Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 26, 2021

CLAIM NO. 201901095, 201900595, 201860509

CAMBRIAN HOLDING COMPANY, INC. PETITIONER

VS. **APPEAL FROM HON. PETER NAAKE, ADMINISTRATIVE LAW JUDGE**

LD SEXTON;
APPALACHIAN REHABILITATION TEAM;
DR. JAMES VARNEY, PIKEVILLE MEDICAL CENTER;
DR. JOHN GILBERT, SPINE AND BRAIN NEUROSURGICAL;
FUGATE FAMILY CHIROPRACTIC;
KENTUCKY MOUNTAIN HEALTH;
KENTUCKY PAIN MAINAGEMENT SERVICES;
MOUNTAIN COMPREHENSIVE HEALTH CORPORATION;
PIKEVILLE NEUROLOGY;
WHITESBURG ARH;
DR. VAN BREEDING; AND
HON. PETER NAAKE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

BORDERS, Member. Cambrian Holding Company, Inc. ("Cambrian") appeals from the October 9, 2020 Opinion, Award, and Order and the November 11, 2020 Order denying it's Petition for Reconsideration, rendered by Hon. Peter Naake, Administrative Law Judge ("ALJ"). On appeal, Cambrian argues the ALJ erred in finding LD Sexton ("Sexton") sustained a cervical injury, is permanently and totally disabled due to the cervical injury, and in determining the forty-five-day rule for submitting medical expenses does not apply pre-judgment. For the foregoing reasons, we affirm.

Sexton filed applications for resolution of a specific injury claim alleging cervical, thoracic, lumbar, and psychiatric injuries occurring on October 9, 2018, when he struck his head on the mine ceiling. He also filed applications for resolution of hearing loss and coal workers' pneumoconiosis ("CWP") claims. All the claims were consolidated for purposes of litigation.

The ALJ dismissed Sexton's CWP and hearing loss claims, however, he awarded medical benefits for the hearing loss claim. The ALJ also dismissed Sexton's claim for psychiatric injury and for injuries to his thoracic and lumbar spine. The ALJ determined the cervical spine condition was causally related to the work incident and awarded permanent total disability ("PTD") benefits, as well as medical benefits for the cervical condition inclusive of payment for the cervical surgery.

Cambrian filed a Petition for Reconsideration seeking review of the PTD benefits and the average weekly wage ("AWW") calculation, otherwise restating its original argument. The ALJ denied the Petition for Reconsideration, in part, and provided additional findings for his determination. The petition was

sustained to the extent the AWW calculation was corrected. This appeal followed. For the reasons to be set forth herein, we affirm.

Sexton testified by deposition on June 24, 2019 and at the Final Hearing held on August 28, 2020. Sexton is 50 years old and is a high school graduate. He has worked as a coal miner since he was 19 or 20 years old, primarily underground. He has worked for either Cambrian or their predecessors since 2007. He worked as a mobile bridge operator on the date of his accident. He operated machine levers but also maintained the equipment and moved the belts. The job description indicates he was required to lift up to 75 lbs., with occasional lifting of 100 lbs.

Sexton was injured on October 9, 2018, when he was walking from the mine face and struck his head on the mine roof. The blow addled him, and it felt like a lightning bolt went through his body, bringing him to his knees. His foreman witnessed the accident. He reported to work the next day but was unable to raise his arms and presented himself to Dr. Van S. Breeding for treatment. He was thereafter seen by Dr. Sujati Gutti, Dr. Phillip Tibbs, and eventually came under the care of Dr. John Gilbert who performed cervical surgery. Sexton denied having any prior neck pain on a regular basis. He has not returned to work and has filed for Social Security disability benefits.

The ALJ considered the records from Dr. Breeding, Sexton's primary care physician, who has treated him since 2013 for complaints of headaches, back pain, neck pain, anxiety, tremors, and concentration difficulties. He first saw Sexton for his work injuries on October 10, 2018. Dr. Breeding felt Sexton's symptoms and

complaints were severe enough to require a neurosurgical consultation with Dr. Tibbs. Dr. Breeding believed Sexton's neck condition worsened after the work incident, and he was of the opinion it was causally related to the October 9, 2018 work incident.

