Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 15, 2016

CLAIM NO. 201500502 & 201500501

BLEDSOE COAL COMPANY PETITIONER

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

BOBBY STRUNK
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Bledsoe Coal Company ("Bledsoe") seeks review of the November 19, 2015, Opinion, Award, and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") finding Bobby Strunk ("Strunk") sustained work-related cumulative trauma injuries to his low back and both shoulders and awarding permanent partial disability ("PPD") benefits and medical benefits. The ALJ also awarded

medical benefits for Strunk's work-related hearing loss but no income benefits. Bledsoe also appeals from the December 29, 2015, Order overruling its petition for reconsideration.

In the Form 101, Strunk alleged cumulative trauma injuries to his neck, back, and both lower extremities, and left shoulder manifesting on March 7, 2014.[1] In the Form 103, Strunk alleged work-related hearing loss manifesting on March 7, 2014. In an order dated May 20, 2014, the ALJ sustained Strunk's motion to consolidate the claims.

After summarizing the lay and medical evidence, in the November 19, 2015, decision, the ALJ entered the following findings of fact and conclusions of law regarding Strunk's alleged cumulative trauma injuries:

> The Plaintiff's claim arises as a result of cumulative trauma. Factually and legally it could not have gotten any worse after he left his employment. No recommended or disputed medical treatment is before me and no additional, non-diagnostic treatment has been recommended. As such he was at MMI as of his last date worked and no additional TTD will be award [sic].
>
> The above analysis makes moot any credit for short and long term disability.

[1] During the proceedings, Strunk filed a motion to amend his Form 101 to include a right shoulder injury which was sustained by order dated July 13, 2015.

> I find the Plaintiff entirely credible and accurate. As such although he did not seek on-going and extensive medical treatment for his shoulders and back prior to March 7, 2014 he did have pain and limitations. He was also not aware it was work-related.
>
> Following his last date at work he has been treated by Dr. Williams and examined by Dr. Hughes. Both physicians feel that the Plaintiff has work-related cumulative trauma injuries aroused into disabling reality by the Plaintiff's work.
>
> Dr. Lyon does not dispute that the Plaintiff has harmful changes to his shoulders and back. He does think they are normal age related changes and they do not warrant an impairment rating in any case.
>
> I believe and so find that the Plaintiff's work did cause his dormant condition to be aroused into disabling reality, for the shoulders and his low back. He worked as an underground coalminer for thirty-nine years. I can't expertly say that normal men his age (58) don't have these problems but I am not persuaded by Dr. Lyon's opinion that it is "normal".
>
> In reliance on Dr. Hughes the Plaintiff has a 13% impairment rating.

Because Strunk ceased work due to breathing problems, the ALJ concluded Strunk is not permanently totally disabled and precluded from returning to his job due to his cumulative trauma injuries, reasoning as follows:

> The Plaintiff left work because of co-morbid breathing problems. From a physical standpoint he was able to do all of his required tasks up to that point. His CWP claim is not waived but it [sic] also not part of these findings. In any case it would not combine with this claim to cause a total disability award. Purely for the physical conditions the Plaintiff retains the capacity to return to the type of work done on the date of injury.
>
> Based on this analysis he is not totally disabled from the work injury.

Strunk was awarded PPD benefits based on the 13% impairment rating assessed by Dr. Arthur Hughes.

Bledsoe filed a petition for reconsideration raising the same arguments it does on appeal. In the December 29, 2015, Order, overruling the petition for reconsideration, the ALJ stated:

> 1. The evidence as summarized in the Opinion is accurate and not disputed.
>
> 2. If any clerical errors occurred in which I stated that Dr. Lyon found a right shoulder condition, but stated it was not work-related, are merely that, clerical errors [footnote omitted], and do not alter the overall analysis. They do not alter the fact that substantial evidence of record exists, from Dr. Hughes, exists [sic] to support the Opinion.
>
> 3. Based on the foregoing the Petition for Reconsideration is OVERRULED.

