# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: February 6, 2015**

CLAIM NO. 201301574 & 201191077

SOUTHERN COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

MARCUS WALTERS
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**VACATING AND REMANDING**

* * * * * *

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

**ALVEY, Chairman.** Southern Coal Corp. ("Southern Coal") appeals from the Opinion and Order rendered August 14, 2014, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Marcus Walters ("Walters") permanent total disability ("PTD") benefits and medical benefits for an acute injury to his left shoulder, cumulative trauma

injuries to his lumbar spine and occupational hearing loss. Southern Coal also seeks review of the September 16, 2014 Opinion denying its petition for reconsideration.

On appeal, Southern Coal argues the ALJ erred in relying upon Dr. Robert Hoskins' opinions in finding Walters' low back condition was the result of cumulative trauma. It also argues the ALJ did not perform a proper analysis pursuant to Ira Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). For the reasons set forth below, we vacate and remand to the ALJ for additional findings regarding Walters' acute left shoulder injury and his alleged back injury due to cumulative trauma, for a more detailed analysis in support of his determination of PTD, and a discussion pertaining to entitlement to temporary total disability ("TTD") benefits.

Walters filed a Form 101 on March 15, 2013 alleging on March 26, 2011, he injured his left shoulder when he fell off a ladder while working on a road grader. Walters also alleged cumulative trauma to his back due to the repetitive nature of his job with Southern Coal, manifesting on January 19, 2012, the day he was laid off. Walters later filed a Form 103 on October 18, 2013, alleging occupational hearing loss, manifesting on January 19, 2012. The claims were consolidated.

Walters testified by deposition on June 5, 2013 and December 11, 2013. He also testified at the Hearing held July 22, 2014. Walters was born on November 26, 1961, resides in Wallins, Kentucky and is right-hand dominant. He completed high school and received vocational training in welding. He subsequently worked as a welder for approximately twenty-eight years, primarily in the coal mining industry. Prior to that, he worked in a body shop, was a seasonal roofer, truck driver, laborer performing "underground utilities," furnace repairman, fabricator and welder.

Walters began working for Southern Coal in August 2010 as a welder. He worked outside repairing heavy equipment and large air tools. He handled large tools and hammers, crawled under equipment which required reaching above his head, and climbed ladders. Walters regularly lifted 50 pounds, and occasionally lifted oxygen tanks weighing 75 to 100 pounds. Walters was laid off from Southern Coal on January 19, 2012, and has not worked since except for a side job in January 2013 where he repaired a coal truck. Walters testified he sustained a left shoulder injury, a gradual low back pain, and occupational hearing loss while employed with Southern Coal.

On March 26, 2011, Walters slipped off steps while climbing down from a road grader, and fell. Walters stated he could not move his left arm and experienced pain in his left shoulder and back.

He was eventually referred to Dr. David Dome for his left shoulder complaints. Dr. Dome surgically repaired his left shoulder rotator cuff and biceps tendon on March 26, 2011. Dr. Dome restricted Walters from work until July 18, 2011, when he was released to return to light duty. He continued to work light duty until he was laid off on January 19, 2012. Dr. Dome performed a second surgery on March 6, 2012 to re-attach the biceps tendon and Walters was later released to return to work without restrictions in July 2012. Thereafter, he began experiencing gradual pain and returned to Dr. Dome in April 2013, who eventually performed a third surgery on August 27, 2013. Walters testified he experiences constant left shoulder pain, as well as soreness, stiffness and weakness. He is unable to pick up objects with his left arm. He has difficulty performing daily activities and sleeping due to his left arm problems.

Walters testified he experienced a gradual onset of back pain during his last two or three years of work for Southern Coal. He denied experiencing low back symptoms

prior to his employment there. Walters has daily pain and stiffness in his back, which radiates mostly into his left leg. He also experiences numbness throughout his left leg. Walters is unable to sit, stand or walk for long periods of time without resting. Dr. Hoskins was the first physician to inform him his low back symptoms are work-related.

Walters testified he has been exposed to loud noise throughout his twenty-eight year history as a welder, including at his job with Southern Coal. He first noticed his hearing problems approximately three years ago. He has difficulty hearing other people, the telephone and the television.