Dr. Gutti performed EMG/NCV studies which she felt indicated cervical radiculopathy. Dr. Gutti also diagnosed Sexton with cervical disc herniations. She recommended a lumbar MRI.

Dr. Tibbs saw Sexton on March 29, 2019 for a neurosurgical consultation. He received a history of the October 9, 2018 work incident with increasing complaints of neck pain. Sexton complained of numbness and tingling in his fingers with difficulty closing his hands and severe headaches, along with memory and vision problems. Dr. Tibbs examined Sexton, reviewed a cervical MRI, and recommended cervical epidurals and a C5-6-7 discectomy if those were unsuccessful.

Dr. Gilbert evaluated Sexton on August 20, 2019. Dr. Gilbert reviewed all medical records both before and after the October 9, 2018 accident, reviewed diagnostic studies, and performed a physical examination. He diagnosed Sexton with a C3-7 disc rupture, causally related to the October 9, 2018 work incident. Dr. Gilbert assessed an 18% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), for the injury, and restricted Sexton to sedentary work.

On May 4, 2020, Dr. Gilbert opined Sexton's cervical fusion surgery was reasonable and necessary. Dr. Gilbert determined Sexton has a 28% impairment rating pursuant to the AMA Guides for his cervical injury.

Dr. Russell Travis evaluated Sexton on February 19, 2019. He noted a history of the October 9, 2018 work incident and reviewed medical records and diagnostic studies. He also performed a physical examination. Dr. Travis found no objective findings of injury. Dr. Travis assessed a 0% impairment rating pursuant to the AMA Guides. Dr. Travis prepared a supplemental report dated November 21, 2019 opining Sexton's cervical spine problems were all pre-existing and symptomatic, and reiterated his 0% impairment rating. In a second addendum dated July 10, 2020, he opined the cervical surgery performed by Dr. Gilbert was not work-related.

Dr. David Muffly performed a review of medical records generated both before and after the October 9, 2018 work incident. Dr. Muffly opined Sexton suffered from a prior active cervical spine condition for which he retains a 0% impairment rating pursuant to the AMA Guides. He later amended his opinion to opine Sexton has a 30% impairment rating to the cervical spine that was pre-existing and active. He also opined the surgery performed by Dr. Gilbert was not for treatment of a work-related condition.

After considering the evidence, the ALJ entered the following Findings of Facts and Conclusions of Law, relevant to the issue of causation of the cervical condition, which are set forth *verbatim*:

> The Administrative Law Judge finds that the Plaintiff's description of his injury as a severe blow to

the top of his head while walking in the underground coal mine, striking the top of his head against the roof of the mine, while his body continued to move, and feeling a sudden shock from his neck to his feet, and near loss of consciousness while he fell to his knees, is credible. The Plaintiff's testimony at his deposition, and at the Hearing in this matter, and the facts of his loss of occupation, voluntarily undergoing a major surgery to his neck, and demeanor during his deposition and at the Hearing, are all persuasive that the Plaintiff's injury was not a mere bump on the head, but instead was one which traumatized the cervical spine, causing severe headaches and requiring a cervical fusion surgery. There is no countervailing testimony that he merely bumped his head. The Plaintiff testified that the next day he could not dress himself and he had severe headaches thereafter. The Administrative Law Judge relies on the testimony of Dr. Breeding and the reports of Drs. Tibbs and Gilbert regarding the cervical spine to find that Mr. Sexton injured his cervical spine on October 9, 2019, which has caused temporary disability, the need for a cervical fusion surgery as performed by Dr. Gilbert, and a permanent impairment rating. In doing so, the Administrative Law Judge has carefully considered the deposition of Dr. Breeding and his extensive medical records of prior treatment. While the Defendant's attorney skillfully cross-examined Dr. Breeding, Dr. Breeding maintained his position that Mr. Sexton's cervical spine, while symptomatic, was not disabling prior to his injury on October 9, 2019. Dr. Breeding also noted the difference in the history of the injury relied upon by Dr. Travis, and the injury description which he relied upon. Dr. Travis based his opinion on a history that the Plaintiff bumped his head in the mine. The description of the injury by the Plaintiff, which the Administrative Law Judge has found credible, is much more severe and indicates a significant trauma to the cervical spine. Mr. Sexton described hitting his head on the top of the mine while his body continued to move, a sudden shock from his neck to his feet, and near loss of consciousness while he fell to his knees. Dr. Tibbs stated that symptoms of cervical radiculopathy, headaches, memory loss and vision loss have occurred since the injury, whereas Dr. Travis equates a single doctor's visit for headaches in 2014 with the type of problems Mr. Sexton describes since his injury.

