

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: July 22, 2016

CLAIM NO. 201466198

RURAL METRO CORP

PETITIONER

VS.

APPEAL FROM HON. UDELL LEVY,  
ADMINISTRATIVE LAW JUDGE

MICHAEL MULLINS  
and HON. UDELL LEVY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING IN PART AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Rural Metro Corp ("Rural Metro") seeks review of the March 7, 2016, Opinion, Award, and Order of Hon. Udell Levy, Administrative Law Judge ("ALJ") finding Michael Mullins ("Mullins") sustained a work-related neck injury which caused him to be permanently totally disabled. Rural Metro also appeals from the April 6, 2016, Order denying its petition for reconsideration.

Mullins alleged work-related neck and left shoulder injuries occurring on September 14, 2014, while in the employ of Rural Metro.

In its Form 111, Rural Metro accepted the compensability of the left shoulder injury but stated there was a dispute as to the amount of compensation owed. It specifically denied the compensability of the cervical/neck injury.

In the January 13, 2016, Benefit Review Conference Order & Memorandum, the parties stipulated Mullins sustained a work-related shoulder injury on September 4, 2014. However, Mullins' alleged cervical injury was denied. The contested issues were: "benefits per KRS 342.730; work-relatedness/causation(neck); notice (neck); unpaid or contested medical expenses (neck); injury as defined by the ACT (neck); and TTD (5/11/15 thru 7/23/15)."

At the time of the injury, Mullins was employed as an EMT with Rural Metro. He provided the following description of the event resulting in the work injury:

Q: Michael, would you briefly tell Judge what happened on September the 14<sup>th</sup> of 2014?

A: Well, it was around 11:00 a.m. that day. I was - we got dispatched to Cardinal Hill Hospital in Lexington,

Kentucky, a rehab facility, to transport a patient from there over to St. Joe Main. Me and my partner, I run on an ALS truck, and -

Q: Now what's that mean?

A: Advanced life support.

Q: Okay.

A: And we went in to move the patient and I was on the left side of the stretcher, she was - and the bed and she was on - excuse me, I was on the right side of the bed, and she was on the left side of the bed, and the stretcher was between us, between me and the bed. We went to move this patient over and she kindly panicked out and she thought she was gonna fall between the stretcher and the bed on the floor.

And I reached over real quick and grabbed the other side - we pull with a draw sheet always and when I reached over to get her on the other side to keep from falling between the bed and the stretcher, that's when I had severe pain in my left lower back and neck.

Q: How big a lady was she that you had to grab?

A: I would say she was probably 240.

Q: Okay. Now, you said you felt pain in your low back and in your neck; is that correct?

A: Yes, sir.

The ALJ determined Mullins sustained a work injury finding as follows:

I find from the evidence that the injury caused symptoms to Plaintiff's neck and left shoulder. Although it's not clear whether he complained of problems with his neck when he first presented to Baptistworx, Dr. Primm's review of records noted he had complaints of pain and tenderness in his left shoulder and upper back at that time. Just four days after the injury, Dr. White documented symptoms from Mr. Mullins' scapular region up into his neck and down his arm with numbness and tingling. Although he did not note cervical tenderness at that time, Dr. White also documented restriction in cervical motion and reduced left triceps reflex while cervical x-rays revealed degenerative changes in the cervical spine.

Subsequently, Dr. Tutt documented sensory deficits and atrophy in Plaintiff's left hand while Dr. Primm noted some limited cervical motion and abnormal bicep reflexes. Dr. Hughes also observed limited cervical motion and abnormal reflexes in both bicep and triceps testing on the left. Dr. Hughes also considered the report of the radiologist that concluded the 10/28/14 MRI indicated Mr. Mullins had a disc protrusion and stenosis at C6-7. Dr. Hughes further confirms that these radiological findings correlate with findings from his examination and, while he was unclear what was causing limited motion in the left shoulder, concluded Plaintiff has radiculopathy and findings consistent with a cervical nerve root compression. While Dr. Hughes couldn't state within a degree of reasonable medical probability at his deposition that Plaintiff sustained an acute disc protrusion, Dr. Primm suggested Plaintiff had pre-existing degenerative findings that were aroused

and became symptomatic from the strain on 9/14/14. The inference drawn from both opinions is that the work injury caused Plaintiff's cervical symptoms.

In determining Mullins is totally occupationally disabled, the ALJ provided the following:

Based on the above, the Administrative Law Judge must undertake a two-step analysis to determine if Plaintiff is totally disabled. The first step is to determine if he has a permanent disability rating. Three physicians have expressed opinions regarding Mr. Mullins' impairment. Notwithstanding findings consistent with neurological deficits in Plaintiff's upper left arm, documented atrophy in the left hand, and evidence of degenerative changes, Drs. Tutt and Primm concluded the injury resulted in no "acute" cervical pathology or permanent condition.

