OPINION ENTERED: December 12, 2011

CLAIM NO. 200889251

APCOM POWER, INC. PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

KEVIN WEIR
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, COWDEN and STIVERS, Members.

COWDEN, Member. AP Com Power, Inc. ("AP Com") appeals from an opinion, order and award dated July 14, 2011, rendered by Administrative Law Judge ("ALJ") Chris Davis finding Kevin Weir ("Weir") sustained his burden of demonstrating causation/work relatedness of a right shoulder impingement syndrome producing a permanent partial disability with corresponding future medical expenses stemming from a work-related injury occurring on September

28, 2007.[1] AP Com also appeals from an order dated August 22, 2011 denying its petition for reconsideration. On appeal, AP Com contends the ALJ erred in finding Weir's shoulder impingement syndrome was causally related to Weir's September 28, 2007 SLAP tear and/or his employment.

Weir testified in his discovery deposition taken March 17, 2011 and at the formal hearing held on May 26, 2011. Weir noted he has worked almost exclusively as a pipe fitter during his occupational life. He worked as a pipefitter at AP Com from 2007 through 2008 and was a member of the pipefitters and plumbers local 452 union located in Lexington. His work as a pipe fitter entailed installing industrial pipe. He estimated approximately 99% of the time as a pipefitter, he performed overhead work. His work as a pipe fitter required him to routinely bend, stoop, crouch and crawl during a normal workday. He was also required to lift items above head level, work at heights, as well as climb ladders and scaffolding.

The injury which is the subject matter of this litigation occurred on September 28, 2007 when Weir noticed right shoulder pain while he was welding a steel beam overhead. Weir stressed prior to this episode, he did not

[1] The petitioner is listed as APCom Power in certain pleadings, AP Com in the Form 101 and Alstom Power in other pleadings. For purposes of consistency, we will refer to the petitioner as "AP Com".

believe he ever sought medical care for his right shoulder. He also denied he ever had ongoing problems or symptoms in his right shoulder prior to the accident. He described the pain as a result of the injury of September 28, 2007 as burning and piercing. The pain was located in the posterior aspect of his right shoulder in the joint itself. He attempted to keep working the rest of the day. He sought medical attention either the next day or the next week. He was initially prescribed non-steroidal anti-inflammatory agents for the pain. He eventually was referred to Dr. McClung who ran tests, including x-rays and imaging. It was at this time Dr. McClung informed Weir he needed shoulder surgery. He eventually had surgery consisting of a SLAP procedure on April 16, 2008 after which time he underwent physical therapy.

After surgery, Weir testified he still encountered a lot of pain and he also noticed a strength deficit. At some point, Dr. McClung released Weir to return to work with restrictions which included no reaching overhead, no lifting, and no repetitive motion. He returned to work at AP Com with these restrictions and was put in charge of a crew which necessitated climbing ladders. He eventually was laid off from AP Com as a result of reduction in manpower. His restrictions were lifted on January 5, 2009

and he ultimately returned to work for International Piping Systems. He testified he continues to have constant pain and discomfort to some degree in his right shoulder. He acknowledged his symptoms significantly increased when he returned to work. He estimated his pain level was a six, on a scale of one to ten. Weir indicated in the last six months, his shoulder condition has generally degenerated and the pain and discomfort has gotten worse. Weir last worked at AP Com in 2008. He is presently working on a project at the Clark Regional Medical Center in Winchester, Kentucky performing regular pipefitting tasks for Hussung Mechanical.

The parties filed medical records and reports from Dr. John Larkin, Dr. Larkin's deposition, a medical report from Dr. Glenn McClung, and a post-surgical MRI scan of the right shoulder dated December 17, 2008. Only those medical records pertinent to the issue raised on appeal will be summarized below.

In a March 17, 2011 Form 107, Dr. McClung recorded a history in which Weir felt a pop in his right shoulder at work while lifting a steel beam on September 28, 2008.[2]

[2] The date of the injury is actually September 28, 2007.

Treatment included a SLAP repair. Dr. McClung opined within a reasonable medical probability, Weir's injury was the cause of his complaints. Dr. McClung assessed a 0% impairment rating. He further opined Weir reached maximum medical improvement ("MMI") as of March 6, 2009. He noted Weir retained the physical capacity to return to the type of work he performed at the time of the injury. Dr. McClung did not impose any restrictions on Weir.

