Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 22, 2016

CLAIM NO. 201500473 & 201500472

B & W RESOURCES PETITIONER

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

C.J. NEACE
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. B & W Resources ("B & W") seeks review of the October 7, 2015, Opinion, Award, and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") finding C.J. Neace ("Neace") sustained work-related cumulative trauma to his shoulders and awarding permanent partial disability ("PPD") benefits and medical benefits. The ALJ also awarded medical benefits for work-related hearing loss. B

& W also appeals from the November 13, 2015, Order denying its petition for reconsideration.

On appeal, B & W challenges the award on three grounds. First, it asserts the ALJ erred in finding Neace sustained cumulative trauma injuries to his shoulders. Second, B & W asserts the record is devoid of a permanent impairment rating assessed pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Third, B & W asserts Neace failed to provide due and timely notice of his work-related injuries and hearing loss.

On April 3, 2015, Neace filed a Form 103 asserting an occupational hearing loss arising out of his employment with B & W and a Form 101 asserting he sustained cumulative trauma injuries to his "neck, back, right and left upper extremities, right and left lower extremities." By order dated May 20, 2015, the ALJ consolidated the claims.

Neace testified at his June 15, 2015, deposition and the August 24, 2015, hearing. At the time of his deposition, Neace was fifty-eight years old and had worked thirty-one years in surface coal mines. His last employment was with B & W and last date worked was November 10, 2014.

Neace testified he worked for B & W for fourteen years as an oiler and a mechanic. As an oiler, Neace drove a truck containing fuel, grease, and hydraulic fluid. He was responsible for greasing and refueling all the heavy equipment daily. He performed all the maintenance work and filled out all the service records without any assistance. He also assisted the mechanics. Neace estimated he serviced and refueled approximately twenty or twenty-one pieces of equipment during his shift. He worked approximately sixty hours a week. Neace's prior work for other coal companies entailed working as an oiler. Neace stopped working because he was laid off.[1]

Other than an injury resulting when a grease hose burst, Neace denied experiencing any other previous accidents or injuries at B & W. Neace broke his left wrist requiring surgery many years ago when he believed he was working for Kentucky Prince Coal Company. As a result, he is unable to "move it one way."

Neace had problems with his arms, back, neck, right hip, and hands. He was unable to raise his right arm over his head. Neace denied sustaining a specific right shoulder injury. In addition to his shoulder problems,

[1] Neace testified only he was laid off.

Neace experienced numbness in his right arm and his right elbow pops. He had no problems with his right hand. He acknowledged still having problems with the left hand. Neace denied experiencing any previous low back, hip, or neck injuries. He believed he is unable to return to his previous work at B & W because he cannot climb the equipment. Neace was unable to remember if he had gone to a doctor for his right shoulder problems. He acknowledged his attorney sent him to Dr. Dale Williams.[2] Neace testified he had never been diagnosed with a work-related injury prior to seeing Dr. Williams.

At the hearing, Neace again testified he ran a grease truck without assistance servicing approximately thirty to forty pieces of equipment. He cannot read or write. Neace testified that after Dr. Williams advised him he had a work-related injury, a March 30, 2015, letter was sent by his attorney notifying B & W of his work-related cumulative trauma injuries and hearing loss.

Neace is unable to raise his arms above shoulder level but has more use of his left shoulder as it is not as restricted as the right. Neace was seeing Dr. Dirk Franzen for his right shoulder problems and was either undergoing

[2] Dr. Williams' records and "Medical Statement" are attached to the Form 101.

or had undergone physical therapy. His shoulder pain, sometimes severe, extends to the elbow. He testified he is unable to return to his work because of an inability to lift which he believed was his most severe limitation. Neace did not remember testifying at his June 2015 deposition. He testified he worked every day for B & W working approximately seventy-eight hours a week. Neace testified he had received no medical treatment while working, and all medical treatment occurred after he was laid off by B & W.

Neace introduced the Form 107 prepared by Dr. Arthur Hughes dated April 21, 2015. Neace also submitted the records of Dr. Williams which included a "medical statement" and a case history.

B & W introduced the reports of Dr. Daniel Primm dated June 26, 2015, and August 14, 2015. It also submitted the August 10, 2015, report of Dr. David Muffly.