On appeal, Bledsoe asserts a four-prong argument. First, it contends the ALJ did not properly consider Strunk's testimony that he did not suffer right shoulder problems. Bledsoe notes the summary of the evidence in the November 2015, opinion, references Strunk's complaints of back, left shoulder, and neck pain but no complaints of right shoulder pain. Bledsoe contends the ALJ's summary of the evidence is an accurate representation of Strunk's deposition and hearing testimony. It asserts since the ALJ found Strunk's testimony credible, no impairment should have been awarded for the right shoulder injury as Strunk admitted his pain or other problems were confined to his left shoulder.

Second, Bledsoe asserts the ALJ did not properly characterize Dr. J. Rick Lyon's opinions regarding the right shoulder. It observes the ALJ correctly summarized Dr. Lyon's independent medical evaluation ("IME") report as reflecting Strunk reported left shoulder pain, left arm pain to the elbow, neck and upper back pain, low back pain, left knee pain, and crepitance. Importantly, the ALJ's summary contains no mention of right shoulder pain. However, in his findings of fact, the ALJ incorrectly stated Dr. Lyon's does not dispute Strunk had harmful changes to his shoulders and back. Bledsoe maintains Dr.

Lyon noted Strunk exhibited signs of myofascial pain in the left shoulder and back but he registered nothing concerning Strunk's right shoulder. Bledsoe maintains the June 4, 2015, IME report and June 30, 2015, supplemental IME report, are completely devoid of references to right shoulder pain or limitations during his examination. Bledsoe notes in his December 29, 2015, Order ruling on the petition for reconsideration, the ALJ stated any misstatement concerning Dr. Lyon's opinions was a clerical error which suggests the ALJ agreed Dr. Lyon did not find Strunk had any harmful change to his right shoulder.

Third, Bledsoe argues the ALJ did not properly consider the opinion of Dr. Dale Williams in analyzing Strunk's right shoulder injury claim. It again notes the ALJ correctly summarized Dr. Williams' findings. However, Dr. Williams' records do not reference right shoulder complaints or a diagnosis of a right shoulder condition. Bledsoe maintains Dr. Williams' treatment records are consistent with Strunk's testimony and Dr. Lyon's findings. Yet, neither the ALJ's decision nor his order ruling on the petition for reconsideration provide any insight as to whether he considered or gave any weight to the opinions and findings of Dr. Williams with respect to Strunk's right shoulder claim.

Finally, Bledsoe contends Dr. Hughes' IME report does not constitute substantial evidence supporting an award for right shoulder impairment. It contends the April 22, 2015, IME of Dr. Hughes is the only mention in the record concerning reported pain in or limitation of the right shoulder. Bledsoe notes Dr. Hughes' impairment ratings for both shoulders are the same. Bledsoe observes Dr. Hughes assigned an impairment rating despite the fact Dr. Lyon, Dr. Williams, and Strunk reported no issues with pain or limitations in the right shoulder. Bledsoe posits the ALJ apparently attributed considerable weight to Dr. Hughes' opinions, but provided no explanation for his reliance upon Dr. Hughes in the face of contrary evidence in the record. Bledsoe also notes that in the order ruling on the petition for reconsideration, the ALJ seems to indicate Dr. Hughes' report is the only evidence upon which he relied in concluding Strunk sustained a compensable right shoulder injury.

Bledsoe maintains the Board's holding in Go Hire Empl. Dev., Inc. v. Miller, Claim No. 2012-79265, rendered January 31, 2014, is applicable arguing as follows:[2]

[2] In Miller v. Go Hire Employment Development, Inc., 473 S.W.3d, 621 (Ky. 2015), rendered October 9, 2015, the Court of Appeals affirmed in part and reversed in part, the Board's decision.

> It is important to note that, in Go Hire, the plaintiff's formal hearing testimony was in contrast to her deposition testimony. While the plaintiff had denied any CTS symptoms during her deposition, she apparently changed her testimony at the formal hearing, where she did complain of CTS symptoms upon direct examination. In its Opinion, this Board suggested that the IME report of Dr. Hughes *together* with the plaintiff's testimony from the formal hearing might have presented substantial evidence sufficient to support an award of CTS. In the case at bar, however, the *only* evidence which could have supported the ALJ's decision is the IME report of Dr. Hughes alone. Unlike in Go Hire, the Respondent has maintained throughout this case that he was not claiming any injury with respect to his right shoulder. In fact, during re-direct examination by his own attorney at the formal hearing, Respondent unequivocally testified that he only had issues with his left shoulder, not his right. Thus, this case is distinguishable from Go Hire in that sufficient reasonsing [sic] exists for a total reversal of the ALJ's award for Respondent's alleged right shoulder injury, as there is no substantial evidence in the record to support the decision, even on remand.