Dr. John Larkin conducted an independent medical evaluation ("IME") on March 23, 2011. Dr. Larkin received a history Weir was a 50-year-old pipefitter who had worked for the pipefitters union for greater than 20 years. Dr. Larkin received a history of an injury occurring on September 28, 2007 when Weir and a coworker were balancing a steel beam weighing approximately 90 pounds and Weir felt acute sharp pain in his shoulder. Weir continued to work off and on, treating himself mainly symptomatically with Aleve. Since Weir's symptoms persisted, he was seen by a primary physician. Dr. Larkin noted the diagnosis was underlying impingement tendonitis. Weir underwent a subacromial injection but Weir's symptoms continued. Dr. Larkin noted an MRI showed evidence of a superior labral tear commonly known as a SLAP lesion. Surgery was eventually performed by Dr. McClung on April 16, 2008 which

consisted of an arthroscopy along with the arthroscopic SLAP repair and decompression of the spinoglenoid notch. Dr. Larkin noted Weir then underwent an extensive course of physical therapy, regained his range of motion and eventually returned to unrestricted work. Dr. Larkin noted Weir continued to have pain involving his shoulder.

Dr. Larkin diagnosed ongoing impingement of the right shoulder with corresponding evidence of a possible re-tear of the labrum or underlying failure to completely heal the prior labral repair. In regard to MMI status, Dr. Larkin believed a repeat MRI would be recommended inasmuch as Weir was continuing to have ongoing right shoulder pain. Based on the range of motion model contained in the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Larkin opined Weir would have a 2% whole person impairment.

In a supplemental report dated April 4, 2011, Dr. Larkin noted a repeat MRI arthrogram dated December 17, 2008 showed the labral tear to be intact. Dr. Larkin again pointed out an impression was made at the time of an underlying impingement tendonopathy of the rotator cuff. Based upon his review of the medical records, Dr. Larkin confirmed it was more likely Weir's symptoms were the result of an aggravation of his right shoulder joint

secondary to his continued work as a pipefitter which was considered heavy activity based upon the Dictionary of Occupational Titles. Dr. Larkin noted Weir continued to have ongoing symptoms of repetitive tendonitis and apparently ongoing symptoms after the labral repair by Dr. McClung as documented in medical records dated December 8, 2008, January 5, 2009, and November 6, 2009. Dr. Larkin further confirmed Weir's continued work as a pipefitter aggravated Weir's shoulder. Dr. Larkin noted the heavy, unrestricted work Weir was performing would cause episodic aggravation of the shoulder with evidence of a documented impingement tendonitis which was found at the time of Dr. Larkin's IME and documented in Dr. McClung's notes.

Dr. Larkin testified Weir exhibited evidence of impingement tendonitis involving the right shoulder which he described basically as tendonopathy of the rotator cuff of the right shoulder. He noted the cause of this condition was usually secondary to an overuse type injury commonly associated with overhead activity. He further noted Weir's work as a pipefitter was the type of work that could cause impingement tendonitis. When asked whether he attributed this condition to any one particular event or to a cumulative effect of work Weir performed on a daily basis, Dr. Larkin noted it was more related to the

cumulative effect of the work Weir performed on an ongoing basis. Dr. Larkin was then asked to explain impingement tendonitis. In response, Dr. Larkin noted as follows:

> . . . An impingement tendonitis, as it relates to the shoulder, is where the principal tendon of the rotator cuff -- and there are four tendons that make up the rotator cuff.
>
> The principal one that's involved with tendonitis or impingement -- this is also commonly referred to as "bursitis" by primary care physicians -- is the supraspinatus tendon, and that runs underneath the tip of the shoulder blade itself and can rub in there with heavy activity where you have to do activity that results in the rotator cuff fatiguing, and then it rides up and rubs on the underlying bone.
>
> It's a mechanical problem, and it is usually caused because -- it's usually caused by overhead activity because the shoulder is in a somewhat compromised position when it's overhead.