Further, regarding the cervical spine, Drs. Travis and Muffly overstate the amount of treatment Mr. Sexton had undergone to his neck, and for headaches, prior to his injury. Instead, they conflate the history of treatment for prior injuries to the low back with treatment for the cervical spine. Unfortunately, Dr. Nazar did the same thing in a medical review upon which the Defendant denied the claim in November 2018. The statement that the Plaintiff suffered from chronic cervical pain is not reflected in the actual medical history. While it is true that the Plaintiff had ongoing treatment of his low back four years with Dr. Breeding, this is not the case with his upper back. There are actually three mentions of neck pain in the notes, which were also associated with low back pain, previous to the injury, no cervical injections, and no neurological consultations for neck pain. The Administrative Law Judge finds persuasive the testimony of Dr. Breeding, who is the physician most familiar with the Plaintiff's history of pre-existing problems, the injury which is the subject of this claim, and with the treatment of it which occurred afterwards. Dr. Breeding's opinion of causation as to the cervical spine was that it was a new injury and a new problem arising from the injury of October 9, 2018. Dr. Tibbs' and Dr. Gutti's opinions are also persuasive that the neck injury was dormant and non-disabling prior to the injury and became symptomatic, creating cervical radiculopathy as confirmed by Dr. Gutti's EMG, and causing the need for cervical fusion surgery, as supported by Dr. Tibbs' consultation. This is also consistent with the Plaintiff's work history which shows that he worked overtime nearly every week in the underground coal mine for years prior to his injury, and did not work at all after his injury. He testified this was a job he enjoyed and he was clearly making a substantial income prior to the injury. His testimony at the hearing and during his deposition was that he could not work after his injury and that he could worked consistently despite low back pain before his injury, which is also clear from the wage records. The facts of rare, intermittent pre-existing neck pain and infrequent headaches, compared with the degree of neck pain, radiculopathy and headaches which Mr. Sexton after the injury, resulting in a major surgery, present a convincing picture of a dormant and non-disabling

> cervical condition aroused into disabling reality by a work-related accident. *McNutt Constr./ First Gen. Servs. v. Scott,* 40 S.W.3d 854, 859 (Ky. 2001).
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> The Administrative Law Judge is persuaded by the opinions of Dr. Gilbert and Dr. Breeding that the cervical spine injury and subsequent cervical fusion were the result of the October 9, 2018 injury at work, and will award medical expenses and income benefits accordingly. The Administrative Law Judge has considered Drs. Travis' and Muffly's opinions, as well as the record review provided by Dr. Nazar, and is not persuaded by them because they overstate the degree of cervical symptoms and treatment prior to the injury, when records show very few notations where the Plaintiff complained of neck pain, and little or no treatment for it. Further, they significantly understate the mechanism of the impact which occurred on October 9, 2018, characterizing the injury as merely a bump on the head, instead of a severe blow to the top of the head causing trauma to the cervical spine.