Walters testified he cannot return to his former job with Southern Coal due to his physical condition, specifically stating he is unable to lift fifty pounds on a daily basis. Walters further indicated he is unaware of any job he can do, including all of his past jobs. Walters testified he takes over-the-counter Ibuprofen or Aleve on a daily basis. He also indicated he has received several periods of unemployment benefits.

The parties filed the records of Dr. Dome. On April 20, 2011, Dr. Dome diagnosed an acute traumatic injury to the left rotator cuff along with long head biceps tendon rupture, and restricted Walters from work. On May 10, 2011,

Dr. Dome performed an arthroscopic rotator cuff tear and subpectoral biceps tenodesis of the left shoulder. After a period of physical therapy, Walters was released to light duty work on July 21, 2011. In February 2012, Walters returned complaining of severe pain. On March 6, 2012, Dr. Dome performed a "revision, tenodesis, left long head of the biceps tendon." Following a period of physical therapy, Walters was released to regular duty on July 5, 2012, and placed at maximum medical improvement ("MMI") on August 2, 2012. On April 4, 2013, Walters returned to Dr. Dome complaining of left upper extremity pain. Dr. Walters stated a left shoulder MRI demonstrated AC joint arthropathy. He restricted Walters from work on August 16, 2013 and performed a left shoulder arthroscopy with arthroscopic partial clavicalectomy on August 27, 2013. Subsequently, on March 5, 2014, Dr. Dome stated Walters had attained MMI and assessed an 8% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). On that date, he also prescribed Voltaren gel and restricted Walters from work.

Southern Coal filed the October 7, 2013 lumbar x-rays from Harlan ARHC which demonstrated Grade II spondylolisthesis with bilateral spondylolsis at L5-S1. The

x-rays are the only treatment and/or diagnostic records submitted into evidence regarding Walters' lumbar condition.

Walters filed the April 15, 2013 Form 107-I medical report completed by Dr. Hoskins, who evaluated him on April 11, 2013. After reviewing the left shoulder injury and subsequent treatment, Dr. Hoskins stated Walters also reported a two to three year history of gradual lower back pain associated with heavy manual labor as a welder. Dr. Hoskins noted Walters "has not had any recent diagnostic studies relative to his lower back."[1] Walters reported a thirty year work history as a welder, with the last three years with Southern Coal. Dr. Hoskins diagnosed lumbosacral sprain/strain; left lumbar radiculitis; history of left shoulder arthroscopic rotator cuff repair and subpectoral biceps tenodesis on May 10, 2011; history of left shoulder revision tenodesis of long head of biceps tendon on March 6, 2012; residual left shoulder stiffness/impingement syndrome; and residual left elbow weakness. Dr. Hoskins stated Walters' injuries caused his complaints. Dr. Hoskins opined Walters' left shoulder impairment is due to the March 26, 2011 fall, and his "lumbar impairment is secondary to cumulative trauma and repetitive strain encountered over his

[1] At the time of Dr. Hoskins' evaluation on April 11, 2013, the lumbar x-rays from Harlan ARHC had not yet been done.

30 years of work as a heavy equipment repairman. His lumbar condition is not due to a single macro-traumatic event."

Pursuant to the AMA Guides, Dr. Hoskins assessed a 10% impairment rating for the left shoulder and 5% impairment rating for the lumbar spine, yielding a combined 15% impairment rating. Dr. Hoskins stated Walters had attained MMI for his left shoulder on March 6, 2013, but had not reached MMI regarding his lumbar spine. He stated Walters does not have the physical capacity to return to the type of work performed at time of injury. Dr. Hoskins imposed the following restrictions: 1) no lifting over fifty pounds, twenty pounds with the left arm and five pounds overhead with the left arm; 2) no overhead work or extended reach with the left arm; 3) no sitting over two hours at a time without allowance to stand and walk for fifteen minutes; 4) no standing or walking over two hours at a time without allowance to sit for fifteen minutes; 5) no prolonged or repetitive stooping or crouching, or use of equipment subjecting spinal column to vibration; 6) no heavy pulling, pushing or carrying; and 7) no activities involving sustained posturing of the lumbosacral spine at extremes of motion or repetitive movements into extremes of lumbosacral motion.

In an April 15, 2013 addendum, Dr. Hoskins reiterated Walters has not reached MMI for his lumbar spine. He stated Walters will not attain MMI until he has a lumbar MRI and electrophysiological testing of the left leg, exhausts all reasonable therapeutic medical interventions available, and surgical intervention is either undertaken or ruled out. Dr. Hoskins stated, "If the [ALJ] disagrees and places Mr. Walters at [MMI]," he would again assess a 10% impairment rating to the left shoulder and a 5% impairment rating to the lumbar spine.