Bledsoe seeks reversal of the ALJ's award of PPD benefits and medical benefits for Strunk's cumulative trauma right shoulder injury.

We decline Bledsoe's request to reverse the award for the right shoulder injury. However, because the ALJ's findings are contradictory and inaccurate indicating the

ALJ did not have a correct understanding of the evidence relating to the cumulative trauma right shoulder injury, we vacate the award of income benefits and medical benefits and remand.

In his Form 101, Strunk did not allege a right shoulder injury. Notably, the records of Dr. Williams attached to the Form 101 reflect the reason for the initial visit of November 24, 2014, was "back, shoulder, and knee." In his medical statement of October 3, 2014, Dr. Williams noted as follows:

> Findings upon examination: Low back pain down bilateral legs/knees and left shoulder pain. Neck pain. Breathing problems.
>
> Diagnosis: Cervicalgia with moderate degeneration. Lumbalgia with moderate degeneration. Knee pain. Left shoulder pain. Breathing problems.

Dr. Williams responded to the question "[i]n your medical opinion, has the Patient's previous employment caused or contributed to the aforementioned condition(s)? If so, please explain," as follows:

> Mr. Strunk is a 57 year old male with 39 years in the mining industry, which was all underground. He suffers from cervicalgia, lumbalgia, moderate degeneration in both regions of the cervical and lumbar spine, knee and left shoulder pain. He took off work 3/7/14 for respiratory problems. Mr. Strunk has widespread moderate

> degeneration. These findings are consistent with an accumulation damage condition and the occupational hazards of the mining industry.

On June 22, 2015, when Strunk introduced in evidence Dr. Hughes' Form 107 dated April 22, 2015, he also filed a motion to amend his Form 101 to allege a right shoulder injury. The motion asserted Dr. Hughes examined Strunk on April 22, 2015, and opined he suffered a cumulative trauma injury to the right shoulder and assigned an impairment rating. Therefore, Strunk sought to amend his Form 101 to include a cumulative trauma right shoulder injury.

Significantly, after his examination by Dr. Hughes, on June 15, 2015, Strunk was deposed by Bledsoe. During his deposition, when asked to identify the body parts he alleged were injured, Strunk provided the following testimony:

> Q: You've made a claim for cumulative trauma. Can you tell me what body parts that you're claiming that you have issues with as a result of your employment at Bledsoe?
>
> A: My knees.
>
> Q: Both knees?
>
> A: Yeah. My back. My shoulder.
>
> Q: Which shoulder?

A: The left. My neck. And that’s – that’s about it.

Q: Do you have any problems with your right shoulder?

A: Not – not like the – not like the left.

Q: Okay. Do you have any issues with your legs at all? Besides you knees, any issues with your legs?

A: My right hip hurts when I …

Q: Your right hip?

A: Yeah.

Q: Hurts when you do what?

A: When I stand on my right leg.

Q: Do you have any problem with your feet or ankles?

A: They – they hurt.

Q: They hurt?

A: Yeah.

Q: Okay. Your feet or your ankles?

A: My ankles.

Q: Your ankles. What about your hands or your arms?

A: My left arm. And then these fingers.

Q: And you’re referring to the last three fingers on –

A: No. These. All four of these.

Q: Okay. All four of your fingers, not your thumb, on your right hand?

> A: Yeah.
>
> Q: Okay. What kind of problems do you have with them?
>
> A: They go numb.
>
> Q: And that's on the right, for the record?
>
> A: Yeah.
>
> Q: Have you seen a doctor for carpal tunnel or anything like that?
>
> A: No.

