant/Employer's medical proof specifically from Dr. Schiller is found to be incredulous based on the fact that Dr. Schiller does not believe that cumulative trauma injuries exist while the Kentucky General Assembly believes it does as indicated by the definition of the same being included in the statutory definition of injury.

Austin Powder appealed the ALJ's decisions to the Board.

In its brief to the Board, Austin Powder argued that the ALJ's decision was not based upon substantial evidence, specifically, the evidence from Dr. Hughes; that Dr. Hughes's impairment ratings were not within the parameters of the *AMA Guides*; that Stacy was not entitled to medical benefits for his hearing loss claim; and that there was no basis for finding total disability. In his responsive brief, Stacy argued that he had met his burden of proof and that the ALJ's decision was supported by substantial evidence. He pointed out that the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence, in determining that Dr. Hughes's opinions were the most credible.

On May 9, 2014, the Board entered a lengthy opinion affirming in part, vacating in part, and remanding the matter to the ALJ for further findings. The Board found that Dr. Hughes's opinions as set forth in his Form 107 and testimony were supported by objective medical findings. His physical examination revealed reduced range of motion and reduced grip strength in both wrists. And Dr. Belhasen's report supported Dr. Hughes's diagnosis and conclusions that Stacy had sustained work-related cumulative traumas to his wrists. The Board also found Austin Powder's argument that he was not qualified as an expert pursuant to Kentucky Rules of Evidence (KRE) 702 to be both unpreserved and without merit because Stacy had not been provided the opportunity to submit any evidence to support the reliability of his testimony. Next, the Board held that a portion of the impairment rating for the wrists was not assessed pursuant to the *AMA Guides* because Dr. Hughes had added 6% for reduced grip strength, and it therefore

vacated the ALJ's reliance on this impairment rating. However, the Board disagreed with Austin Powder's argument related to the range of motion testing and determined that the basis for Dr. Hughes's 6% impairment rating for reduced range of motion was in keeping with the *AMA Guides*. The Board stated:

It appears Dr. Hughes believed he had complied with the *AMA Guides* and his findings concerning the range of motion in each wrist was in keeping with the *AMA Guides*. Specifically because he could not obtain passive motion measurements without hurting Stacy, Dr. Hughes did not believe he was required to obtain these measurements.

The Board concluded that Dr. Hughes's diagnosis and impairment rating for reduced range of motion were appropriate based on the circumstances of this case.

Regarding Stacy's back impairment rating, the Board determined that Dr. Hughes's belief that his condition fell within DRE category II was not in compliance with the *AMA Guides* because he did not have a specific injury, radiculopathy, or any fractures. Therefore, the Board vacated the portion of the ALJ's opinion finding that Stacy had a 5% impairment for his low back condition. The Board went on to find that Stacy's and Dr. Jones's testimony constituted substantial evidence to support the award of medical benefits for his hearing loss claim and that the argument related to the award of total disability benefits was moot.

Citing Kentucky Revised Statutes (KRS) 342.285(2) as authority, the Board spent the remainder of the opinion addressing two issues that were not raised by any of the parties or decided by the ALJ; namely, the date of manifestation of

Stacy's cumulative trauma claim and the percentage of his disability that could be assigned to Austin Powder pursuant to *Southern Kentucky Concrete Contractors, Inc., v. Campbell*, 662 S.W.2d 221 (Ky. App. 1983). The Board remanded for further findings on both issues. In addition, the Board directed the ALJ on remand to determine whether Stacy was entitled to medical benefits related to his back condition by finding whether he had sustained a cumulative trauma back injury during his employment for Austin Powder. If the ALJ were to determine that Stacy had sustained a cumulative trauma to one or both of his wrists that merited an impairment rating, the ALJ had to then determine the extent of his occupational disability in accordance with the applicable statutory and case law. Ultimately, the Board affirmed only the portion of the ALJ's opinion awarding medical benefits for Stacy's work-related hearing loss claim. These petitions for review now follow.

After the appeals were assigned to the merits panel, the Court placed them in abeyance pending final resolution by the Supreme Court of Kentucky in *Hale v. CDR Operations, Inc.*, 474 S.W.3d 129 (Ky. 2015). By order entered January 26, 2016, the matters were returned to the active docket.

