

RENDERED: AUGUST 9, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-001199-WC

ROBERT HODGE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-17-00775

SEBREE MINING; HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: DIXON, JONES AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Robert Hodge appeals from the decision of the Workers' Compensation Board which vacated and remanded the decision of the Administrative Law Judge (ALJ) determining Hodge was entitled to permanent partial disability (PPD) benefits for work-related cumulative trauma to his neck.

As the ALJ made sufficient factual findings and there is no need to clarify them, we reverse the Board's decision for remand to the ALJ.

Hodge was sixty-six years old at the time of the hearing. He had a tenth-grade education and worked in mining for over forty years. He suffered a cervical spine (neck) injury to C7-8 which pinched a nerve and required surgery in 2013. Stating he did not know the cause of his injury, Hodge did not seek workers' compensation. Post-surgery, Hodge lost much of the use of his left hand which was particularly debilitating as he is left-handed. However, after the surgery, Hodge returned to his previous occupation and continued to work without accommodation until January 6, 2016, when he was laid off.

In 2017, Hodge filed a workers' compensation claim for cumulative trauma to multiple body parts as of the day of his layoff against Sebree Mining, which is insured by Alliance Coal (Sebree). When Hodge filed his claim, he was receiving unemployment compensation. Hodge has not resumed working and currently receives social security benefits. The only claim relevant on appeal is his claim of injury to his cervical spine. The issue is whether this injury was the result of cumulative work-related trauma or the result of an isolated unrelated incident.

According to a medical questionnaire and report from Dr. James Rushing, Hodge's treating physician and chiropractor, Hodge's medical issue with his neck was caused by his job activities. His medical records indicated that his

symptoms were of gradual onset, but it was unclear whether this related to his neck injury or other injuries.

In the Form 107-I report of Dr. Stephen Autry, Dr. Autry noted that in Hodge's employment in the mining industry he had to do a substantial amount of pushing, pulling and lifting, and operated heavy equipment. He reported:

[Hodge] has had significant neck pain and concurrent pain that will radiate into the left hand and arm. . . . The neck pain has been substantially symptomatic. Three years prior to this exam, he underwent a posterior cervical laminectomy. This left him with permanent numbness and weakness in his left arm. He has had an also dysfunctional left hand ever since the procedure was completed.

In his physical examination of Hodge, Dr. Autry reported:

C7-8 distribution distally shows marked sensory loss. There is a negative Spurling's. Examination of the left wrist shows essentially a claw hand with a positive Froment's sign and almost no interosseous function. Grip on the left is 10 pounds. Grip on the right is 90 pounds. Pinch on the left is 0. Pinch on the right is 22 pounds.

As to diagnosis, Dr. Autry compared singular traumatic injuries versus injuries resulting from cumulative trauma over time. He then explained:

Recurrent micros trauma may occur throughout the musculoskeletal system including bones, ligaments, tendons, muscles and vertebral discs. Cyclic loading of these tissues may cause structural fatigue and gradual degradation of these structures. The symptomatic appearance of these destructive processes may take years to emerge. Individuals engaged in frequent heavy lifting,

working in positions requiring highly leveraged or repetitive activities, or substantial cyclic impact loading are candidates for symptomatic injuries and impairment due to cumulative trauma.

Dr. Autry opined there was a reasonable medical probability that Hodge's injury was the cause of his complaints, explaining:

[Hodge's] history and job description correlate with the specific diagnoses [of C7-8 profound radiculopathy status post posterior laminectomy for cervical disc pathology]. [Hodge] *had a specific history of progressional pain in his neck secondary to work activities*, subsequently undergoing a posterior laminectomy with profound neural impairment to the C7-8 distribution subsequent to that procedure. . . . [Hodge] has had a history of work activities requiring lifting, bending, stooping, pushing and pulling, as well as using wrenches, hammers, pry bars, air tools, and lifting belt rollers and timbers. These activities have led to cumulative injuries to the cervical . . . regions secondary to axial and compressive loading. [Hodge] has a documented loss of function associated with the prior laminectomy of the cervical spine with ongoing substantial neural impairment involving this extremity.

(Emphasis added). Dr. Autry explained the causal relationship as follows:

Mr. Hodge has worked in mining for over forty six years. Over this period of time, [Hodge] has sustained injuries. . . . Mr. Hodge has experienced work related pain . . . including [to] his neck . . . [as a] consequence[] of many years in mining. Pain and functional limitations may be the combined result of incident and cumulative trauma.