Strunk provided a fairly in depth explanation of how each body part had been adversely affected by the cumulative trauma he experienced while at work. When asked specifically about his right shoulder problems, Strunk provided the following testimony:

> Q: Okay. Now, you said that you don't really have trouble in your right shoulder –
>
> A: Yeah.
>
> Q: -- right? Just in your left shoulder?
>
> A: Yeah.
>
> Q: But you have some issues with your right hand. Correct?
>
> A: Yeah. Yeah.

The June 4, 2015, report of Dr. Lyon reflects he received complaints from Strunk regarding the left shoulder, left arm, neck, and upper back, low back, and

left knee. His report does not reflect Strunk voiced any right shoulder symptoms or problems.

In the same vein, within Dr. Lyon's summary of the medical records he reviewed, including those of Dr. Williams and Dr. John Jones, Strunk's treating physician, there is no notation that Strunk experienced right shoulder problems or symptoms.

In a subsequent letter of June 30, 2015, Dr. Lyon noted Bledsoe informed him Strunk intended to amend his Form 101 to assert a claim for the injury to the right shoulder. He noted that in his examination, performed on June 14, 2015, there were no objective findings to support an impairment rating for the right shoulder.

At the hearing, on direct examination Strunk was asked to address the physical problems arising from his employment at Bledsoe:

> Q: Okay. That's what I am getting ready to ask you. Now, I know you had some problems, health-wise, other than what we're here on today, correct?
>
> A: Yes.
>
> Q: You were taken off from work, it appears, back in 2014, I believe, …
>
> A: March 7th.
>
> Q: … by a physician because you had some problems with your heart.
>
> A: Breathing and my heart.

Q: All right. And, I understand you had some procedures to correct those problems.

A: Yeah.

Q: Bobby, even without those problems, were you experiencing other difficulties trying to maintain your employment with your last years …

A: Yes.

Q: … at Bledsoe?

A: Yes.

Q: What were those problems you were suffering …

A: My back – my back and knees and my shoulders and I just couldn't – I just couldn't bend. I can't – I couldn't get down – if you had to get down and bend over to walk in fifty inches of coal, that ain't – you know, that's your height, and there's a lot of times you would have to crawl and I couldn't do that. I mean, it got to where I couldn't do it. My knee would – it would swell up at times and my back would hurt me so bad, you know, I couldn't – I had to – the whole time I'm always around, I have to lean up on something or stand up, you know, because I hurt so bad in my back.

Q: Is the back the worst problem you've got?

A: No, my breathing. It's my breathing and my – my knees, my shoulders and my back and my neck.

Q: So, you've got all of those problems?

> A: Yeah. I mean, I hurt twenty-four/seven, I mean.
>
> Q: Now, you and I sat down after we had you evaluated for your claim and we went over Dr. Williams' – Dale Williams' findings and we went through the information we had on hearing loss and things of that nature and you directed me to write a letter to your employer, Bledsoe Coal, on March the 30th and tell them about your problems and give them notice of your claim?
>
> A: Yeah.

Later during the hearing, the following exchange took place between Strunk and counsel for both parties:

> Q: Okay.
>
> A: …medicines.
>
> Q: That's okay. That's okay. I just wanted to make sure there was nothing new.
>
> A: No.
>
> Q: Okay. Now, when you were telling the Judge about your shoulders, you were pointing – you were holding your left shoulder. Is that …
>
> A: Yeah.
>
> Q: … right?
>
> A: Yeah.
>
> Q: And, during your deposition, you told me that the left shoulder is, really, the one that gives you trouble.
>
> A: Yeah, it hurts. It – it hurts more than the right.

> Q: And, you said that, really, with your right, the pain that you had was in your hand. Is that still right?
>
> A: Yeah, my – my fingers – my fingers go numb every – every time I lay down. All – both – it was just one hand and, now, it's both hands. They go numb right on the end of my tips of my fingers and I have to do this to wake them up, I mean, seems like to wake them up. I don't know. I mean, …
>
> Q: Okay. But, really, it's your left shoulder that you have the trouble …
>
> A: Yeah.
>
> Q: … out of, right?
>
> A: Yeah.
>
> [text omitted]
>
> RE-DIRECT EXAMINATION BY MR. MORGAN:
>
> Q: I think we've got it was the left shoulder that is your problem, correct.
>
> A: Yeah, the left shoulder.