The October 13, 2015, Benefit Review Conference ("BRC") Order reflects the parties stipulated Neace is alleged to have sustained a work-related injury or injuries on November 10, 2014, his average weekly wage was $963.89, and B & W had not paid any temporary total disability ("TTD") benefits or medical benefits. The contested issues were: "benefits per KRS 342.730; work-relatedness; notice;

unpaid or contested medical expenses; injury as defined by the ACT; credit for unemployment; exclusion for pre-existing disability/impairment; and TTD." Under the heading "Other," was listed: "[b]enefits per KRS 342.7305; Plaintiff is seeking a PTD; apportionment per Southern Kentucky Concrete; proper use of the AMA Guides by Dr. Hughes."

In the October 7, 2015, Opinion, Award, and Order, based on the report of the university evaluator, Dr. Brittany A. Brose, the ALJ found Neace had a 2% impairment rating due to an occupational hearing loss, but because his impairment rating was below the statutory threshold he was only entitled to medical benefits including hearing aids. With respect to Neace's claim for cumulative trauma injuries, the ALJ provided the following findings of fact and conclusions of law:

> There is absolutely no question that Neace has degenerative changes and arthritis, diffusely. The questions are whether or not they are work-related, what impairment rating if any do they require, and what restrictions are applicable.
>
> Dr. Primm, who examined Neace, and Dr. Muffly, who reviewed records, both believe that the level of degeneration Neace has are age related and wholly unrelated to his work. They also believe that the impairment rating assigned by Dr. Hughes is excessive.

Dr. Hughes, who examined Neace, and Dr. Williams, who examined Neace, both believe that the level of arthritis is work-related and has resulted in symptoms which require treatment, and in the case of Dr. Hughes, warrant an impairment rating for the shoulders.

It is true that the Plaintiff has listed his date of manifestation as the date he was laid off. This should not by itself, and does not, in this claim, penalize the Plaintiff.

Cumulative trauma claims are complex and ever evolving matters. The date of manifestation for benefits and the date of manifestation for notice and statute of limitations are not the same. Often times, to cut short, the date of manifestation for benefits will always be the last date worked, regardless of why that is the last date worked. That doesn't mean a Plaintiff did not experience symptoms and limitations prior to that date. It can mean, as herein, that he simply continued working because he needed to and did not yet know the cause of his condition(s).

I am, in this claim, more persuaded by the opinions of Drs. Williams and Hughes. The Plaintiff worked a very strenuous and physical demanding job for twenty years in the coal mines. He has arthritis in his shoulders. He provides credible testimony that his shoulders are in pain and are limited. I find nothing persuasive in Drs. Muffly and Primm's testimony that such a level of arthritis is normal. The Plaintiff has work-related cumulative trauma in the form of arthritis in both shoulders.

> Although Drs. Primm and Muffly disagreed with the rating assigned by Dr. Hughes they do not persuade me that by simply assigning a rating, or one higher than they would have assigned, is out of the scope of the AMA Guides. All are experts and entitled to their opinions. Nothing about Dr. Hughes' opinion is so off base as to make it unusable.
>
> In fact I adopt the 16% impairment rating as assigned by Dr. Hughes, 10% for the right shoulder and 7% for the left. As stated Neace has arthritis and I believe his testimony on pain and limitations. I also believe Dr. Hughes accurately recorded loss of range of motion. These facts alone are sufficient to support the adoption of the rating as assigned by Dr. Hughes.
>
> I further adopted the restrictions assigned by Dr. Hughes, including only light lifting. A limitation of light lifting clearly prevents a return to the type of work done on the date of injury. Again, it is no bar to this finding that the Plaintiff worked until the date he was laid off. People often work through pain when they feel they have no choice and believe they are near the breaking point. That is what I find happened here.

The ALJ declined to award TTD benefits and determined Neace was not totally disabled, calculating Neace's award of PPD benefits as follows:

> The Plaintiff's permanent partial disability award shall be 963.89 (AWW) x 2/3 (workers' compensation rate) x .16 (impairment rating) x 1.00 (grid factor) x 3.6 (KRS 342.730(1)(c)1) = $332.24 a week for 425 weeks, from

> November 10, 2014 and excluding any period of temporary total disability benefits.