The ALJ made the following Findings of Facts and Conclusions of Law regarding the issue of whether Sexton is permanently totally disabled, and the award of medical benefits for treatment of the cervical condition, *verbatim*:

> **PERMANENT DISABILITY RATING**
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> The Administrative Law Judge finds that the Plaintiff has an impairment rating under the A.M.A. Guides to the Evaluation of Permanent Impairment, 5th Ed., of 28% to the body as a whole, relying upon Dr. Gilbert's testimony. Dr. Gilbert's testimony is persuasive because he is the treating neurosurgeon for Mr. Sexton. Drs. Travis and Muffly deny that there is any impairment related to the injury, although Dr. Muffly assigns a 25% impairment rating to the spine due to cervical fusion. This rating ignores the multi-level nature of the fusion, and additional impairment percentages should be allowed for a several level fusion, showing that Dr. Gilbert's impairment is more in line with the A.M.A. Guides.

Applying KRS 342.730(1)(b) to a 28% impairment rating yields a permanent disability rating of: 28% x 1.35 = 37.8%

PHYSICAL CAPACITY TO PERFORM PRE-INJURY JOB

The Plaintiff testified that he was a mobile bridge operator in an underground coal mine. The bridge is a machine which transfers the coal from the continuous miner to a conveyor belt or buggy, and it is operated by means of control levers and buttons which can be operated while the miner is seated underground. The Plaintiff testified that this was the easiest job he ever had, which cannot be taken at its face value. The job is performed in an underground coal mine, where the roof of the mine is low in places and the worker must stoop to walk. There are large rocks and dangerous machinery present at all times. The job description filed by the Defendant indicates lifting was required occasionally of greater than 100 pounds, that the job was performed 100% inside a coal mine, and that occasionally installing timbers and cribs to support the roof and walls was required. Further, the form indicates that no light duty is available. At the hearing in this matter, Mr. Sexton testified that when he was not operating the mobile bridge, he may have been required to perform other duties such as moving a belts, shoveling, and maintenance of the machinery. Restrictions imposed by Dr. Gilbert state that Mr. Sexton is limited to sedentary work, which preclude coal mining in an underground mine. The Administrative Law Judge is persuaded by Dr. Gilbert because he is the treating surgeon for Mr. Sexton's cervical spine. The Administrative Law Judge is not persuaded by the opinions of Dr.'s Muffly and Travis because they have minimized the Plaintiff's complaints of cervical pain and headaches. These have caused Mr. Sexton to lose his occupation, and to undergo a significant surgery to his cervical spine in order to cure, and prevent him from returning to work as an underground coal miner.

The Administrative Law Judge finds that the Plaintiff does not retain the physical capacity to return to the type of work he performed prior to his injury.

PERMANENT TOTAL DISABILITY

In order to award a permanent total disability, the Administrative Law Judge must follow the guidance of the Supreme Court in *City of Ashland v. Stumbo*, 461 S.W.3d 392, 396-97 (Ky. 2015). First, the ALJ must determine if the claimant suffered a work-related injury. Second, the ALJ must determine if the claimant does or does not have an impairment rating. Third, based on the impairment rating, the ALJ then must determine the claimant's permanent disability rating. Fourth, the ALJ must determine whether the claimant is unable to perform any type of work. Finally, it must be determined that the claimant's total disability is a result of the work-related injury. In determining whether a claimant is able to perform any type of work (under step four), the ALJ must consider "factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact."

The Administrative Law Judge has found that a work-related injury occurred, and that the Plaintiff has a permanent impairment rating, and a permanent disability rating applies. The Administrative Law Judge now must decide whether the Plaintiff is completely and totally disabled. This is defined as a "complete and total inability to perform any type of work as a result of an injury." The determination of complete and total inability to perform work includes factors such as "the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact, [and] the likelihood that the particular worker would be able to find work consistently over normal employment conditions," which "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 *McNutt Const. Co. v. Scott*, 40 S.W.3d 854 (Ky. 2001).