Dr. Larkin was then asked whether this condition caused inflammation of the joint. In response, Dr. Larkin noted as follows:

> Yes. When you talk about something that ends with an -itis in medicine, whether it's a bursitis or a tendonitis, those represent an inflammatory response in either the tendon or the muscles or their surrounding soft tissues that are related to an injury or an activity.
>
> So a tendonitis represents an inflammation within the tendon, and it

> really represents a cellular response within the tendon substance itself that results in usually fluid and swelling within the tendon and secondary discomfort and pain.

Dr. Larkin confirmed on cross-examination Weir exhibited labral symptoms with cross arm impingement. Dr. Larkin was then asked whether this impingement symptom was the result of the September 28, 2007 injury. In response, Dr. Larkin noted as follows:

> Well, let me try to help with that. It -- the symptoms that he's continuing to have appear to be more consistent with an impingement. He does have still some labral symptoms, and his injury of 9/28/07 was a labral tear as related to that injury, but he does still have some symptoms on his physical exam of irritation of the labrum. . .

Dr. Larkin was then asked the following question which elicited the corresponding response:

> Q. What I was getting at, these symptoms -- if he had not had the underlying injuries, then he would not be having the symptoms now?
>
> A. Well, I don't -- based upon that he -- if he was symptom-free prior to the incident of April -- or I mean, September 28th of 2007, then I would say his ongoing symptoms still appear to be an aggravation of that injury. I do not know whether or not he was symptom-free prior to that.

Dr. Larkin was then asked the following:

> Q. If there is a retear or there was a failure of the prior repair, would it not be necessary for him to have another surgery of the shoulder?
>
> A. Yes, sir, it could be. Now, I have to correct one component of that question, and that is that there -- part of that question, was a failure to heal. We have an MRI dated from 12/17/08 that shows that that did heal.
>
> So in answer to your question -- the question is, could he have a retear of that labrum that is present since the MRI of December 17th of '08. The answer to that is that it is certainly a possibility, although the principal component of his symptoms currently appear to be the impingement tendonitis.

Dr. Larkin again emphasized Weir's symptoms were the result of an aggravation to his right shoulder secondary to continued work activity. Dr. Larkin then made reference to Dr. McClung's records which reflected as of September 8, 2008, Weir continued to have some mild pain posteriorly but by November 5, 2008 Weir experienced quite a bit of pain along his proximal biceps.

The following questions were then asked to Dr. Larkin on further cross examination which elicited the following responses:

> Q. Yes, sir. If you'll go to the next record, 11/17/08, now -- it states that he is getting pain in the anterior portion of his shoulder. Would that be related to the possible reinjury, or

> would that relate to the underlying postsurgical pain?
>
> A. That is more consistent with the impingement, yes, sir. And part of that is he -- they put in him a work-hardening program to get his strength back so he could return back to his work, and that did aggravate his symptoms somewhat.
>
> That's a common finding after this type of surgery, by the way, where you get them back -- they get their motion back and they work on strength. And as they get their strength back, they start to have some overuse pain and some tendonitis. That's a very, very common thing that we see usually in the second six weeks after a surgery like this.
>
> Q. What I'm getting at, there's evidence that he's still having pain as a result -- or he's having pain after the surgery?
>
> A. Yes, sir.

At a benefit review conference ("BRC") held on May 10, 2011, the parties listed as the only contested issue, "benefits per KRS 342.730." A formal hearing was held on May 26, 2011. Subsequent to the formal hearing, the parties filed an agreed order signed by the ALJ and dated June 30, 2011 which supplemented the list of contested issues as follows:

> 1) Benefits pursuant to KRS 342.730/Extent and Duration;

> 2) Causation/work-relatedness of the Plaintiff's right shoulder impingement syndrome; and
>
> 3) Whether Plaintiff is entitled to future medical benefits for his ongoing right shoulder complaints.