Walters filed the September 26, 2013 "Medical Assessment of Ability to do Work-Related Activities" by Dr. Gregory Dye. He indicated Walters cannot lift/carry over ten pounds and cannot stand and/or walk for a total of four hours a day due to his shoulder, low back pain and right foot. He also stated Walters should never climb, balance, stoop, crouch, kneel or crawl due to the back pain radiating into his left thigh, and imposed several environmental restrictions. After noting Walters' left shoulder condition, low back pain, and foot pain, Dr. Dye stated Walters "is no longer able to work as a welder and likely unable to perform manual labor for gainful employment."

Walters filed the January 28, 2014 report of Dr. William Brooks, who evaluated his low back. Dr. Brooks

performed an examination and reviewed the October 7, 2013 lumbar x-rays. Dr. Brooks diagnosed congenital spondylolisthesis at L5-S1, grade 2, and recommended a spinal fusion. He restricted Walters from repetitive bending, lifting, climbing, crawling, and squatting; no lifting over five to ten pounds; and no sitting, standing, and walking for more than twenty to thirty minutes without a break. He found Walters occupationally disabled.

Walters filed the March 27, 2014 report of Dr. David Muffly, who evaluated his back and shoulder. Dr. Muffly diagnosed left shoulder rotator cuff tear, chronic left shoulder pain and residual loss of motion due to the March 26, 2011 work injury. He also stated Walters "has congenital Grade II spondylolisthesis at L5-S1 which remains symptomatic." Dr. Muffly assessed a 5% impairment rating for the left shoulder. He also assessed a 5% impairment rating for the lumbar spine, noting it is "based on congenital listhesis at L5-S1 and is not related to cumulative trauma disorder." Dr. Muffly restricted Walters from no overhead reaching, bending, climbing or twisting, and no lifting over five pounds from above the head and fifteen pounds from waist to chest. Dr. Muffly stated Walters reached MMI on March 27, 2014 and does not retain

the physical capacity to return to the type of work performed at the time of injury.

Southern Coal filed the June 26, 2013 report of Dr. Gregory Snider, who evaluated Walters' low back and shoulder. Dr. Snider diagnosed left rotator cuff and biceps injury; rotator cuff repair and biceps tenodesis on May 10, 2011 and revision, left biceps tenodesis on March 6, 2012; untreated prior left shoulder injury on November 8, 2004; and low back pain. Dr. Snider opined Walters had attained MMI and recommended a home exercise program and anti-inflammatory medicine for his left arm. Dr. Snider noted Walters had not received any treatment for his low back complaints, but stated "they seem to be relatively new and his exam is benign." Dr. Snider opined Walters can return to his prior job in light of his examination. Pursuant to the AMA Guides, Dr. Snider assessed a 3% impairment rating for the left shoulder and 0% for Walters' low back.

Southern Coal also filed the January 22, 2014 report of Dr. Ronald Burgess, who evaluated Walters' left shoulder only. Dr. Burgess opined Walters attained MMI on July 5, 2012, and requires no further treatment. Dr. Burgess opined the arthritis of the AC joint in Walters' left shoulder and subsequent distal clavicular resection is a result of arthritis based on the aging process and not

related to his work activities or previous March 2011 shoulder injury. Pursuant to the AMA Guides, Dr. Burgess assessed an 8% impairment rating for Walters' work-related left shoulder injury. If the unrelated third surgery is included, Dr. Burgess stated he would assess a 13% impairment rating.

Dr. Burgess also testified by deposition on June 11, 2014. He diagnosed Walters with acute tear of the proximal biceps tendons, and the infraspinatus and supraspinatus tendons, attachment to the humerus, due to the March 26, 2011 work injury. He again opined the third left shoulder procedure is not work-related, and reiterated his assessment of impairment. Dr. Burgess restricted Walters from repetitive overhead use and no lifting above shoulder level over twenty pounds occasionally, five pounds frequently. He further stated his limitations would probably prohibit Walters from returning to work as a welder.