This Court's standard of review in workers' compensation appeals is well-settled in the Commonwealth. "The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or

committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Kentucky law establishes that “[t]he claimant in a workman’s compensation case has the burden of proof and the risk of persuading the board in his favor.”

Snawder v. Stice, 576 S.W.2d 276, 279 (Ky. App. 1979) (citations omitted).

“When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to

reasonably find as it did.” *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky.

1986). However, “[i]f the board finds against a claimant who had the burden of

proof and the risk of persuasion, the court upon review is confined to determining

whether or not the total evidence was so strong as to compel a finding in claimant’s favor.” *Snawder*, 576 S.W.2d at 280 (citations omitted).

Furthermore, we recognize that:

The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence. *Paramount Foods, Inc. v. Burkhardt*, Ky., 695 S.W.2d 418 (1985). Where, as here, the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. *Pruitt v. Bugg Brothers*, Ky., 547 S.W.2d 123 (1977).

Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993). Because the decision favored Stacy, we must determine whether there was some evidence of substance to support the ALJ’s findings.

Although a court cannot substitute its evaluation of the weight and credibility of the evidence for that of the Workmen's Compensation Board, nevertheless, the findings of fact of the board when it decides in favor of the claimant must be supported by substantial evidence. Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.

Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971).

We shall first consider Stacy's appeal. In his petition, Stacy raised four issues, including an argument that the Board erred in *sua sponte* reversing the ALJ's decision for findings related to the date of manifestation of his cumulative trauma claims and for a determination of the percentage of his cumulative trauma that is related to his work for Austin Powder. Based upon the holding in *Hale*, we agree.

In *Hale*, the Supreme Court addressed the issues of apportionment and the date of manifestation in a cumulative trauma injury claim. The Court discussed the case law and statutes addressing this issue and noted that KRS Chapter 342 had been amended many times over the years, including the abolishment of the Special Fund. In holding that KRS Chapter 342 did not limit the liability of an employer to time spent in that employment, the Court held:

Resurrecting the apportionment scheme of *Southern Kentucky Concrete* would in essence create a "lesser" class of claimants. In hearing loss and occupational disease claims—which are quite similar in nature to cumulative trauma because they occur gradually over time—the employer at the time of the last injurious or hazardous exposure is liable. The employee is entitled to the same amount of compensation whether he worked

for one employer or many. An employee who sustains a harmful change in his human organism due to cumulative trauma over many years working for the same employer is entitled to compensation to the full extent of his resultant disability. But, someone like Hale would not be fully compensated, simply because he worked for multiple employers. We can discern no basis for such a distinction. “Although both the employee and the employer have rights under the [Workers' Compensation] Act, the primary purpose of the law is to aid injured ... workers.” *Zurich Am. Ins. Co. v. Brierly*, 936 S.W.2d 561, 563 (Ky. 1996). Nothing in KRS Chapter 342 limits the liability of the employer, in whose employ the date of manifestation occurred, to the percentage of the claimant's work-life spent there. *Southern Kentucky Concrete* has no application under the current statutory scheme.

Hale, 474 S.W.3d at 138 (footnote omitted). Based upon this holding, we hold that the Board erred as a matter of law in applying *Southern Kentucky Concrete, Inc. supra*, to this case and directing the ALJ to analyze it as a cumulative trauma claim with multiple employers and determine how much of Stacy’s wrist injuries were sustained while he was employed by Austin Powder. We must reverse the Board’s decision on this issue.

The *Hale* Court also addressed the date of manifestation, noting initially that “a rule of discovery applies for establishing the date of injury” in cumulative trauma cases. *Id.* Although the parties in *Hale* had stipulated the date of manifestation, the ALJ used that date in the opinion, and the date was not raised as an issue in the appeal to the Board, the Board nevertheless vacated the award of PPD benefits and remanded the matter for the ALJ to consider this question. *Id.* The Supreme Court disagreed with the Board’s decision, holding “[a]lthough the

Board held that the ALJ's determination as to the date of manifestation must be vacated, the Board has no authority to set aside a valid stipulation of fact, *sua sponte*.” *Id.* at 140 (footnote omitted). The Court further explained:

Here, the ALJ properly found that the date of manifestation was February 7, 2012, because he was bound by the parties' stipulation. *Lappinen v. Union Ore Co.*, 224 Minn. 395, 29 N.W.2d 8, 17 (1947) (“As long as a stipulation remains in effect it is binding not only on the parties, but on both the trial and appellate court.”); *Fed. Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, 942 F.2d 1032, 1038 (6th Cir. 1991) (“Stipulations voluntarily entered by the parties are binding, both on the district court and on us.”); *Double M Const., Inc. v. State Corp. Comm'n*, 288 Kan. 268, 202 P.3d 7, 10 (2009) (“Parties are bound to their stipulations, however, and a trial court or appellate court must render judgment based on those stipulated facts.”); *Bruggner v. Shaffer*, 138 Ind.App. 183, 210 N.E.2d 439, 441 (1965) (“[F]acts which are stipulated ... not having been set aside or withdrawn are conclusive upon the parties and the tribunal.... While the specific question of the stipulated facts was not raised in appellant's briefs, this court ... is not so restricted that it must close its eyes to what is clearly before it.”).

Hale, 474 S.W.3d at 139-40. Because the Board erred as a matter of law in ignoring the parties’ stipulation as to the date of manifestation, we must also reverse the Board’s opinion on this issue.

In response to *Hale*, Stacy moved this Court to reverse the Board’s opinion and reinstate the ALJ’s opinion. We agree that *Hale* mandates a reversal of the Board’s holdings related to apportionment and the date of manifestation, as both of these rulings are clearly in error. Had Austin Powder not filed its own petition seeking review of the Board’s opinion, the motion to reinstate would

perhaps have had some merit. However, we denied the motion because we must also consider Austin Powder's arguments raised in its separate petition.

Furthermore, we note that our holdings on Stacy's petition do not affect the portions of the Board's opinion vacating the ALJ's findings regarding Stacy's back impairment and the portion of his wrist impairment related to reduced grip strength, and directing the ALJ to determine whether Stacy is entitled to medical benefits for to his back condition. Those portions of the Board's opinion were not appealed and shall stand.

In its separate petition, Austin Powder disputes the Board's holdings that Dr. Hughes's testimony was based on substantial evidence of record, that the impairment Dr. Hughes assigned was within the parameters of the *AMA Guides*, and that Stacy's hearing loss claim was due to his last exposure at work.

Austin Powder's first argument addresses the medical testimony of Dr. Hughes regarding Stacy's wrist injury. The Board concluded that Dr. Hughes's opinions were supported by objective medical findings, including loss of range of motion. The Board went on to observe:

In line with *Gibbs*, Dr. Hughes' medical examination revealed Stacy had reduced range of motion in both wrists and reduced grip strength. This does not appear to be in dispute. Clearly, Dr. Belhasen's report establishes Stacy has significant wrist problems. This premise is reinforced by the report of M & G Neurophysiology which reveals Stacy had an abnormal nerve conduction velocity study of the bilateral upper extremities. There was electrodiagnostic evidence of bilateral carpal tunnel syndrome affecting both the motor and sensory portion of the nerve fiber.

In *Gibbs v. Premier Scale Co./Indiana Scale Co.*, 50 S.W.3d 754 (Ky.

2001), as modified on denial of reh'g (Aug. 23, 2001), the Supreme Court addressed this issue:

KRS 342.0011(1) makes it clear that not all work-related harmful changes are compensable. Therefore, we are constrained to conclude that although a worker may experience symptoms and although a physician may have diagnosed a work-related harmful change, the harmful change must be evidenced by objective medical findings as that term is defined by KRS 342.0011(33). Otherwise, it is not compensable as an “injury.” KRS 342.0011(1).

Id. at 761. KRS 342.0011(33) defines “objective medical findings” as “information gained through direct observation and testing of the patient applying objective or standardized methods[.]” The Court went on to recognize that something more than a diagnosis based upon a worker’s subjective complaints is necessary to establish an injury pursuant to KRS Chapter 342. *Id.* at 761-62.