The cervical . . . spine region[] is . . . subject to axial (compressive), bending, and torsional (twisting) loads during work activities. These stresses subject soft tissue

and bone to cyclic loading and fatigue. These traumas are initially asymptomatic but, over time, can accumulated and make a previously asymptomatic condition symptomatic. In the case of Mr. Hodge, harmful change occurred due to recurrent stress loading to the disc, ligament, and facet anatomy sustained during the course of performing the activities required in [his] job description. The annular fibrous ring of the disc may tear causing the gelatinous nucleus to herniate or degenerate and lose its shock absorbing capacity. These stresses also damage the articular cartilage of the facets leading to the development of arthritis and bony spurs.

Dr. Autry explained that Hodge's symptoms which had been asymptomatic, dormant, and non-disabling were aroused into a disabling condition by his latest employment. Dr. Autry determined that Hodge had a 37% whole person impairment based on cervical spondylosis status post cervical laminectomy with neural loss C7-8, making him unable to return to his same work.

According to Hodge's deposition testimony, he did not turn his neck injury in as a workers' compensation injury because he did not know how it happened. He testified he did not have neck issues before the pinched nerve and "[i]t just started one day."

According to the Independent Medical Examination (IME) of Dr. Christopher Stephens, Hodge's neck never bothered him until 2013 when he awoke one morning with severe left arm pain and weakness and numbness of his left hand which was treated with a posterior decompression for cervical radiculopathy. Although his pain was relieved, he did not regain function in his

left hand. Dr. Stephens opined that the medical evidence did not support a claim for cumulative traumatic injury to Hodge's cervical spine. He concluded:

I have reviewed the report of Dr. Autry. . . . I am . . . in agreement with him regarding his rating methodology for this gentleman's chronic cervical impairment. [Dr. Autry] has appropriately categorized him in Cervical Category 5. However[,] I completely disagree with [Dr. Autry] with regards to causation. It is unclear to me how he could allocate all of this impairment to cumulative traumatic injury, when all of [Hodge's] cervical complaints and residual issues after surgery resulted from an acute disc herniation occurring in 2013, which was not work related.

The report of Dr. Daniel Primm regarding Hodge's history was that he had no problems with his neck until he awoke one morning with pain in his neck radiating down his left arm. However, the questions asked of Dr. Primm related to Hodge's left shoulder complaint and not to his neck injury.

The medical records from Dr. Neil Troffkin documented several diagnoses of neck problems with neuro formlinal narrowing between the vertebra. However, the source of his symptoms was that at C7-T1 there was severe left neuro formlinal narrowing with Hodge's symptoms consistent with a left-sided C8 radiculopathy. As a result, Dr. Troffkin recommended and performed a laminoforaminotomy on C7-T1 to remove the extra bone crowding the neural foramen which was impacting the C8 nerve root.

An addendum to Dr. Autry's medical report was filed in which he reviewed the IME of Dr. Stephens. Dr. Autry stated:

The history that I obtained from Mr. Hodge is not reflected in a similar manner in the history described by Dr. Stephens. When I had discussed his work history, he indicated that he had operated heavy equipment with significant impact loading causing injuries and pain that radiated into his left hand and arm. He did not equate his neck and arm pain to a sudden onset of pain at home. He attributed . . . the cervical . . . symptoms to cumulative injuries during the course of employment. He also noted that, as a utility man, he had to do significant pushing, pulling and lifting. This will create both torsional and axial loading stresses that are compatible with cumulative injuries to . . . [the] neck . . . area[. . . .

I have also reviewed my initial notes as well as my Form 107-I report. It is my opinion that Mr. Hodge did, at the time of his examination, relate his neck . . . injuries . . . to cumulative activities at work through the above-noted mechanisms.

At the hearing, Hodge testified that he worked for Sebree for five years. He testified the job requirements of his various jobs over the years required heavy manual labor as a belt mechanic, including repeatedly lifting forty-five pound rollers.

As to his neck injury, Hodge described its onset as follows:

I got up to go to work one morning on Monday morning and I – you know, my back was hurting; but, heck, that was normal right there. You know, I went on to work; and as the day went on, I got this pain going down my arm; and as the day went on, I couldn't even hold a water hose in my hand right there, it just hurt so bad.

Hodge explained that he did not remember any distinct injury and did not turn in a worker's compensation claim because he did not know what happened and he never had any neck injuries before then or required any treatment for his neck before then. Following the surgery, he returned to work with no restrictions, though he still could not use his left hand normally. Hodge testified he could no longer straighten the fingers in his left hand and that it was hard for him to button his shirt. He described having trouble using his thumb and index fingers to pinch and pick things up and did not believe he could resume his past employment.