Finally, several reports regarding Walters' hearing loss were submitted by the parties. The ALJ relied upon the December 18, 2013 university evaluation report by Drs. Raleigh Jones and Lindsay Walker. An audiogram demonstrated sloping bilateral high frequency sensorineural hearing loss due to repetitive exposure to hazardous noise

over an extended period of employment. Drs. Jones and Walker assessed a 20% impairment rating pursuant to the AMA Guides and recommended the use of hearing protection and bilateral hearing aids.

A benefit review conference ("BRC") was held on July 22, 2014. The BRC order and memorandum reflects the parties stipulated Southern Coal paid Walters temporary total disability ("TTD") benefits from March 26, 2011 to August 6, 2011; March 6, 2012 to July 8, 2012; and August 26, 2013 to February 10, 2014 for a total of $42,699.37. The parties identified work-relatedness/causation, benefits per KRS 342.730, credit for unemployment benefits, and injury as defined by the Act, causation/work-relatedness of the August 27, 2013 surgery and PTD as contested issues.

In the August 14, 2014 opinion, the ALJ summarized Walters' testimony, as well as the medical reports of Drs. Muffly, Brooks, Hoskins, Snider, Burgess, Jones and Walker, and Barbara Eisenmenger. Under the subsection titled "Injury as defined by the Act; work-relatedness/causation," the ALJ quoted the definitions of "injury" and "objective medical findings" pursuant to KRS 342.0011(1) and (33). He then summarized the cases of Haycraft v. Corhart Refractories, 544 S.W.2d 222 (Ky. 1976), Southern Kentucky Concrete Contractors, Inc. v. Campbell, 662 S.W.2d 221 (Ky.

App. 1983) and McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). The ALJ then made the following statements:

> Based upon Mr. Walters' credible and convincing lay testimony, which is covered above, and the persuasive and compelling medical evidence from Dr. Hoskins, as covered in detail above, as well as the persuasive and compelling evidence from Dr. Burgess, as covered in detail above, I make the factual determination that the plaintiff Mr. Walters will sustain a 13% permanent whole person impairment due to his work-related left shoulder injuries sustained on March 26, 2011, as per the evidence from Dr. Burgess, and also a 5% whole person present impairment due to his cumulative trauma lumbar spine injuries, as per the medical evidence from Dr. Hoskins. I make the factual determination that Mr. Walters reached maximum medical improvement on January 22, 2014, as per the opinion of Dr. Burgess. I also make the factual determination that the medical evidence from Dr. Jones and Dr. Walker was very persuasive and compelling, since they were the university evaluators. Dr. Jones stated that Mr. Walters suffers from an occupational related noise induced sensorineural hearing loss, which translates under the AMA Guides, Fifth Edition, to a 55.9% hearing impairment, which translates to a 20% impairment of the whole person.

Regarding PTD, the ALJ stated as follows:

> I again make the factual determination that the lay testimony of Mr. Walters, as covered above, was very credible and convincing. I also make the factual determination that the medical evidence

> from Dr. Hoskins, as covered in detail above, and the medical evidence from Dr. Burgess, as covered in detail above, and the medical evidence from Dr. Jones and Dr. Walker, as covered in detail above, was very persuasive and compelling. I make the factual determination that Mr. Walters will sustain as a result of his work-related injuries to his left shoulder on March 26, 2011, a 13% permanent whole person impairment, as per the medical evidence from Dr. Burgess. I also make the factual determination that due to Mr. Walters' occupation related noise induced sensorineural hearing loss, he will under the AMA Guides, Fifth Edition, sustain a 20% whole person permanent impairment, as per the medical evidence from Dr. Jones.

After quoting the definition of "permanent total disability" pursuant to KRS 342.0011 and the analysis required under Ira A. Watson Dept. Store v. Hamilton, supra, the ALJ stated as follows:

> Based upon the credible and convincing lay testimony of Mr. Walters, as covered above, and the persuasive and compelling medical evidence from Dr. Burgess, Dr. Hoskins and Drs. Jones and Walker, all of which is covered in detail above, I make the factual determination that Mr. Walters will sustain as a result of his left shoulder and left upper extremity injuries and his hearing loss a serious permanent impairment. Mr. Walters is now 52 years of age, meaning that he is an older worker for re-employment in the highly competitive job market. I make the factual determination that Mr. Walters is not physically able to work at any job as per his testimony. His

> lay testimony is credible, competent and convincing under the decision of the Kentucky Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979). I make the factual determination that Mr. Walters had a good work history, showing a good work ethic, but that he will not be able to return to any regular gainful employment in the highly competitive job market. Based on all of the above factors, I make the factual determination that Mr. Walters cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the determination that he is permanently and totally disabled effective from and after beginning on January 22, 2014, as per the medical evidence from Dr. Burgess.