In all claims, the ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a

detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

In determining the cumulative trauma injuries sustained by Strunk, the ALJ made the specific finding Strunk was entirely credible and accurate. He also noted Drs. Williams and Hughes felt Strunk had work-related cumulative trauma injuries aroused into disabling reality by his work. However, the ALJ misunderstood the opinions expressed by Dr. Lyon as evidenced by his finding Dr. Lyon did not dispute Strunk had experienced harmful changes to his shoulders and back. To the contrary, Dr. Lyon did not receive any complaints from Strunk concerning his right shoulder. This finding by the ALJ is not a clerical error as characterized in the December 29, 2015, Order ruling on the petition for reconsideration. Rather, it is a fundamental misunderstanding of the evidence. Without providing the specific medical evidence which served as the basis for his finding, the ALJ stated he believed Strunk's work caused his dormant condition to be aroused into

disabling reality for both the shoulders and low back. Relying upon Dr. Hughes, the ALJ found Strunk had a 13% impairment rating.

The ALJ's opinion does not demonstrate he had an accurate grasp of Strunk's testimony and the opinions of Drs. Williams and Lyon. In fact, finding Strunk was a credible and accurate witness, without further explanation, predominately supports a determination he did not sustain a right shoulder injury.

After finding Strunk's testimony was credible and accurate, the ALJ noted Strunk had been treated by Dr. Williams and examined by Dr. Hughes, and both felt Strunk had work-related cumulative trauma injuries aroused into disabling reality by Strunk's work. The problem with this finding is that upon examination, Dr. Williams did not find or diagnose right shoulder problems. Consequently, Dr. Williams' report does not support the ALJ's finding of a right shoulder injury. In addition, the ALJ incorrectly stated Dr. Lyon had found harmful changes in both shoulders. Even though Dr. Hughes diagnosed a right shoulder problem for which he assessed a 4% impairment rating, the fact remains the ALJ's summary of the evidence is not in concert with his findings of fact concerning the opinions expressed

in the reports of Drs. Williams and Lyon and Strunk's testimony.

In the December 29, 2015, decision, the ALJ stated substantial evidence in the record exists from Dr. Hughes to support the opinion. That statement in and of itself is not sufficient to explain why he relied upon Dr. Hughes in the face of evidence from Strunk, Dr. Williams, and Dr. Lyon which completely contradicts Dr. Hughes' opinions. Just as important, the December 29, 2015, order does not address the issues raised by Bledsoe in its petition for reconsideration. Bledsoe was entitled to additional findings of fact addressing these legitimate issues.

Thus, we believe the claim should be remanded to the ALJ for further explanation as to why he found Strunk sustained a right shoulder injury in spite of Dr. Williams' medical report and Strunk's deposition and hearing testimony given after Dr. Hughes' examination.

In Arnold v. Toyota Motor Mfg., 375 S.W.3d 56, 61, 62 (Ky. 2012), the Supreme Court directed as follows:

> Mindful that Chapter 342 and the Kentucky Constitution require review of decisions in post–1987 workers' compensation claims by the Board, the Court of Appeals, and the Supreme Court, [footnote omitted] when requested, we conclude that KRS 342.275(2) and KRS 342.285 contemplate an opinion that summarizes the

> conflicting evidence concerning disputed facts; weighs that evidence to make findings of fact; and determines the legal significance of those findings. Only when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ's finding [footnote omitted] 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. [footnote omitted]

In the case *sub judice*, the ALJ did not discuss the conflicting evidence in the form of Strunk's testimony and the report of Dr. Williams indicating Strunk did not sustain a cumulative trauma right shoulder injury. Further, his finding as to Dr. Lyon's opinion regarding the condition of Strunk's shoulders is not a clerical error, but a misunderstanding of Dr. Lyon's opinion. Because we believe the ALJ did not have an accurate understanding of Strunk's testimony and all the medical evidence, the award of income and medical benefits must be vacated.