In an opinion, order and award dated July 14, 2011, the ALJ determined Weir had sustained a 2% functional impairment as a result of the work-related injury of September 28, 2007 and was entitled to all past, present and future medical expenses incurred to treat the work injury. As it applies to the issue raised on appeal, the ALJ determined as follows:

> Finally, although not originally listed as a contested issue on the BRC Order the issue of work-relatedness of the impingement syndrome caused by cumulative trauma was added by Agreed Order dated June 30, 2011, and fully briefed by the parties. It is further clear that the parties were contemplative [sic] its inclusion as a contested issue at least no later than the Final Hearing.
>
> As a result of the above the undersigned determines that the work-relatedness and compensability of this issue [sic] is properly before the Administrative Law Judge and that the Defendant has received sufficient notice to defend this claim.
>
> Further, the undersigned does not believe, and finds that it does not apply herein, that the fact that a Plaintiff has had more than a single

> employer is a bar to a cumulative trauma claim against the employer for whom the Plaintiff worked when he first experienced symptoms.
>
> As a result of the above analysis and in reliance on the testimony of Dr. Larkin it is found that the impingement syndrome is work-related and came into disabling reality on September 28, 2007. As a result of that injury the Plaintiff has a 2% impairment rating and is entitled to all past, present and future medical expense.

Commensurate with these findings, in Paragraph 3 of the award section, the ALJ ordered as follows:

> Plaintiff shall recover of the Defendant-Employer, and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances, as may be reasonably required for the care and relief from the effects of the work-related injury to the right shoulder, whether for the SLAP repair or impingement syndrome, whether past, present or future. Defendant's obligation shall be commensurate within the limits set by the Kentucky Medical Fee Schedule.

AP Com filed a petition for reconsideration on July 29, 2011 arguing there was no evidence Weir was suffering from shoulder impingement syndrome either at the time of his injury, or at any point during the remainder of his tenure with AP Com which ended in late 2008. AP Com contended the employer responsible for the shoulder

impingement syndrome should be Weir's employer at the time Weir's impingement symptoms first began. AP Com pointed out Weir's impingement symptoms did not begin until he left employment with AP Com and therefore it should not be the responsible party. AP Com noted Weir worked for several employers following his full duty release to return to work by Dr. McClung, including International Piping Systems from January 26, 2009 through September 24, 2009, A and A Mechanical from December 28, 2009 through January 22, 2010, Nelson-Stark Mechanical from January 25, 2010 through April 21, 2010, H & R Mechanical from April 28, 2010 through December 28, 2010 and Hussung Mechanical through the present. AP Com maintained Weir performed overhead work as a pipefitter in all these jobs. It also argued there is no evidence to suggest the shoulder impingement syndrome was causally connected to the SLAP tear sustained on September 28, 2007. In support of this argument, AP Com pointed out impingement tendonitis is a type of inflammatory process resulting from irritation of the tendon in contrast to a SLAP tear which it noted is not an injury to the tendon. AP Com concluded by arguing the impingement syndrome/tendonitis was not "brought into disabling reality" by the labral tear, and did not become symptomatic contemporaneous to that injury.

In an order dated August 22, 2011, the ALJ noted as follows in denying the petition for reconsideration:

> This matter comes before the Administrative Law Judge on the Defendant's Petition for Reconsideration and the Plaintiff's Response thereto. The Administrative Law Judge having considered the pleadings and the claim as whole the Petition is DENIED. The Administrative Law Judge concedes that the circumstances of this claim are atypical. However, nothing herein prevented the impingement syndrome from being properly heard and there clearly exists substantial evidence of record upon which this Award was based.

On appeal, AP Com again argues there is no evidence whatsoever in the record to link Weir's September 28, 2007 injury to his subsequent development of shoulder impingement syndrome. AP Com maintains Weir's development of symptoms relating to impingement tendonitis did not develop until Weir was employed at some other employer. It posits the employer responsible for compensation for this condition should be the employer where Weir worked at the time the symptoms began. In support of this argument, it cites to the medical records of Dr. McClung, the treating surgeon, who concluded in his medical reports of March 17, 2011 and March 22, 2011 Weir had reached MMI as of March 6, 2009 and required no restrictions as a result of the work

injury and required no further treatment as a result of the work injury.