Austin Powder contends that Dr. Hughes did not have a complete medical history and that he had not considered Dr. Belhasen’s report, which attributed Stacy’s wrist problems to gout rather than to a work-related injury or harmful change. However, we agree with Stacy that Dr. Hughes was not required to consider the history taken by Dr. Belhasen, and it was within the ALJ’s discretion to determine the weight and credibility of the witnesses. *See Square D Co. v. Tipton, supra.* The ALJ was well within his discretion in relying upon Dr. Hughes’s report and testimony in awarding benefits to Stacy.

Also related to the medical evidence of Dr. Hughes, Austin Powder contends in its second argument that Dr. Hughes did not assign an impairment rating to Stacy's wrists that was within the parameters of the *AMA Guides* because he did not properly perform the passive range of motion test when a less than full arc of wrist motion existed. Upholding the ALJ's 6% impairment rating, the Board held as follows:

We note the *AMA Guides* specifically state in assessing motion, the examiner should first observe what an individual can and cannot do by asking him or her to move each joint of the extremity, from the shoulder down, through its full range of motion. Given that language, we conclude the basis for Dr. Hughes' 6% impairment rating for reduced range of motion was in keeping with the mandates of the *AMA Guides*. It appears that Dr. Hughes believed he had complied with the *AMA Guides* and his findings concerning the range of motion in each wrist was in keeping with the *AMA Guides*. Specifically because he could not obtain passive motion measurements without hurting Stacy, Dr. Hughes did not believe he was required to obtain these measurements.

The above discussion aside, the issue here is not the same as the previous issue where it was clear an impairment rating could not be assessed for reduced grip strength. Here, Austin Powder argues Dr. Hughes' calculation of the range of motion and diagnosis of a loss of range of motion was not based upon the mandates of the *AMA Guides*. The Supreme Court in *Tokico v. Kelly*, 281 S.W.3d 771 (Ky. 2009), held KRS [Chapter] 342 does require a doctor to conform his diagnosis to criteria listed in the *AMA Guides*. . . .

As noted in *Tokico v. Kelly, supra*, the ALJ could consider the diagnostic criteria contained in the *AMA Guides* in "judging the credibility of a diagnosis." Here, the ALJ obviously determined Dr. Hughes' diagnosis of a

loss of range of motion in the wrist was based on appropriate criteria. We do not believe Austin Powder established Dr. Hughes did not comply with the procedure recommended by the *AMA Guides* in determining Stacy's range of motion in both wrists. Rather, it appears in keeping with the *AMA Guides*, Dr. Hughes determined Stacy's range of motion in both wrists in a manner which would not cause any pain or discomfort. Even if, in evaluating the range of motion and formulating a diagnosis, Dr. Hughes did not strictly comply with Table 16.4a, we believe his diagnosis and the impairment rating assessed for reduced range of motion for both wrists was appropriate. Significantly, Austin Powder does not challenge the impairment rating assessed for loss of range of motion; rather, it challenges the manner in which Dr. Hughes determined the loss of range of motion.

Austin Powder contends that the holding in *Tokico* is inapplicable here because that case dealt with diagnostic criteria of the *AMA Guides*, not an impairment rating. Rather, Austin Powder relies upon the Supreme Court's holding in *Jones v. Brasch-Barry Gen. Contractors*, 189 S.W.3d 149 (Ky. App. 2006):

We agree with Jones that the *AMA Guides* do not abrogate a physician's right to assess independently an individual's impairment rating. We also agree that if the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe. But an ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the *AMA Guides*. In other words, a physician's latitude in the field of workers' compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the *AMA Guides*. The fact-finder may not give credence to an impairment rating double that called for in the *AMA*

Guides based upon the physician's disagreement with the disability percentages called for in the *AMA Guides*, which is precisely what Dr. Reasor did in the case at hand.

Under our law, the *AMA Guides* are an integral tool for assessing a claimant's disability rating and monetary award. So to be useful for the fact-finder, a physician's opinion must be grounded in the *AMA Guides*, meaning that a physician's personal antagonism toward the *AMA Guides*, such as that demonstrated by Dr. Reasor in this case, is legally irrelevant. And any assessment that disregards the express terms of the *AMA Guides* cannot constitute substantial evidence to support an award of workers' compensation benefits.

Id. at 153-54.