Mr. Sexton is unable to perform the work of an underground coal miner, as was explained above. Dr. Gilbert's opinion that Mr. Sexton is "disabled from any occupation permanently into the future" is outside of the area of expertise of a physician because it assesses his vocational ability. However, Dr. Gilbert also states that Mr. Sexton is limited to sedentary work, and the advice

of a physician that limits the Plaintiff to seated work only is substantial evidence. In terms of work experience, the Plaintiff has worked as a cashier at a convenience store previously, and has worked at a coal mine as a security guard. But those jobs occurred more than 25 years ago and the fact that he could perform those jobs 25 years ago does not prove that he could do the same jobs now without retraining. Mr. Sexton's age at 50 years old tends to prove that he would be able to find other work, since at that age he is still able to retrain and enjoy several more years of productive work life. However, other vocational and physical factors interfere with his ability to retrain. Regarding his education, Mr. Sexton has a high school education, but several records in evidence, such as Drs. Christopher Allen and Dr. Cletus Carvalho, as well as his own testimony prove that he took special education classes in high school due to problems with reading and writing, and probably has a learning disorder. This element favors a finding that he is totally disabled because most sedentary jobs involve reading and writing, and in today's working environment, also require some computer literacy, and the plaintiff would require an ability to adapt to a sedentary position if he would continue working.

KRS 342.0011(34) defines "work" as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." This part of the analysis of total disability or partial disability involves considering whether the Plaintiff would be able to come to work dependably, would not have to leave due to his disability, and whether his physical disabilities will interfere with his vocational capabilities. *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). Clearly Mr. Sexton's headaches, depression and anxiety, and upper back pain would cause difficulty finding a job which is sedentary, when he has not performed that type of work for many years, and would interfere with his ability to dependably come to work every day, remain for many hours, and adapt to the changing work demands that most jobs require in today's competitive economy.

In considering whether Mr. Sexton can perform any type of work, the Administrative Law Judge must consider his physical and emotional intellectual and

vocational status and how those factors interact. Mr. Sexton has been an underground coal miner for most of his working life and has done so since he was 19 years old, with the exceptions noted above. His physical status is that has been limited to sedentary work by his treating surgeon, he has frequent headaches and he is no longer active. The records show that the plaintiff has gained a great deal of weight after the injury, and this is probably due to inactivity and is compounding the problems of his cervical spine and his low back. Emotionally, the Administrative Law Judge relies on the evidence from Drs. Christopher Allen, corroborated by the records of Mountain Behavioral Health, to find that that he now has emotional problems causing anxiety and depression which are related to being unable to work and being in pain. Emotional problems such as nervousness and anxiety were controlled before the injury, and did not prevent Mr. Sexton from going to work every day and working dependably, but now constitute a factor which would prevent him from undergoing retraining, searching for other employment, and maintaining that employment dependably if he were to find it.

The Administrative Law Judge finds that it is unlikely that Mr. Sexton will return to work in a competitive economy primarily because he cannot return to doing the work he has customarily done. Retraining will require educational and physical rehabilitation in order to return him to the workforce. Mr. Sexton's educational level is on its face a high school education, but the record shows that he was in remedial education during high school, and he testified that the reason he could not complete Dr. Carvalho's examination was that he could not read and write well enough to answer the questions posed in the testing. He asked that his wife help him with the questions, but that was refused. Mr. Sexton's educational status therefore favors a finding that he is totally occupationally disabled.

At 50 years of age, with a high school education, Mr. Sexton is young enough to retrain to another occupation would he be able to do so, however there appear to be mental and physical obstacles to retraining, finding sedentary employment, and maintaining that employment, which prevent him from doing so. Those

obstacles include his pain, which prevents many activities of daily living, his educational and intellectual level, and his depression and anxiety. The Administrative Law Judge finds that Mr. Sexton is totally and permanently occupationally disabled.

Finally the Administrative Law Judge must address whether the total disability is due to the work-related injury alone. The records of Dr. Breeding show that Mr. Sexton has had lumbar pain for many years, and has had treatment for it, and has had some preexisting symptoms of anxiety and depression. His wage records and his testimony, however, supported by Dr. Breeding's testimony, prove that the Plaintiff was able to perform coal mining work on a regular and sustained basis, even despite those conditions, and they were not disabling prior to his injury.