I have previously determined the September 14, 2014 injury caused Plaintiff's cervical symptoms. While Dr. Primm concludes it didn't cause any "acute" pathology, he suggests the injury involved a strain that aroused a pre-existing condition. It is well-established that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable. *McNutt Constr./First Gen. Servs. v. Scott*, 40 S.W.3d 854 (Ky. 2001). At the same time, there is simply no evidence that Plaintiff had an active cervical impairment before sustaining this injury. . . .

**While the evidence shows the injury caused the cervical symptoms, it is not clear from the evidence it resulted in a distinct left shoulder**

condition. No physician has diagnosed any underlying shoulder condition separate from the cervical injury. Dr. Hughes' diagnosis of left shoulder pain with limitation of motion merely describes symptoms; he further stated in his deposition that he couldn't determine an etiology for a left shoulder injury. Therefore, I do not find that the injury caused a separate permanent condition to Plaintiff's left shoulder.

Mr. Mullins was very credible in describing his current symptoms. Dr. Hughes is the only physician providing a rating for a permanent cervical impairment. The 15% rating he provides for a DRE Cervical Category III pursuant to the AMA Guides is consistent with a cervical impairment with radiculopathy. The purpose for the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition, is to establish a standardized, objective approach to evaluating medical impairments. "Impairment" is defined in the *Guides* as "a loss, loss of use, or derangement of any body part, organ system, or organ function." But an impairment cannot be considered to be permanent until the underlying condition "has reached maximum medical improvement (MMI), meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment." *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213 (Ky. 2006).

Dr. Hughes did not believe Plaintiff was at MMI. He also noted Mr. Mullins was receiving no treatment but did not provide any recommendations regarding additional procedures reasonably necessary to treat the effects of his injury. Dr. Hughes

provided an impairment rating in the event no further treatment was approved. No treatment has been approved since Dr. Primm determined Plaintiff was at MMI last May. Under the circumstances, Plaintiff reached MMI on May 6, 2015 per Dr. Primm. However, since he remains symptomatic from the cervical injury after reaching MMI, I conclude Mr. Mullins has a 15% whole person permanent impairment for the cervical injury, per Dr. Hughes.

Upon reviewing the evidence, the Administrative Law Judge finds Mr. Mullins has shown he meets the definition for permanent total disability as defined by the Act and relevant case law. He has neurological deficits in his left upper extremity and is limited in his ability to turn his head. Therefore, I believe the restrictions recommended by Dr. Hughes are reasonable and would prevent Plaintiff from returning to work as an EMT, which has been his primary occupation since 1996. Plaintiff also has training as a mechanic. However, he is restricted to light lifting with the right arm, no lifting with the left, no bending or twisting the neck, no repetitive use of the left arm, no work above shoulder level and no performance of tasks requiring dexterity. This precludes him from returning to work as a mechanic, as well. These are the only occupations for which Plaintiff has training and, given that he is fifty-nine years old, it is unlikely he can be retrained to return to the workforce, assuming he has any additional transferrable skills.

Plaintiff also has prior employment as an elected constable. Even if he could be reelected to this position, he is unlikely capable of

executing certain powers of a peace officer, including effectuating arrests if that was ever required. Even if such opportunities were reasonably available, I do not believe Plaintiff could consistently work eight hours per day five days per week. The only "work" he has been able to perform since his injury is to volunteer approximately eight hours per week for the Lincoln County Sheriff's Office. This does not meet the criteria for being able to work per KRS 342.0011(11)(c) since "work" is further defined as ability to earn an income by "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." Based on the foregoing, I do not believe there are jobs available in the current market for which Plaintiff could compete for employment on a sustained basis.

(emphasis added).

Rural Metro filed a petition for reconsideration citing Mullins' testimony indicating he could possibly perform sedentary work and the fact he worked for the Lincoln County Sheriff's Department on a volunteer basis. Thus, Rural Metro contended the ALJ erroneously found Mullins is permanently totally disabled. Relying on the opinions of Drs. Daniel Primm and Henry Tutt, Rural Metro argued the weight of the medical evidence established Mullins did not sustain a permanent impairment to the cervical spine.

The ALJ denied the petition for reconsideration concluding Rural Metro was rearguing the merits of the case and the parties had been sufficiently apprised of the factual basis for his decision.

On appeal, Rural Metro argues substantial evidence does not support the determination of permanent total disability. It argues Mullins is capable of performing sedentary work in an office setting, as Mullins testified he volunteered at the Lincoln County Sheriff's Department performing clerical duties. In addition, Mullins demonstrated the ability to use his left shoulder by repairing a leak on the top of his camper. Rural Metro asserts the surveillance video of Mullins along with portions of Mullins' hearing testimony establish he is able to bend, stoop, spray-paint, and climb up and down a ladder utilizing both upper extremities.