B & W filed a petition for reconsideration noting the ALJ relied upon Dr. Hughes in finding Neace sustained cumulative trauma injuries. However, it asserted Dr. Hughes identified a specific work-related injury and not cumulative trauma as the basis for his impairment ratings. Dr. Hughes identified a fall from a piece of equipment as being the cause of Neace's problems, noting Neace had bilateral shoulder pain since the fall. He also noted Neace did not have this problem prior to the fall.

In addition, B & W noted Dr. Hughes stated Neace was not at maximum medical improvement ("MMI"). Thus, Dr. Hughes was prohibited by the AMA Guides from assigning an impairment rating.

Finally, it requested findings of fact on the contested issue of notice. B & W pointed out Neace filed the claim alleging development of a hearing loss and cumulative trauma injuries manifesting on November 20, 2014, and that his attorney gave notice by delivering a March 30, 2015, letter after a November 19, 2014, independent medical evaluation ("IME") by Dr. Williams and a November 20, 2014, IME performed by Beltone of Hazard.

It contended one hundred and thirty-one days did not constitute timely notice per KRS 342.185.

In the November 13, 2015, Order denying the petition for reconsideration, the ALJ did not address any of these issues.

Concerning its first argument, B & W argues the Form 107 completed by Dr. Hughes does not support the ALJ's award of benefits for a cumulative trauma, as he provided no causation opinion supporting a finding of work-related cumulative trauma bilateral shoulder injuries. Rather, Dr. Hughes' diagnosis links Neace's problems to a fall from a piece of equipment. As such the ALJ could not find Dr. Hughes' Form 107 provides an opinion Neace's work activities caused cumulative trauma injuries. B & W notes on July 6, 2015, it filed an objection to the report of Dr. Hughes on the grounds he attributed the impairment rating to a traumatic injury not alleged in the Form 101. It also asserts since the report of Dr. Hughes does not state the date of the injury and the employer involved, "the Board cannot hold that this report meets the 'reasonable medical probability' standard in a cumulative trauma appeal."

B & W also contends the opinion of Dr. Hughes constitutes substantial evidence that Neace's shoulder problems were not caused by cumulative trauma but rather a

traumatic injury sustained in a 2014 fall.[3] Consequently, B & W argues the ALJ could not rely upon Dr. Hughes' report over the causation opinions of Drs. Primm and Muffly.

B & W contends that upon its filing of a petition for reconsideration, the ALJ was obligated to supply additional facts and analysis sufficient to correct the patent errors appearing on the face of the opinion and award. B & W notes throughout the pendency of the claim it contended Dr. Hughes never stated there had been a cumulative trauma injury. Consequently, it filed a petition for reconsideration requesting the ALJ to specifically address this issue. Since the ALJ summarily denied the petition for reconsideration without providing any discussion or explanation, B & W argues the Board must reverse and remand to the ALJ for dismissal as there is not substantial evidence to support the ALJ's finding of causation.

B & W also contends Dr. Hughes failed to identify the underlying condition causing Neace's symptoms or explain how the degenerative process was accelerated by his work at B & W. It maintains neither Dr. Hughes nor Dr.

[3] The reference by B & W to the 2014 fall appears to be based on Dr. Hughes' statement on the first page of his Form 107 that Neace indicated he fell off a piece of equipment approximately a year ago and recalled hitting the ground but did not recall what happened thereafter.

Williams established a causal relationship between Neace's work as an oiler on heavy equipment and its accelerating effect on his body or the symptoms as required by Haycraft v. Corhart Refractories Co., 544 S.W.2d 222 (Ky. 1976). B & W contends these omissions are especially glaring in the face of uncontroverted evidence from Drs. Primm and Muffly. It argues there is no evidence establishing degenerative shoulder changes which are excessive for Neace's age or a departure from the normal state of health.

As a sub-part to its first argument, B & W contends the ALJ erred in enhancing the award by the three multiplier. B & W notes Neace was not treated for his alleged shoulder problems while working and stopped working only because of a lay off. It contends the ALJ erred in failing to properly analyze Neace's entitlement to the three multiplier. In addition, the ALJ failed to provide a finding whether Neace retains the physical capacity to return to the type of work he performed at the time of the injury due to cumulative trauma.