The Administrative Law Judge must determine whether Mr. Sexton's other, preexisting conditions such as low back pain and anxiety and depression disqualify him from receiving a total disability award based on his work-related injury. In considering a total disability and whether pre-existing medical or psychiatric issues are an independent cause of disability, the Administrative Law Judge must consider whether the Plaintiff had pre-existing disability, and not whether he had pre-existing impairment. The terms "impairment" and "disability" are not synonymous. *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181, 183 (Ky. 2003). KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730 (1)(b) requires the ALJ to determine the worker's impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a). Mr. Sexton was working regularly and for long hours in a difficult working environment for many years prior to his injury, without restrictions. While he had low back problems which may have been ratable as an impairment prior to his injury, and anxiety and depression which arose occasionally, they did not stop him from working. Both of these conditions seem to have been aggravated by the work-related injury.

Therefore, even if Mr. Sexton had a pre-existing impairment due to his low back, or due to psychiatric problems, they would not qualify for a carve-out of disability, because those conditions did not warrant restrictions nor did they interfere with his ability to perform work on a regular and sustained basis prior to his injury at work. The Administrative Law Judge finds that the plaintiff is totally occupationally disabled by his work-related injury.

MEDICAL DISPUTE

The Plaintiff filed medical billing regarding all denied medical treatment, mileage, out-of-pocket expenses and co-payments incurred by the Plaintiff as a result of treatment of his injury. No medical payments were made on this claim by the Defendant, because it denied the entire claim soon after treatment started. The Defendant now complains that medical bills were not submitted within 45 days of treatment. The Workers' Compensation Board has consistently held that the 45-day rule stated in KRS 342.020 has no application to a claim before an award has been made. *Brown Pallet v. David Jones*, Claim No. 2003-69633, (entered September 20, 2007). Having denied the entire claim, the Defendant would also deny all medical bills, regardless of whether they were reasonable or necessary. Application of the rule would serve no legitimate purpose, and would create additional costs for the providers of medical treatment. Therefore, late filing of medical expenses is not a bar to the Defendant's obligation to pay work-related medical expenses. This very question was answered similarly by the Court of Appeals in *Wonderfoil v. Russell,* No. 2019-CA-001671-WC, (rendered June 5, 2020, now on appeal to Supreme Court). The Defendant will be responsible for the Plaintiff's medical expenses related to his cervical fusion surgery. Medical Expenses for psychological treatment are the Defendant's responsibility from the date of injury until May 4, 2020. All parties will have 60 days from the date of final decision in which to submit medical expenses, mileage, or out-of-pocket medical expenses in the correct format, in order to obtain payment for treatment related to the plaintiff's work-related injury.

Cambrian filed a Petition for Reconsideration requesting the ALJ set forth additional findings supporting his determination. In response, the ALJ entered the following Order, *verbatim*:

> 1. The Defendant requests further findings of fact concerning whether the Plaintiff's total occupational disability is a result of his cervical spine injury. The Administrative Law Judge explained in his Opinion that the Plaintiff was working for long hours, in an underground coal mine, without restrictions prior to his injury. The ALJ cited Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181, 183 (Ky. 2003), which held that if an individual is working without restrictions at the time a work-related injury is sustained, a finding of preexisting impairment does not compel a finding of pre-existing disability if there is an award of total disability. Since there were no restrictions upon the Plaintiff's ability to work due to his pre-existing low back pain and occasional pre-existing symptoms of anxiety, and the Plaintiff was found to have restrictions as described by Dr. Gilbert after the injury, the inference which the Administrative Law Judge made was that only the cervical spine caused that disability. Because the cervical spine injury resulted in a spinal fusion from C3 through C7, and the Plaintiff's low back condition had not been aroused into disabling reality, the Administrative Law Judge finds that the restrictions placed upon the Plaintiff by Dr. Gilbert were due to his cervical spine injury.
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> As agreed upon by the Defendant's Petition, the Administrative Law Judge found that the Plaintiff's pre-existing low back problems, thoracic spine condition, and pre-existing psychiatric anxiety were not aroused by the injury. Evidence from Dr. Travis and Dr. Muffly indicated that those conditions were unchanged by the injury. Dr. Carvalho opined that the Plaintiff could return to work from a psychiatric standpoint, and the Administrative Law Judge is persuaded by his opinion that Mr. Sexton's psychiatric condition does not contribute to his total occupational disability.
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> The ALJ has the prerogative to make reasonable inferences from the evidence. The ALJ found that the Plaintiff was able to work long hours in strenuous work

prior to his injury, and he is now severely restricted from working by Dr. Gilbert.