In the ALJ's opinion, order and award, entered on February 5, 2018, the ALJ found Hodge satisfied his burden of proving that he had a cumulative trauma injury to his cervical spine:

Dr. Autry assigns 37% impairment for the cervical spondylosis status post cervical laminectomy with neural loss at C7-8 and relates the entire impairment to cumulative trauma injury in the cervical spine. Dr. Autry explained recurrent micro trauma might occur throughout the musculoskeletal system including the bones, ligaments, tendons, muscles and vertebral discs. Cyclic loading of these tissues may cause structural fatigue and gradual degradation of these structures. The symptomatic appearance of these destructive processes may take years to emerge. Individuals engaged in frequent heavy lifting working in positions requiring highly leveraged or repetitive activities, or substantial cyclic impact loading are candidates for symptomatic injuries and impairment due to cumulative trauma.



Dr. Stephens disagrees with Dr. Autry stating Hodge's cervical relates to a specific event of acute cervical radiculopathy secondary to an acute disc herniation, which occurred without an inciting event in 2013 and was not work-related; however, his opinion is not consistent with the treatment records. Dr. Toffkin's records indicate the diagnosis of Hodge's condition was left sided C8 radiculopathy and cervical spinal stenosis. The September 10, 2013 MRI reveals severe spinal stenosis and multilevel degenerative changes. There was no mention of any herniated disc on the MRI or in Dr. Toffkin's records. The changes were described as degenerative.

Based on the foregoing, the ALJ is persuaded by Dr. Autry with regard to the cervical spine and finds that Hodge has sustained a cumulative trauma injury with regard to the cervical spine.

The ALJ found that Hodge had a 37% impairment for the cervical spine, had the capacity to return to work and awarded him permanent partial disability benefits.

Sebree filed a petition for reconsideration on the basis that “[t]he overwhelming evidence supports that no cumulative trauma occurred to the cervical spine and that [Hodge’s] cervical complaints are due to an acute injury (or, in the very least, not due to accelerated degeneration).” Sebree cited Hodge’s testimony that his cervical pain did not gradually manifest but just started one day and claimed that Dr. Autry’s report and addendum were inaccurate because he did not attribute Hodge’s neck and arm pain to a sudden onset but to cumulative trauma and Dr. Stephens’ report was far more accurate. It also challenged the ALJ’s findings as to the heavy lifting Hodge engaged in while working above

ground, and that any link was established between his cervical complaints and his work at the mine.

On March 12, 2018, the ALJ denied Sebree's petition for reconsideration, noting in detail the physical demands of Hodge's work and stating "[t]he ALJ explained her rationale for relying on the testimony of Dr. Autry regarding the cervical condition."

Sebree appealed to the Workers' Compensation Board arguing that the ALJ's finding of cumulative trauma to the cervical spine was not supported by substantial evidence. Sebree argued that Dr. Autry's opinion, which is based on the erroneous assumption that there was no singular event instigating Hodge's pain, is inconsistent with Hodge admitting his pain started suddenly. Sebree also argued that the retroactive provisions of 2018 Kentucky Laws Ch. 40 (HB 2), which amended Kentucky's Workers' Compensation laws, should be applied to this case once the act became effective.<sup>1</sup>

The Board issued an opinion vacating and remanding for further findings of fact for the ALJ to more fully explain her reliance on Dr. Autry's

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<sup>1</sup> HB 2, which was approved on March 30, 2018, (after the ALJ denied Sebree's petition for reconsideration), became effective as of July 14, 2018. Section 20 of HB 2, a non-codified provision, made certain amendments to these statutes retroactive, including a revision to KRS 342.730(4). There are currently cases pending before the Kentucky Supreme Court to resolve the issue of whether a statute may be made retroactive based upon the non-codified provision of the Act.

opinion. The Board, after reviewing the evidence in this case, explained its reasoning as follows:

The history of the onset of Hodge's neck pain was of utmost importance in determining causation. As the ALJ acknowledged, Drs. Stephens and Autry agree Hodge suffers a 37% impairment rating for the residual effects of the surgical procedure, particularly left arm radiculopathy. The two physicians disagreed as to the cause of this condition. The ALJ emphasized the fact Dr. Stephens misidentified the procedure as a herniated disc repair. However, the ALJ did not explain how this error resolves the question of causation, or the fact the physicians relied upon vastly different histories.