In support of its second argument that the record does not contain a whole person impairment rating based on the AMA Guides, B & W notes the most significant finding by Dr. Hughes was Neace had not attained MMI. Consequently, pursuant to the AMA Guides, a permanent impairment could

not have been assessed by Dr. Hughes at that time. Therefore, because Dr. Hughes stated Neace was not at MMI, his impairment rating does not constitute substantial evidence supporting an award of income benefits. It notes there is no other medical evidence supporting an award of income benefits.

With respect to B & W's third argument that Neace failed to give due and timely notice, it notes Neace's counsel gave notice via a March 30, 2015, letter. B & W maintains 131 days is not timely notice pursuant to the statute. B & W points out in cumulative trauma claims the date triggering the obligation to give notice is the "manifestation of disability" which is the date a worker first learns he has sustained a gradual injury and knows it is due to his work.[4]

We will not address the merits of B & W's third argument Neace failed to give due and timely notice. However, because the ALJ failed to resolve the notice issue, we vacate the ALJ's findings and the award of income and medical benefits. Significantly, the parties listed notice as an issue in the BRC order, notice was argued in the parties' briefs, and B & W's petition for

[4] Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999).

reconsideration raised the ALJ's failure to resolve whether due and timely notice was provided. Without explanation, the ALJ refused to address this issue. For this reason alone the award of income benefits must be vacated and the claim remanded to the ALJ to determine whether Neace gave due and timely notice.

We also note that after determining Neace sustained work-related cumulative trauma shoulder injuries and had work-related hearing loss, the ALJ failed to determine the date of manifestation. Since the ALJ made a specific finding that Neace sustained cumulative trauma injuries to the shoulders and had work-related hearing loss, he was required to determine the date of manifestation of the work-related cumulative trauma injuries and hearing loss. This was necessary because after determining the date of manifestation, the ALJ must then decide whether notice was timely.

A cumulative trauma injury "manifests" for purposes of notice and statute of limitations when the injury is diagnosed <u>and</u> a physician informs the claimant the injury is work-related. *See e.g.* <u>Alcan Foil Products v. Huff</u>, 2 S.W.3d 96, 101 (Ky. 1999). The date of manifestation for notice and statute of limitation purposes is not one and the same as the date when one is entitled to

disability benefits. American Printing House for the Blind ex rel Mutual Ins. Corp. of America v. Brown, 142 S.W.3d 145 (Ky. 2004).

A determination of the date of manifestation is central to determining whether Neace provided due and timely notice of his cumulative trauma injuries. Thus, the finding of cumulative trauma injuries and the award of income and medical benefits must be vacated. On remand, if the ALJ should again conclude Neace sustained work-related injuries to his shoulder, he must then determine the date of manifestation of the cumulative trauma shoulder injuries. After making that determination, he must then determine whether Neace provided due and timely notice of those injuries and the hearing loss.

If the ALJ determines due and timely notice was not provided, then the claims must be dismissed. However, if the ALJ finds due and timely notice was provided then he must resolve all remaining contested issues. Although we are vacating the ALJ's opinion and award, in the interest of judicial economy we will address B & W's other arguments.

Concerning B & W's first argument, in his April 21, 2015, Form 107, Dr. Hughes provided, in relevant part, the following history:

> Plaintiff related history of complaints or alleged injury as follows:
>
> Mr. Neace is a 58-year-old (DOB: 10/03/1956) gentleman employed in surface mining for 31 years. His job was to service 60 pieces of equipment twice per day. He would work a 60 hour week. He was seen with his wife. Approximately a year ago, he fell off a piece of equipment. He recalls hitting the ground but does not recall what happened thereafter. He was unable to continue working, however, and drove himself from the job site to a hospital, though does not recall the trip there.
>
> . . .
>
> He has continued to have pain in both shoulders since the fall and this has worsened. He has had some change in personality. He has become less talkative and more dependent on his wife. He is unable to sleep on either side. He has had neck pain since the fall and also has had lower back pain since the fall. He has had bilateral hip pain and bilateral knee pain since the fall.
>
> . . .