The ALJ found Southern Coal is entitled to a credit against Walters' award of PTD benefits for any unemployment benefits. He also found the August 27, 2013 left shoulder surgery "work-related and caused or brought about by plaintiff's work-related left shoulder injuries on March 26, 2011" based upon Dr. Muffly's report and Dr. Dome's records. The ALJ awarded Walters PTD benefits beginning on January 22, 2014 and medical benefits.

Southern Coal filed a petition for reconsideration. It requested additional findings of fact regarding the ALJ's determination of PTD. It requested the ALJ consider Walters' age, education, vocational skills, medical restrictions, and the likelihood he can resume some

type of work under normal employment conditions in accordance with Ira Watson Dept. Store v. Hamilton, supra. Southern Coal argued once he considered the appropriate factors, substantial evidence supports a finding Walters is partially, not totally, disabled. Southern Coal also requested additional findings of fact to clarify which alleged injuries he considered in finding Walters totally disabled.

Southern Coal requested the ALJ provide an explanation regarding the work-relatedness/causation of Walters' low back condition. It also requested the ALJ make a finding whether Walters' cumulative trauma to his low back developed during his employment with Southern Coal only or spanning several previous employers. It requested the ALJ make additional findings of fact clarifying whether he considered the reports of Dr. Brooks and Dr. Muffly, and to explain why he believed Walters' work activities caused his low back injuries as opposed to the congenital abnormality diagnosed by the two physicians.

As argued in its brief to the Board, Southern Coal argues Dr. Hoskins' opinion cannot constitute substantial evidence regarding causation of the low back condition since his April 11, 2013 examination took place prior to the October 7, 2013 lumbar x-rays, and he did not obtain his own

diagnostic studies. Therefore, Dr. Hoskins was unaware of Walters' congenital condition, and his opinion was based upon an incomplete history. It also requested additional findings of fact on this issue.

The ALJ rendered a fourteen page Opinion and Order on Reconsideration on September 16, 2014. In the Order, the ALJ made no additional findings of fact requested by Southern Coal. Rather, the ALJ repeated large sections of his August 14, 2014 opinion. He made the following additional statement with regard to reliance on Dr. Hoskins' opinion:

> As stated in *Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771, 774 (Ky. 2009), "physicians must use clinical judgment when assigning impairment ratings, and that 'clinical judgment, combining both the "art" and "science" of medicine, constitutes the essence of medical practice.' " The applicable law affords Dr. Hoskins certain discretion and professional judgment when interpreting the Guides and assigning an appropriate impairment rating.

Regarding his determination of PTD, in addition to repeating his analysis found in the August 14, 2014 opinion, the ALJ made the following additional statements:

> I make the determination that the permanent impairment ratings from Dr. Burgess and Dr. Jones and Dr. Walker give rise to and bring about a serious occupational disability on the part of the plaintiff Mr. Walters.

> . . . .
>
> The plaintiff Mr. Walters worked for many years as a welder and at other physical labor jobs. It is uncontradicted that Mr. Walters last worked back on January 19, 2012, which is well over two years ago.

On appeal, Southern Coal argues the ALJ did not perform a proper analysis pursuant to Ira Watson Dept. Store v. Hamilton, supra, in determining Walters is permanently and totally disabled. Southern Coal asserts the ALJ merely stated he relied upon Walters' testimony and the opinions of Drs. Burgess, Hoskins, Jones and Walter, without explaining "how the reports from those physicians support his finding of total disability." It also points out the ALJ's analysis did not include such factors as Walters' education, work experience, or how the various work restrictions imposed by the various physicians render him unable to work. Southern Coal asserts the ALJ's analysis falls short of what is required pursuant to Ira Watson Dept. Store v. Hamilton, supra, and does not support his conclusions with facts from the evidence so as to properly apprise the parties of the basis for the decision. Shields v. Pittsburg and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982.) If the ALJ had performed the proper analysis, Southern Coal argues substantial evidence does not support a finding of PTD.