None of these restrictions could possibly have come from the Plaintiff's lumbar, thoracic, or psychological conditions because they were non-disabling prior to the injury and were unchanged after the injury. Therefore, the only logical inference is that the restrictions assessed by Dr. Gilbert, the Plaintiff's treating neurosurgeon, were due to the Plaintiff's cervical spine injury and subsequent cervical fusion.

2. The Defendant requests further findings of fact on whether an injury occurred to the Plaintiff's cervical spine, citing Dr. Travis' comparison of a postinjury MRI of the cervical spine to a pre-injury x-ray of the cervical spine, which the Defendant argues shows no change and therefore no injury. The ALJ construes this argument as contending that causation of an injury must be proven by objective medical evidence verifiable by a change in objective medical findings before and immediately after the injury. That argument was rejected by the Supreme Court in Staples, Inc. v. Konvelski , 56 S.W.3d 412 (Ky. 2001). There, it was held that KRS 342 .0011(1) requires a harmful change to be proven by objective medical findings but does not require causation to be proven with such findings. The law has always been that the arousal of a dormant condition into disabling reality constitutes an injury within the meaning of the Act, and that once aroused into a disabling state, the previously dormant condition, or medical treatment attributable to address the symptoms which began after the injury, constitute a harmful change in the human organism. McNutt Construction/First Generation Servs. v. Scott, 40 S.W.3d 854 (Ky. 2001)

The Administrative Law Judge found that the Plaintiff suffered an injury within the meaning of KRS 342.0011(1). The Plaintiff now has a spinal fusion from C3 through C7 which is unquestionably a change in the human organism. This change was proximately caused by the injury because it is a result of a surgery performed to resolve the symptoms of a work-related injury. Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986); The injury on October 16, 2018 was a traumatic work-related event, and it produced a harmful

change in the human organism. Therefore, the incident injuring the Plaintiff's cervical spine was an "injury" within the meaning of KRS 342.0011(1).

3. The Defendant petitions for reconsideration of the Administrative Law Judge's finding of the Plaintiff's average weekly wage. The Administrative Law Judge recognizes that a patent error appears in calculating the Average Weekly Wage of the Plaintiff, having misconstrued the Defendant's filing of wages as only of the 13-week period immediately preceding the injury. In reconsidering the average weekly wage, the Defendant's calculations did include wage information for the four quarters preceding the Plaintiff's injury. The Plaintiff's calculations did not include that quarter, but relied on the third quarter preceding the Plaintiff's injury as the most favorable to the Plaintiff.

The Plaintiff's calculation of average the wage for the third quarter preceding the injury contains mathematical errors. The multiplication of total hours times the rate of $19.80 per hour does not equal the weekly wage reported on the Plaintiff's calculations, and the Plaintiff relied on an addition of those wages, not the addition of hours, to calculate average wage. This is patently incorrect. Therefore, the ALJ recalculates the Plaintiff's Average Weekly Wage to conform to the defendant's calculation, which is $1,148.97 per week relying on the fourth quarter preceding the injury.

The Administrative Law Judge grants the Defendant's petition regarding calculation of average weekly wage. The Plaintiff's average weekly wage is found to be $1,148.97 per week. 66 2/3% of $1,148.97 = $765.98. Therefore the Award must be amended as follows:

4. The Plaintiff, LD Sexton, shall recover of the Defendant/Employer, Cambrian Holding Co./ Perry County Coal, income benefits for temporary total disability from October 10, 2018 through May 4, 2020 at the rate of $765.98 per week. Thereafter, the Plaintiff shall recover of the defendant $765.98 per week for permanent total disability, for as long as he is so disabled or until he reaches the age of 70, whichever shall first occur. KRS 342.730(1)(a)(4). He shall further

> recover interest at 6% per annum on all unpaid installments of income benefits.