After outlining Neace's previous treatment, the results of his examination, diagnostic tests reviewed, and the history of surgery, Dr. Hughes provided the following diagnosis:

> 1. Traumatic brain injury.
>
> 2. Mild cognitive impairment due to traumatic brain injury.

> 3. Right shoulder pain and limitation of motion.
>
> 4. Left shoulder pain and limitation of motion.
>
> 5. Neck pain.
>
> 6. Lower back pain.
>
> 7. Bilateral knee pain.
>
> 8. Bilateral hip pain.

Under the heading "Causation," Dr. Hughes marked yes to the question "[w]ithin reasonable medical probability was [Neace's] injury the cause of his complaints." Under the heading "Explanation of Causal Relationship," Dr. Hughes stated as follows:

> Mr. Neace fell from a piece of equipment. He sustained a presumed head injury manifested by amnesia and ongoing treatment in retention of recent memory for hours following this event.
>
> He has been left with continuing cognitive impairment, personality change and difficulty in doing his job satisfactorily. He has required the support of his wife and family for adequate functioning at home. He has had bilateral shoulder pain since the fall. He did not have these problems prior to the fall.

Pursuant to the AMA Guides, Dr. Hughes assessed a 10% impairment rating for the right shoulder condition based on shoulder pain and limitation of motion. For the left shoulder, Dr. Hughes assessed a 7% impairment rating

based on shoulder pain and limitation of motion. He also assessed a 14% impairment rating due to traumatic brain injury and mild cognitive impairment. Dr. Hughes assessed no other impairments for Neace's other alleged injuries.

With respect to whether Neace had reached MMI, Dr. Hughes stated as follows:

> Mr. Neace has had no evaluation or treatment of his persisting problems from the accident and, thus, is not at maximum medical improvement. If, however, no treatment is approved, then he is at maximum medical improvement as of this date.

Dr. Hughes set forth the physical requirements of Neace's job as related by Neace. Consequently, he did not believe Neace retained the physical capacity to return to the type of work performed and imposed the following restrictions:

> Mr. Neace could [sic] jobs which would allow him to stand or sit as needed. He should avoid bending and twisting of the neck and lower back. He cannot do work above shoulder level. He should avoid any but light lifting. He also would have to perform in a position in which he was closely supervised to compensate, if possible, for his cognitive limitations.

Neace, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. *See*

KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Neace was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof

is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The opinions expressed by Dr. Hughes as set forth herein do not constitute substantial evidence supporting a finding Neace sustained cumulative trauma injuries to both shoulders. Dr. Hughes did not attribute any of Neace's physical problems and the impairment ratings for the injuries to the shoulders to cumulative trauma. Thus, the ALJ erred in relying upon Dr. Hughes in finding Neace sustained cumulative trauma injuries to his shoulders.

That said, we note the ALJ relied upon the opinions of Drs. Hughes and Williams in determining Neace sustained cumulative trauma bilateral shoulder injuries. In his December 2, 2014, Medical Statement, Dr. Williams provided the following findings:

> Cervicalgia, thoracalgia, lumbalgia. Shoulder pain bilateral. Decreased active range of motion in all directions with pain in all directions. Multiple positive orthopedic exams. Severe degeneration in the cervical spine. Moderate/severe degeneration in the lumbar spine. Kyphosis in cervical spine.

Among his diagnosis were shoulder pain and knee pain bilaterally. In response to the question, "[i]n your medical opinion, has the Patient's previous employment caused or contributed to the aforementioned condition(s)," Dr. Williams wrote:

> Mr. Neace is a 58 year old male with 31 years as a coal miner. He worked as maintenance/greaser the entire time. There were multiple reported injuries. He suffers from cervicalgia, thoracalgia, and lumbalgia with moderate/severe lumbar degeneration and severe cervical degeneration. His overall condition is widespread and consistent with an accumulation damage condition and the occupational hazards of the laborious duties of the mining industry. MRI is recommended on both shoulders for future analysis.