On remand, the ALJ must specifically address Strunk's testimony, provided after he was seen by Dr. Hughes, and the report of Dr. Williams and provide the evidentiary basis for his finding concerning the alleged right shoulder injury in order for this Board and any reviewing court to determine whether the ALJ's finding of a

right shoulder cumulative trauma injury is supported by an accurate understanding of the evidence and is reasonable.

We decline to remand for a finding of no injury to the right shoulder, as we believe substantial evidence may exist in the record which supports a finding of a work-related right shoulder injury and an award of PPD benefits and medical benefits. However, based on the text of the ALJ's November 19, 2015, decision and his December 29, 2015, Order, we do not believe the ALJ complied with the Supreme Court's directive in Arnold v. Toyota Motor Mfg., supra.

The dissent points to Bledsoe's failure to request remand for further findings of fact and its failure to request further findings in its petition for reconsideration. The dissent mistakenly asserts Bledsoe's sole argument on appeal is that there is insufficient evidence to support an award for the right shoulder injury and reversal is required. As such, the review should be limited as to whether the award is supported by substantial evidence. To the contrary, in addition to arguing Dr. Hughes' report cannot constitute substantial evidence, Bledsoe also contends the ALJ did not properly consider Strunk's testimony and did not accurately characterize the opinions of Dr. Lyon and Dr. Williams regarding the right shoulder. Clearly, Bledsoe is not just contending there is

insufficient evidence to support an award for the right shoulder injury. Bledsoe's first three arguments are that it is entitled to a decision based on a correct understanding of the evidence.

All parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990).

That scenario exists in the case *sub judice*. This is not just a question of whether substantial evidence supports the award. Rather, the core issue is whether the ALJ had an accurate understanding of the evidence in reaching his decision.

The dissent does not take issue with the fact the ALJ mischaracterized Dr. Lyon's opinion regarding the right shoulder and Dr. Williams did not state Strunk experienced a work-related cumulative trauma injury to the right shoulder. In reaching a decision, the ALJ mischaracterized Dr. Lyon's opinion and apparently misunderstood the extent

of the injuries found by Dr. Williams. Immediately following the ALJ's finding Strunk is entirely credible and accurate, the summary of the opinions of Dr. Williams and Dr. Hughes and the mischaracterization of Dr. Lyon's opinion regarding Strunk's shoulders, without citing to any evidence, the ALJ found Strunk's work caused dormant conditions to be aroused into disabling reality for the shoulders and low back. The ALJ then stated he relied upon the impairment rating assessed by Dr. Hughes. Thus, we are left to conclude based on the three paragraphs immediately preceding his finding of work-related injuries to the shoulders and low back, the ALJ relied upon Strunk's entire testimony and the opinions of Drs. Williams, Hughes, and Lyon in finding a compensable right shoulder injury. Herein lies the problem, as most, if not all, of Strunk's testimony and the opinions of Drs. Williams and Lyon are not evidence supporting a finding of a right shoulder injury, a fact the ALJ failed to perceive.

As noted by the dissent, although the petition for reconsideration did not request additional findings, the ALJ addressed one assertion of error. The ALJ did not choose to address the other errors brought to his attention in the petition for reconsideration. The petition for

reconsideration raised legitimate issues which should have been addressed by the ALJ.

As noted in the dissent, Strunk vaguely identifies a right shoulder problem. The relevant portions of Strunk's testimony are set out within this opinion. During his deposition, Strunk only identified a left shoulder injury. He was specifically asked about a right shoulder injury and testified his problems with the right shoulder were not like the left. What cannot be lost is the fact Dr. Hughes assessed the same impairment for both shoulders even though Strunk indicated his left shoulder condition is much worse than the right. This claim is not being remanded with directions to dismiss the claim for the right shoulder injury. This is in part due to Strunk's deposition testimony and hearing testimony vaguely referencing problems with "[his] shoulders."

The dissent characterizes the opinion as a hypertechnical review of every response of a witness. The opinion does not contain a hypertechnical review of the testimony. Rather, it sets forth the actual testimony of Strunk. The problem is not with inconsistent responses by Strunk, but inaccurate findings by the ALJ. There is testimony provided by Strunk which cannot in any way support a finding of an injury to the right shoulder. The

most significant statement came from Strunk's attorney who indicated "we've got it that the left shoulder is your problem," with which Strunk whole heartedly agreed.