For this reason, it was necessary for the ALJ to reconcile her reliance upon Dr. Autry's opinion and Hodge's own testimony as to the onset of his neck pain, which comports with the history provided to Dr. Stephens. On remand, the ALJ is asked to reconsider the work-relatedness of Hodge's current neck condition. If the ALJ chooses to rely upon Dr. Autry's medical opinion, it will be necessary to more squarely determine whether his opinion is based on an accurate history of Hodge's neck symptoms.

The Board noted that as it was vacating the award of PPD, the ALJ would need to apply the version of KRS 342.730(4) in effect on the date it issued its amended opinion.<sup>2</sup>

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<sup>2</sup> The Board, therefore, did not rule on whether HB 2 should be retroactively applied. Neither Sebree nor Hodge addresses this aspect of the Board's decision in their appellate briefs. Therefore, we only address whether the ALJ or Board erred and make no ruling as to the retroactivity of HB 2, as this issue is not before us.

In his appeal of the Board’s decision, Hodge argues the Board clearly erred in wrongfully usurping the ALJ’s role as fact finder by substituting its judgment for that of the ALJ. Hodge argues there was substantial evidence to support the ALJ’s judgment and the ALJ sufficiently laid out the basic facts from which her conclusion was drawn. We focus our review on whether there were sufficient factual findings to allow review by the Board or if it was correct that additional factual findings were required.<sup>3</sup>

“When a claimant successfully carries [the] burden [of proving every element of a workers’ compensation claim], the question on appeal is whether substantial evidence of record supports the ALJ’s decision.” *Miller v. Go Hire Employment Development, Inc.*, 473 S.W.3d 621, 628-29 (Ky.App. 2015). “[A] finding that favors the party with the burden of proof may not be disturbed if it is supported by substantial evidence and, therefore, is reasonable.” *Ak Steel Corp. v. Adkins*, 253 S.W.3d 59, 64 (Ky. 2008).

In making its decision, the ALJ must provide a sufficient explanation of the basis for its decision by summarizing the conflicting evidence concerning disputed facts, weighing the evidence to make findings of fact and determining the

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<sup>3</sup> We note that the Board’s decision to vacate and remand for additional factual findings is a final and appealable order pursuant to *Hampton v. Flav-O-Rich Dairies*, 489 S.W.3d 230, 234-35 (Ky. 2016).

legal significance of those findings to enable adequate review. *Miller*, 473 S.W.3d at 630. “Only when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ’s finding does it enable the Board and reviewing courts to determine in the summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable.” *Arnold v. Toyota Motor Mfg.*, 375 S.W.3d 56, 62 (Ky. 2012) (footnotes omitted). *See Campbell v. Hauler’s Inc.*, 320 S.W.3d 707, 711-12 (Ky. App. 2010) (explaining that when the ALJ fails to articulate the substantial evidence that supported his determination of a causal relationship between the worker’s injury and the worker’s employment, meaningful review cannot be had without additional findings of fact and remanding for additional findings is warranted); *Shields v. Pittsburgh and Midway Coal Min. Co.*, 634 S.W.2d 440, 444 (Ky.App. 1982) (explaining that the fact finder in a workers’ compensation case must “support its conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision.”).

Sebree and the Board focus on the fact that Hodge testified that his acute neck pain started suddenly as a reason to discount that Hodge’s work activities caused his disability. In justifying its decision to vacate and remand, the Board stated that “[t]he history of the onset of Hodge’s neck pain was of utmost

importance in determining causation” and then directed that the ALJ “reconsider the work-relatedness of Hodge’s current neck condition.”

We disagree with this analysis. The Board substituted its judgment for that of the ALJ in determining what facts are important and that Hodge’s injury could only be caused by his work if a progressive injury manifested through a gradual onset of increasingly worsening pain.

The ALJ’s analysis focused not on Hodge’s history as to pain, but the history of his relevant work activities and the strain they caused to Hodge’s body. It was within the ALJ’s purview to determine that any inconsistency in the history as to pain that Dr. Autry received from Hodge compared with the history of onset to which Hodge testified was insignificant given the mechanism for the injury that Dr. Autry described and the consistency between his recitation of the strains Hodge’s body endured and Hodge’s testimony about the tasks he performed as a miner.

In discounting Dr. Stephen’s opinion based upon his determination that Hodge’s injury was caused by a herniated disc, the ALJ could also properly determine that Dr. Stephen’s opinion as to causation was fatally flawed. While a disc might suddenly herniate based on a non-work related trauma, the cumulative trauma injury to Hodge’s cervical spine did not necessarily cause pain or impairment until the nerve was impinged.

Accordingly, we reverse the Board's decision for remand to the ALJ.

ALL CONCUR.

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