Rural Metro notes Mullins has a GED and extensive work history in law enforcement working as a constable on two different occasions. Even though Mullins may not retain the physical ability to return to his EMT job, Rural Metro asserts he is not permanently totally disabled pursuant to the Act as he has the ability to perform work as defined by the statute.

For a reason not asserted by Rural Metro, we vacate the ALJ's finding Mullins is totally occupationally disabled and the award of permanent total disability benefits.

The ALJ concluded the work injury resulted in neck and left shoulder symptoms. Even though the parties stipulated Mullins sustained a work-related shoulder injury, the ALJ found the injury did not cause "a separate permanent condition to Mullins' left shoulder." The ALJ concluded the evidence demonstrated the injury caused cervical symptoms, but it was not clear Mullins had a "distinct left shoulder condition." Further, there was no diagnosis of an underlying shoulder condition separate from the cervical injury. The ALJ found significant Dr. Hughes' testimony he could not determine an etiology for a left shoulder injury. Moreover, we note that in his deposition, Dr. Hughes also acknowledged there was no atrophy or loss of strength in the left arm.

Indeed, in his Form 107 dated July 23, 2015, pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, Dr. Hughes assessed an 8% impairment rating for the left shoulder condition based on a reduced range of motion and pain in the left shoulder. He also assessed a

15% impairment rating due to neck pain with cervical radiculopathy. Dr. Hughes imposed the following restrictions:

1. The plaintiff described the physical requirements of the type of work performed at the time of injury as follows:

The plaintiff described the physical requirements of the type of work performed at the time of injury as including standing, walking, climbing and heavy lifting, as well as bending, twisting, squatting, kneeling. These tasks must all be performed correctly and in a timely fashion because of his job as an EMT.

2. Does the plaintiff retain the physical capacity to return to the type of work performed at the time of injury? No.

3. Which restrictions, if any, should be placed upon plaintiff's work activities as the result of the injury?

Mr. Mullins can do light lifting with the right arm but should avoid lifting with the left. He cannot bend or twist the neck. He cannot repetitively use the left arm and he cannot work above shoulder level. He cannot do tasks requiring dexterity of the left hand or arm.

In analyzing whether Mullins was totally occupationally disabled, the ALJ based his decision in large part upon the restrictions imposed by Dr. Hughes which he concluded prevented Mullins from returning to work as an EMT, his primary occupation since 1996, and as a

mechanic. Since the ALJ determined Mullins did not have a separate permanent condition to his left shoulder, the reliance upon Dr. Hughes' restrictions relating to the alleged left shoulder injury is error.

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).

In conducting his analysis as to whether Mullins was totally permanently disabled, the ALJ did not recognize Dr. Hughes' restrictions were based, in part, upon his diagnosis of a left shoulder injury. The ALJ specifically rejected Dr. Hughes' opinion of a left shoulder injury and the 8% impairment rating for the alleged shoulder injury. Unfortunately, Dr. Hughes did not relate his physical restrictions to a specific injury, and the ALJ made no finding connecting all of Dr. Hughes' restrictions to the neck injury. Thus, we believe that at the very least, Dr. Hughes' restriction of not working above shoulder level

relates to the shoulder injury rejected by the ALJ. Since the ALJ found there was no impairment of the left shoulder, he could not rely upon the restrictions imposed by Dr. Hughes concerning the use of the left shoulder in analyzing the extent of Mullins' occupational disability. Stated another way, in analyzing the extent of Mullins' occupational disability, the ALJ could only rely upon the physical restrictions imposed for the cervical/neck injury. That being the case, the ALJ's finding Mullins is totally occupationally disabled and the award of permanent total disability benefits must be vacated, and the claim remanded for a decision based upon a correct understanding of the restrictions attributable to the work-related cervical/neck injury as found by the ALJ.

Accordingly, those portions of the March 7, 2016, Opinion, Award, and Order and the April 6, 2016, Order ruling on the petition for reconsideration finding Mullins permanently occupationally disabled and the award of permanent total disability benefits are **VACATED**. This claim is **REMANDED** to an Administrative Law Judge as designated by the Chief Administrative Law Judge for a determination of the extent of Mullins' occupational disability in conformity with the views expressed herein.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON GUILLERMO CARLOS  
444 W SECOND ST  
LEXINGTON KY 40507

**COUNSEL FOR RESPONDENT:**

HON MCKINNLEY MORGAN  
921 S MAIN ST  
LONDON KY 40741

**CHIEF ADMINISTRATIVE LAW JUDGE:**

HON ROBERT L SWISHER  
657 CHAMBERLIN AVE  
FRANKFORT KY 40601