AP Com again points out following his full duty release to return to work by Dr. McClung, Weir was employed as a pipefitter with other employers where he performed overhead work. AP Com then cites to the testimony elicited from Dr. Larkin who explained impingement tendonitis was a condition secondary to overuse and was commonly associated with overhead activity. Again citing to Dr. Larkin's testimony, AP Com argues impingement tendonitis is not causally related to the SLAP tear inasmuch as impingement tendonitis is a type of inflammatory process resulting from irritation of the tendon and that in Weir's case, Weir's repetitive overhead work as a pipe fitter is the likely cause of this periodic inflammation. AP Com concludes by arguing no evidence exists whatsoever to demonstrate Weir was suffering from impingement syndrome at the time of his employment with AP Com either at the time of the injury or at any point during the remainder of his tenure with AP Com. Finally, AP Com maintains since Weir did not meet his burden of proving a causal relationship between the SLAP tear and his current impingement syndrome, the ALJ therefore erred in ordering future medical benefits to treat the impingement syndrome.

It is well-established that the claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Among those elements is work-relatedness/causation. Jones v. Newburg, 890 S.W.2d 284 (Ky. 1994). Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969). Since Weir was successful before the ALJ, the question on appeal is whether the ALJ's decision is supported by substantial evidence. Wolf Creek Colleries v. Crum, 673 S.W.2d 735 (Ky. 1984). Substantial evidence is defined as evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has the sole authority to determine the weight to be accorded the evidence and the inferences to be drawn from that evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from

the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence to support the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

It is well-established causation is a factual issue to be determined within the sound discretion of an ALJ as fact-finder. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, supra. Nevertheless, it is well-settled where the matter being considered involves a question of medical causation that is not obvious to a layperson, it must be established by expert medical testimony. Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986); Mengel v. Hawaiian Tropic Northeast & Central Distributors Inc., 618 S.W.2d 184 (Ky. App. 1981). Where the injury at issue is alleged to have resulted from cumulative trauma, questions involving causation are subject to more stringent evidentiary standards. Hill v. Sextet Mining Corp., 65 S.W.3d 503, 507 (Ky. 2001).

Because substantial evidence supports the ALJ’s decision, we must affirm. Relying on the testimony of Dr. Larkin, the ALJ found Weir’s shoulder impingement syndrome was work-related and came into disabling reality on September 28, 2007. Commensurate with these findings, the ALJ awarded medical benefits to treat the effects of the work related injury to the right shoulder which included not only the residuals from the SLAP tear but also any past, present and future medical expenses to treat the shoulder impingement syndrome. Dr. Larkin diagnosed underlying impingement tendonitis. Dr. Larkin noted in a supplemental report, Weir continued to have ongoing symptoms of tendonitis even after the labral repair was performed by Dr. McClung as documented in Dr. McClung's medical records. He further noted impingement tendonitis was more related to the cumulative effects of Weir performing overhead work as a pipefitter.

In his deposition, Dr. Larkin elaborated by noting Weir still exhibited symptoms on physical examination of irritation of the labrum. In response to being asked whether Weir’s current symptoms of impingement was related to the underlying injury, Dr. Larkin acknowledged he did not know whether Weir had been symptom-free prior to the September 28, 2007 injury. However, he stated Weir’s

ongoing symptoms appeared to be an aggravation of that injury. Significantly, Weir testified prior to the work-related episode, he did not believe he ever sought medical care for his right shoulder and also denied he ever had any ongoing problems in the right shoulder prior to this episode. Dr. Larkin noted post-surgery, Weir was put in a work hardening program to get his strength back so he could return to work and the work hardening program aggravated Weir's symptoms. He further noted this was a common finding after this type of surgery inasmuch as through work hardening, a person would attempt to get the motion back in his shoulder and work on getting the strength back, but then would start having some overuse pain and some tendonitis. Dr. Larkin stressed this was a very common occurrence usually seen in the second six weeks after the type of surgery Weir underwent.

Therefore, it was reasonable for the ALJ to conclude the impingement syndrome was work-related and was brought into disabling reality by the injury of September 28, 2007. Substantial evidence supports the ALJ's finding that not only the SLAP tear, but the impingement syndrome were work-related. Therefore, AP Com is responsible for the payment of past, present and future medical expenses to treat these conditions.

Accordingly, the opinion, order and award of July 14, 2011 and the order dated August 22, 2011 denying AP Com's petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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