Southern Coal again challenges the ALJ's reliance on Dr. Hoskins' opinion in finding Walters' sustained cumulative trauma to his low back. It argues at the time of his evaluation, Dr. Hoskins did not have available to him the lumbar x-rays subsequently performed in October 2013, which were interpreted as congenital grade 2 spondylolisthesis at L5-S1 by Drs. Brooks and Muffly. Therefore, his opinion regarding causation cannot constitute substantial evidence.

We begin by noting Walters clearly alleges three separate and distinct injuries arising during his employment with Southern Coal throughout the litigation of his claims. He alleges a singular, acute left shoulder injury occurring on March 26, 2011; a cumulative trauma injury to his lumbar spine manifesting on January 19, 2012, the day he was laid off; and an occupational hearing loss manifesting on January 19, 2012. This necessitated an analysis discussing injury as defined by the Act, causation/work-relatedness, and extent and duration of disability *for each of the alleged injuries.* Here, the ALJ failed to do so. This is especially true in light of the June 25, 2014 BRC, in which the parties identified each of these issues as contested issues.

**March 26, 2011 Shoulder Injury**

Walters first alleges an acute left shoulder injury occurring on March 26, 2011. Under the "Injury as defined by the Act; work-relatedness/causation" section of the opinion, the ALJ found Walters "will sustain a 13% permanent whole person impairment due to his work-related left shoulder injuries sustained on March 26, 2011, as per the evidence from Dr. Burgess," and "based upon Mr. Walters' credible and convincing testimony." He also found the third shoulder procedure casually related to his March 26, 2011 work injury, and therefore compensable. Under the "Benefits per KRS 342; permanent total disability" section, the ALJ reiterated his determination Walters' sustained a 13% impairment rating due to his work-related left shoulder injuries based upon Walters' testimony and Dr. Burgess' opinion. He then found Walters permanently and totally disabled considering his left shoulder injury and occupational hearing loss.

In its appeal to the Board, Southern Coal does not dispute the compensability of Walters' March 26, 2011, left shoulder injury, including the final third surgical procedure, or the 13% impairment rating assessed by the ALJ. Southern Coal challenges the ALJ's analysis finding Walters' permanently and totally disabled. We agree, and vacate the

finding of permanent total disability and the award of PTD benefits for several reasons, some of which are not raised by Southern Coal. This Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

The ALJ did not provide a distinct analysis regarding the extent and duration of Walters' disability due to the March 26, 2011 left shoulder injury. Stated another way, after determining Walters sustained a work-related left shoulder injury warranting a 13% impairment rating, the ALJ was then required to determine whether he was partially or totally disabled as a result thereof, without consideration of his alleged lumbar injury or occupational hearing loss. On remand, the ALJ is directed to determine whether Walters is partially or totally disabled due to the effects of the March 26, 2011 left shoulder injury. In arriving at his determination, the ALJ must engage in an analysis pursuant to KRS 342.730(1)(a) and Ira Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

It is clear from the opinion and order on reconsideration the ALJ considered Walters' occupational hearing loss in determining he is permanently and totally disabled. KRS 342.730(1)(a) expressly prohibits the

consideration of hearing loss in determining whether an employee is totally disabled. On remand, the ALJ must conduct his analysis of the extent of Walters' disability *without* considering his work-related hearing loss. Any award for the work-related hearing loss must be separate and distinct from an award of income benefits for the physical injuries.

In determining whether an injured worker is permanently and totally disabled, the ALJ must make "an individualized determination of what the worker is and is not able to do after recovering from the work injury." Ira Watson Dept. Store v. Hamilton, 34 S.W.3d at 51. As noted by the ALJ, the analysis must include:

> . . . consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. [citation omitted].
> Id.