In his case history dated November 19, 2014, regarding Neace's shoulder problems, Dr. Williams stated as follows:

> The patient stated he has shoulder problems that are localized to his shoulders bilaterally which bother him constantly meaning it bothers him between 76 and 10% of the time. CJ described his discomfort as sharp, a numbness and tingly. The patient stated that his symptoms appear to be getting worse with time. The patient rated the average intensity of his shoulder condition as a 9 with 0 being nothing and 10 being the worst he feels it could be. The patient explained that his symptoms have not interfered with his work and substantially interfered with his social activities. Prior to coming in to see me for his condition, CJ saw a primary care physician. The patient stated that he has had his shoulder problem for 5 years. CJ stated that his shoulder problem is from gradual onset due to his daily occupational duties. When questioned as to the severity of his symptoms, CJ responded that he believes it is severe. The patient reported that nothing relieves his symptoms and they are aggravated when he lifts and tries to put his clothes on. The thing that concerns CJ the most about his shoulder is that it appears to be getting worse.

Dr. Williams further noted shoulder pain was one of Neace's many complaints.

Dr. Williams also provided the following history:

> [T]he patient stated that he started working at the age of 13 doing various jobs over the years. He has worked in

> the mining industry of 31 years. Has been an oiler for the entire time. He worked 14+ hours per day doing various jobs that included lifting, tugging, and was on his fee the entire time.

The December 2, 2014, Medical Statement of Dr. Williams links Neace's bilateral shoulder problems to his work in the coal mining industry which includes his work at B & W Resources. In fact, Dr. Williams recommended MRIs of both shoulders for further analysis.

Although the ALJ cannot rely upon the opinions of Dr. Hughes in finding Neace sustained work-related cumulative trauma injuries to both shoulders, he can rely upon Dr. Williams' opinions in finding Neace sustained work injuries to his shoulders. As such the ALJ's finding Neace has work-related cumulative trauma injuries to both shoulders is supported by substantial evidence. The opinions expressed by Dr. Williams in his December 2, 2014, Medical Statement, albeit succinct, qualifies as substantial evidence to support the ALJ's finding with reference to work-related causation. While the contrary opinions pertaining to causation expressed by Drs. Primm and Muffly may have been articulated in greater detail, such testimony represented nothing more than conflicting evidence compelling no particular outcome. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). Likewise, Dr. Williams'

brief statement in explaining his opinion regarding causation merely went to the weight and credibility to be afforded his testimony, which was a matter to be decided exclusively within the ALJ's province as fact-finder. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Hence, there is substantial evidence which supports a finding Neace sustained work-related cumulative trauma injuries to both shoulders.

We find no merit in B & W's assertion the ALJ cannot enhance Neace's PPD benefits by the three multiplier pursuant to KRS 342.730(1)(c)1. In determining Neace could not return to the job he performed at the time of the injury, the ALJ specifically stated he was adopting the restrictions assigned by Dr. Hughes which included only light lifting. The ALJ concluded the limitation of light lifting prevented a return to the type of work performed on the date of injury. Dr. Hughes stated Neace did not retain the capacity to return to the type of work he was performing, and this was based upon Neace's ongoing pain and restrictions in his shoulders as well as persisting neck, low back, bilateral knee, and bilateral hip pain. Neace could not work above shoulder level and should avoid any but light lifting. We do not believe it was unreasonable for the ALJ to conclude Dr. Hughes'

restrictions that Neace perform no work above shoulder level and avoid anything but light lifting were attributable to the condition of Neace's shoulders. As such, the finding the three multiplier is applicable is supported by the restrictions imposed by Dr. Hughes.

We agree, in part, with B & W's second argument that the record is devoid of a permanent impairment rating based on the AMA Guides. B & W contends Dr. Hughes' impairment ratings were premature. Relative to MMI, Dr. Hughes unequivocally stated since Neace had no evaluation or treatment he was not at MMI; however, if no treatment was approved he was at MMI as of the date he saw Neace. Therefore, if Neace received no treatment of one or both of his shoulders after April 21, 2015, he was at MMI relative to the untreated shoulder condition.

The AMA Guides direct as follows:

> 2.4 When Are Impairment Ratings Performed?
>
> An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an

> impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living.