There are not inconsistencies within Strunk's testimony. Strunk consistently testified to having little or no right shoulder problems. Notably, the ALJ found Strunk's testimony entirely credible and accurate. Strunk never identified a single right shoulder symptom which is consistent with what he told Dr. Williams, his doctor, and Dr. Lyon, Bledsoe's evaluating doctor. This is what the ALJ failed to grasp and address in his opinion and subsequent order ruling on Bledsoe's petition for reconsideration pointing out these facts. Consequently, there are inaccurate and thus inadequate findings regarding the evidence. When that occurs the ALJ should be required to address those inaccuracies particularly when they are fundamental to resolving a contested issue.

In summary, Bledsoe requested the ALJ to address obvious inaccuracies within his opinion not inconsistencies. In addressing the inaccuracies the ALJ merely referenced a clerical error with regard to the opinion of Dr. Lyon. The ALJ did not, in a sufficient manner, delve into the issues raised regarding his failure to accurately set forth findings concerning the lay and

medical testimony pertaining to the alleged right shoulder injury. When the ALJ's findings and order demonstrate he did not have a correct understanding of the evidence the claim must be remanded to the ALJ for further findings as directed herein.

Accordingly, the November 19, 2015, Opinion, Award, and Order and the December 29, 2015, Order ruling on the petition for reconsideration finding Strunk has a 13% impairment rating and awarding PPD benefits and medical benefits are **VACATED**. This claim is **REMANDED** for entry of an amended opinion and order determining whether Strunk sustained a compensable right shoulder injury. We emphasize the finding of compensable low back and left shoulder injuries shall remain unaltered.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

RECHTER, MEMBER. I respectfully dissent. On appeal, Bledsoe has not requested this claim be remanded for further findings of fact. Nor did it request further findings of fact in its petition for reconsideration before the ALJ. It argues <u>only</u> that there is not sufficient evidence to support an award for a right shoulder injury, and asks the award be reversed. As such, review by this Board should be limited

solely to the question of whether the award is supported by substantial evidence.

Dr. Hughes' medical opinion constitutes the requisite substantial evidence to support the award. Furthermore, I disagree with Bledsoe's assertion Strunk denied any injury to his right shoulder. At the final hearing, he testified his right shoulder condition was not as bad as his left shoulder, and stated he had problems with his "shoulders". In one instance, upon a leading question during a brief redirect, did Strunk agree when asked if "we've got it was the left shoulder that is your problem".

On appeal, Bledsoe vigorously asserts the ALJ's determination Strunk was credible is in complete conflict with his response to this leading question. I do not believe it is the function of this Board to engage in a hypertechnical review of every response of a witness. Witnesses often give inconsistent responses to inartfully worded, leading questions from attorneys, and cannot be expected to always express themselves carefully. That is why we afford the ALJ, who is physically present and able to assess the totality of a witness' responses and demeanor, wide discretion in assessing the witness' credibility.

Strunk amended his application to include a claim for a right shoulder injury. Bledsoe opposed the motion to

amend, but has not appealed the ALJ's decision to grant it. Strunk submitted Dr. Hughes' report which assessed an impairment rating for the right shoulder. In his brief to the ALJ, he requested an award for his right shoulder condition. Bledsoe had ample opportunity to argue against an award for a right shoulder condition or to request further findings of fact regarding the award. It chose instead to challenge only the sufficiency of the evidence supporting the award. If any inconsistencies exist in the ALJ's opinion regarding the reports of Drs. Williams or Lyon, they go to the sufficiency of the ALJ's findings of fact, not the sufficiency of the evidence supporting the award. The award is supported by Dr. Hughes' opinion, and should be affirmed.

C**OUNSEL FOR PETITIONER:**

HON TIMOTHY FELD
HON MORGAN FITZHUGH
333 W VINE ST STE 300
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON KY 40741

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
320 WHITTINGTON PKWY
DWC SUITE 2ND FL
LOUISVILLE KY 40222