Therefore, on remand, the ALJ is directed to determine whether Walters is permanently totally disabled due to the effects of the March 26, 2011 work injury, without considering the occupational hearing or lumbar injury, and in accordance with Ira Watson Dept. Store v. Hamilton, supra. We emphasize merely identifying the medical expert(s) and/or claimant's testimony alone in support of a finding of permanent and totally disability is insufficient. In determining whether Walters is totally disabled due to the effects of his shoulder injury, the ALJ must identify the specific portions of any lay or medical evidence he weighed and considered. The ALJ's deficient analysis contains no discussion of Walters' emotional, intellectual or vocational status, and how these factors contribute to his state of PTD. Although there are permanent restrictions assigned by various physicians throughout the record, the opinion contains no discussion how they will interfere with Walters' vocational capabilities. The ALJ found Walters is an older worker, is not physically able to work any job, and despite his good work ethic, is unable to return to gainful employment. In the Order on reconsideration, the ALJ additionally noted Walters has worked many years as a welder and other physical labor jobs, and has not returned to work since January 19,

2012. Such conclusory findings do not adequately summarize or weigh the conflicting evidence at issue. Southern Coal specifically requested additional findings of facts in its petition for reconsideration to support the ALJ's determination of PTD. Instead, the ALJ repeated the same analysis found in the original opinion. To summarize, the analysis contained in the opinion and order on reconsideration does not provide a sufficient basis for the parties to understand the ALJ's decision, or to reasonably apprise them of the basis for the decision, as the law of this Commonwealth requires. *See* Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

If the ALJ determines Walters is not totally disabled due to the effects of the March 26, 2011 left shoulder injury, he may only award permanent partial disability ("PPD") benefits. The ALJ must also include a determination of whether Walters is entitled to either of the statutory multipliers pursuant to KRS 342.730(1)(c)1 or 2, or potentially both. If the ALJ determines KRS 342.730(1)(c)1 and 2 are both potentially applicable, he shall engage in an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). In Fawbush, the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to

determine which provision is more appropriate based upon the facts of the individual claim. 103 S.W.3d at 12. Where both the three multiplier and the two multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush, supra, and its progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

If, after performing the analysis pursuant to Ira Watson Dept. Store v. Hamilton, supra, without consideration of the hearing loss or lumbar injury, the ALJ determines Walters is not totally disabled, he is directed to consider the applicability of the statutory multipliers pursuant to KRS 342.730(1)(c)1 and (c)2, and award the appropriate amount of PPD benefits.

**Cumulative Trauma to the Lumbar Spine**

The ALJ is required to provide a separate analysis regarding Walters' alleged cumulative trauma to his low back. We first address Southern Coal's argument the ALJ erred in relying upon Dr. Hoskins' opinion in finding Walters' low back condition the result of cumulative trauma. We disagree. In the April 15, 2013 report, Dr. Hoskins noted Walters reported a two to three year history of gradual low back pain associated with his work as a welder, which required lifting heavy tools and pieces of metal, cutting heavy edges and stooping. Dr. Hoskins also noted Walters' thirty year history of work as a welder, with the last three years or so with Southern Coal. After performing an examination, Dr. Hoskins diagnosed in relevant part lumbosacral sprain/strain and left lumbar radiculitis and found his lumbar impairment "is secondary to cumulative trauma and repetitive strain encountered over his 30 years of work as a heavy equipment repairman." Dr. Hoskins' opinion regarding causation constitutes the requisite substantial evidence supporting the ALJ's determination Walters sustained a "5% whole person present impairment due to his cumulative trauma lumbar spine injuries, as per the medical evidence from Dr. Hoskins."

We find unpersuasive Southern Coal's argument Dr. Hoskins' opinion cannot constitute substantial evidence since, at the time of his evaluation, he did not have available the lumbar x-rays taken subsequent to his examination. The lumbar x-rays, as well as the reports of Drs. Brooks and Muffly, were properly before the ALJ. He clearly rejected the theory Walters' low back condition is due to a congenital condition, and instead chose to rely upon Dr. Hoskins' opinion. This is well within the ALJ's role as fact-finder. We also note Dr. Hoskins was not cross-examined or questioned regarding how the subsequent x-rays would have altered his opinion, if at all. Southern Coal's argument goes to the weight of the evidence and does not serve to render the opinions of Dr. Hoskins unsubstantial.

With that said, the claim is remanded for additional findings of fact. This claim is remanded for the ALJ to 1) determine what, if any, percentage of Walters' impairment for his cumulative trauma injury is attributable to his period of employment at Southern Coal; 2) determine the extent of disability without considering his occupational hearing loss or shoulder injury; and 3) whether the cumulative trauma injury has resulted in permanent and

total disability in accordance with Ira Watson Dept. Store v. Hamilton, supra.