In arguing that Dr. Hughes's evaluation was faulty, Austin Powder relies upon language on page 451 of the *AMA Guides*. That paragraph reads in full as follows:

In assessing motion, the examiner should first observe what an individual can and cannot do by asking him or her to move each joint of the extremity, from the shoulder down, through its full range of motion. *Both extremities should be compared.* Individual joints are then evaluated as a unit by having the individual make a complete fist and then extend the digits fully over several repetitions. In determining the range of motion of individual joints, the examiner must evaluate both the active and the passive motion. *Active or voluntary motion* is that performed by the active contraction of the governing muscles and is evaluated first. When a person has full active joint extension, passive motion values need not be taken because a joint that has full active excursion will have a full passive range as well. However, if the active arc of motion is incomplete, assisted active and/or passive motion measurements are necessary to evaluate the joint motion. *Passive motion* is that produced by an external force to determine the

freedom and range of motion existing at a joint when all muscles are relaxed. An example is Bunnell's test for intrinsic tightness in the hand. *Assisted active motion* is the result of active muscle contraction and an external force applied to the joint; it allows for stabilization of a segment to improve the mechanical advantage of the muscles that move the joint being measured. In both cases, approximately 0.5 kg of force is applied while a segment of the joint is stabilized. *Measurements of active motion take precedence in the Guides. The actual measured goniometer readings or linear measurements are recorded.* [Emphasis in original.]

As the ALJ and the Board determined, we agree that Dr. Hughes complied with the AMA *Guides* in evaluating the range of motion in Stacy's wrists and the impairment rating he assigned was appropriate. Therefore, we find no error related to this issue.

Finally, Austin Powder argues that there was no basis for the award of medical benefits to Stacy based upon his hearing loss claim because he was only found to have a 2% impairment rating for this condition and because Dr. Jones could not state that his hearing loss was due to his last exposure to noise at work. The ALJ relied upon the medical proof of audiologist Dr. Moore and University Evaluator Dr. Jones, who determined that Stacy "suffered from noise induced hearing loss, as a result of his working as a drill operator being last exposed to the hazards of occupational noise while employed at [Austin Powder] on April 6, 2012." Because Dr. Jones only assessed a 2% impairment rating, the ALJ did not award any income benefits for his work-related hearing loss, but Stacy was entitled to an award of medical benefits for this condition pursuant to KRS 342.020. The

Board upheld this award, pointing to Dr. Jones's deposition testimony where he said that Stacy told him the drill was a "pretty noisy piece of equipment." The Board concluded, "The testimony of Stacy and Dr. Jones constitute substantial evidence supporting the ALJ's award of medical benefits for a work-related hearing loss." We find no error in this ruling.

KRS 342.7305 provides for benefits for occupational hearing loss, and included in this statute are a rebuttable presumption that hearing loss is covered under KRS Chapter 342 and a provision that the last employer where the employee was exposed is liable for benefits:

(2) Income benefits payable for occupational hearing loss shall be as provided in KRS 342.730, except income benefits shall not be payable where the binaural hearing impairment converted to impairment of the whole person results in impairment of less than eight percent (8%). No impairment percentage for tinnitus shall be considered in determining impairment to the whole person.

.....

(4) When audiograms and other testing reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure and the employee demonstrates repetitive exposure to hazardous noise in the workplace, there shall be a rebuttable presumption that the hearing impairment is an injury covered by this chapter, and the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits.

Furthermore, "the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence."

KRS 342.315(2). Accordingly, Dr. Jones's medical evidence holds presumptive weight. Based upon our review of the record, we agree with the Board that the evidence from Stacy and Dr. Jones constitutes substantial evidence supporting the ALJ's determination that Stacy was exposed to injurious noise at Austin Powder.

We also agree with the ALJ and the Board that Stacy is entitled to medical benefits due to his occupational hearing loss. While Austin Powder is correct that Stacy was not entitled to income benefits because his impairment did not reach the 8% threshold mandated in KRS 342.7305(2), he was certainly entitled to medical benefits for this injury pursuant to KRS 342.020(1). As the Supreme Court of Kentucky held in *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 318-19 (Ky. 2007), "disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits." We find no merit in Austin Powder's argument in this regard.

For the foregoing reasons, the portion of the Board's opinion vacating the ALJ's opinion, order and award is reversed, the remainder of the opinion is affirmed, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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