KRS 342.0011(11)(b) and (35) reads as follows:

> (b) "Permanent partial disability" means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work; and
>
> . . .
>
> (35) "Permanent impairment rating" means percentage of whole body impairment caused by the injury or occupational disease as determined by the "Guides to the Evaluation of Permanent Impairment";

In order for Dr. Hughes to assess an impairment rating for each shoulder condition, in accordance with the AMA Guides, Neace must have attained MMI for both of his shoulder problems. However, the record indicates Neace had not yet attained MMI with regard to the right shoulder at the time Dr. Hughes assessed his impairment rating. At the hearing, Neace testified Dr. Franzen was currently treating his right shoulder problem and he had undergone or was undergoing physical therapy on the right shoulder. Based on Dr. Hughes' opinion concerning MMI, since Neace subsequently underwent treatment of his right shoulder, he

was not at MMI at the time Dr. Hughes assessed his impairment rating for the right shoulder. Since the permanent impairment rating assessed by Dr. Hughes for the right shoulder was not in conformity with the AMA Guides, the ALJ cannot award PPD benefits based on the impairment rating assessed by Dr. Hughes for the right shoulder.

In addressing Neace's entitlement to TTD benefits, the ALJ found Dr. Hughes stated Neace was at MMI on the date of his examination. However, the ALJ appears to reject that as the date of MMI by referring to it as "an arbitrary date selected by an IME physician." Without citing to any supporting medical evidence in the record, the ALJ stated Neace's cumulative work-related condition reached its apex on the date he last worked. He added there was no evidence from an actual provider "that additional treatment is or could be offered beyond palliative." In this case, the ALJ did not fully comprehend Dr. Hughes' opinion regarding MMI, as Dr. Hughes stated Neace was not at MMI, but if he received no additional treatment he was at MMI.

Dr. Hughes' impairment rating for the right shoulder can only be relied upon if at the time he assessed the impairment rating he determined Neace was at MMI. As previously noted, Dr. Hughes believed Neace would only be

at MMI if he received no further treatment. As Neace received further treatment, it is clear Neace, according to Dr. Hughes' criteria, was not at MMI. A determination of MMI must be based upon the medical evidence. The ALJ cannot determine the date of MMI without supporting medical evidence. Here, there is no medical evidence supporting the ALJ's statement regarding the date of MMI being Neace's final date of employment. Consequently, the ALJ's statement concerning MMI, unsupported by medical evidence, is clearly erroneous.

For the reasons stated herein, since Neace was actively treated by Dr. Franzen and had undergone physical therapy for his right shoulder following Dr. Hughes' examination of Neace, according to Dr. Hughes' own criteria, Neace's right shoulder condition had not attained MMI at the time Dr. Hughes assessed the 10% impairment rating. Therefore, Dr. Hughes' impairment rating for the right shoulder condition was not in accordance with the AMA Guides.

However, since Neace did not undergo treatment of the left shoulder following his examination by Dr. Hughes, the ALJ can rely upon the impairment rating of Dr. Hughes and, by extension, award PPD benefits for a work-related left shoulder injury. We emphasize that although the ALJ

cannot rely upon Dr. Hughes in resolving the issue of causation, he is permitted to rely upon an impairment rating assessed by Dr. Hughes in accordance with the AMA Guides. Further, the ALJ can rely upon the impairment rating Dr. Hughes assessed for the left shoulder injury but not upon the impairment rating he assessed for the right shoulder injury. Therefore, the ALJ's determination Neace has a 10% impairment rating for the right shoulder is not supported by substantial evidence. However, the determination Neace has a 7% impairment rating for the left shoulder injury is supported by substantial evidence.

Accordingly, the October 7, 2015, Opinion, Award, and Order and the November 13, 2015, Order finding Neace sustained work-related cumulative trauma shoulder injuries and awarding PPD benefits is **VACATED**. This claim is **REMANDED** to the ALJ for a determination of whether Neace sustained work-related cumulative trauma injuries to his shoulders, the date of manifestation of any such cumulative trauma injury and whether Neace provided due and timely notice of his work-related hearing loss and his work-related cumulative trauma bilateral shoulder injuries. In the event the ALJ determines due and timely notice was not provided, both claims shall be dismissed. However, if the ALJ determines due and timely notice was provided, the ALJ

shall then resolve all remaining contested issues. We express no opinion as to the outcome on remand.

ALL CONCUR.

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