The ALJ determined Walters sustained a 5% impairment rating "due to his cumulative trauma lumbar spine injuries, as per the medical evidence from Dr. Hoskins." Southern Kentucky Concrete Contractors, Inc. v. Horace W. Campbell, 662 S.W.2d 221, (Ky. App. 1983), requires the ALJ to find what percentage of Walters' impairments, if any, are due to his employment with Southern Coal. The Kentucky Court of Appeals stated as follows:

> In *Haycraft,* the Court apportioned liability to the employer based upon the percentage of disability attributable to the work. Haycraft spent his entire career with one employer, but Campbell, in the instant case, spent only a small part of his career with Southern. We believe that the "work" referred to in *Haycraft* is the "work" that occurred while the claimant was in the employ of that company.
>
> We are therefore of the opinion that this case should be remanded to the Workers' Compensation Board with directions to determine the percentage of Campbell's disability attributable to the work performed by him while employed by Southern, and Southern is to be liable to that extent. Absent evidence to the contrary, Southern shall be liable for that percentage of Campbell's disability which is equal to the percentage of Campbell's worklife spent with Southern. The remainder of

> his disability is the responsibility of the Special Fund.

Id. at 222-223; *See also* OK Precision Tool & Die Co. v. Wells, 678 S.W.2d 397 (Ky. 1984).

On remand, the ALJ must cite the proof establishing Walters' work at Southern Coal contributed in some degree to the effects of his cumulative trauma injury, and then, with specificity, denote to what degree it contributed. Simply because Walters was last employed there does not impose the entirety of the liability for all of Walter's alleged occupational disability upon Southern Coal.

The ALJ is also required to provide an individualized analysis regarding whether the effects of Walters' cumulative trauma injury rendered him totally disabled. If the ALJ makes such a determination in the affirmative, he must provide a detailed analysis weighing the factors outlined in Ira Watson Dept. Store v. Hamilton, supra. Merely stating he relied upon the testimony of Walters and the opinion of Dr. Hoskins is insufficient. The ALJ must identify the particular portions of the lay and medical evidence which he found persuasive, and provide a discussion of Walters' emotional, intellectual or vocational status, and how these factors contribute to his state of permanent total disability. The analysis must

include a discussion of how the assigned permanent restrictions, if any, will interfere with Walters' vocational capabilities. Conclusory findings do not adequately summarize or weigh the conflicting evidence at issue. If the ALJ determines Walters is not permanently totally disabled, he is directed to award the appropriate period of PPD benefits.

Therefore, on remand, the ALJ is directed determine what, if any, percentage of Walters' impairment for his cumulative trauma injury is attributable to his period of employment at Southern Coal. He is also directed to address the extent of disability without considering his occupational hearing loss or shoulder injury and whether the cumulative trauma injury has resulted in PTD in accordance with Ira Watson Dept. Store v. Hamilton, supra.

**Miscellaneous Issues**

In its appeal to the Board, Southern Coal does not dispute the ALJ's determination Walters' sustained occupational hearing loss warranting a 20% impairment rating pursuant to the university evaluators' opinions. On remand, the ALJ is directed to provide a separate and distinct award of indemnity and medical benefits for Walters' occupational hearing loss.

The ALJ's opinion and order on reconsideration is devoid of any analysis regarding TTD, other than the stipulated TTD payments contained in the BRC order. Likewise, the ALJ failed to include an award of TTD benefits. On remand, the ALJ is directed to determine whether Walters is entitled to TTD benefits, and for what time periods, and render an award accordingly.

On remand, if the ALJ determines Walters is permanently and totally disabled from either of the alleged injuries, the ALJ is also directed to consider the appropriate commencement date of an award of PTD benefits.

Finally, because this claim involves successive compensable injuries, the concept of "excess disability" could apply. In rendering his opinion on remand, the ALJ is directed to consider the doctrine of "excess disability" to the facts of this claim, if applicable. *See* Whittaker v. Fleming, 25 S.W.3d 460 (Ky. 2000); Sears Roebuck & Co. v. Dennis, 131 S.W.3d 351 (Ky. App. 2004) and Sigmon Coal Company v. Tommy Good, 2008 WL 5413374 (Ky. App. 2008)(unpublished).

For the foregoing reasons, the award of PTD benefits contained in the August 14, 2014 Opinion and the September 16, 2014 order on reconsideration by Hon. William

J. Rudloff are **VACATED** and this case is **REMANDED** for additional findings of fact as discussed herein.

ALL CONCUR.

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