Cambrian argues the ALJ erred in determining Sexton is permanently totally disabled, in failing to determine the extent of his pre-existing cervical conditions contributed to his permanent total disability, and in assessing liability for medical expenses not submitted in accordance with KRS 342.020(4).

As the claimant in a workers' compensation proceeding, Sexton had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Sexton was successful in his burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve

various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

On appeal, Cambrian first argues the ALJ erred in determining Sexton suffered a cervical injury as defined by the Act. Next, it argues the ALJ erred in determining Sexton is permanently totally disabled as a result of the cervical injury. Lastly, it argues the ALJ erred in determining the forty-five-day rule for submitting medical expenses does not apply pre-judgment.

Cambrian argues the ALJ's determination Sexton suffered a cervical injury as defined by the Act was in error. It cites the medical proof submitted from Dr. Travis and Dr. Muffly to support this position. Cambrian argues the evidence from Dr. Gilbert and Dr. Breeding is not substantial evidence and cannot be relied on. We disagree. The ALJ was confronted with conflicting evidence from Dr.

Gilbert, Dr. Tibbs, and Dr. Breeding, as well as Sexton, indicating the work incident was significant and caused his injuries. Cambrian submitted proof from Dr. Travis and Dr. Muffly opining Sexton did not suffer an injury as alleged and all his cervical problems were pre-existing and active. After reviewing the proof, the ALJ found the testimony of Dr. Tibbs, Dr. Gilbert, Dr. Breeding and Sexton more persuasive than that from Dr. Travis and Dr. Muffly. The ALJ explained why he felt this proof was more persuasive, and substantial evidence supports his determination. We find the ALJ properly exercised his discretion, and affirm.

Cambrian next argues the ALJ erred in determining Sexton is permanently totally disabled as a result of his cervical injuries. Permanent total disability is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work because of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining Sexton is permanently totally disabled, the ALJ was required to perform an analysis pursuant to City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015), and Ira A. Watson Department Store v. Hamilton, supra. We note additionally, an injured worker's testimony may be considered and relied upon when assessing total disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

The ALJ properly applied the 5 factors set forth in City of Ashland v. Stumbo, supra, in determining Sexton is permanently totally disabled. He first determined Sexton suffered a work-related cervical spine injury on October 9, 2018.

He then determined Sexton retained a 28% impairment rating for the cervical spine injury, which translated to a 37.8% disability. He determined Sexton cannot perform any type of work and the permanent total disability is the result of the cervical work injury alone. Since the ALJ properly applied the analysis as set forth in City of Ashland v. Stumbo, supra, and properly exercised his discretion, we affirm on this issue.

Lastly, Cambrian argues the ALJ erred in determining the forty-five-day rule set forth in KRS 342.020(4) and 803 KAR 25:096 do not apply. It requests this appeal be placed in abeyance to await the decision of the Kentucky Supreme Court in Wonderfoil, Inc. v. Richard Russell, Case No. 2020-SC-0301. We decline to do so.

This Board has held on a number of occasions the forty-five-day rule for submission of statements for services in KRS 342.020(1) has no pre-award application. In R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993), the Kentucky Supreme Court pointed out the requirement in KRS 342.020(1) for the payment of bills within 30 days of receipt of the statement for services "applies to medical statements received by an employer after an ALJ has determined that said bills are owed by the employer." In other words, it does not apply pre-award.

In Brown Pallet v. David Jones, Claim No. 2003-69633, (entered September 20, 2007), we held the reasoning of the Supreme Court in R.J. Corman Railroad Construction, supra, concerning the thirty-day provision for payment of

medical benefits should also apply to the forty-five-day rule for submission of medical bills.

The court in R.J. Corman stated, "[U]ntil an award has been rendered, the employer is under no obligation to pay any compensation, and all issues, including medical benefits, are justiciable." By extension, we find the sixty-day requirement contained in 803 KAR 25:096 §11 is likewise not applicable until an award has been entered finding the claim is compensable. Pursuant to Garno v. Selectron USA, 329 S.W.3d 3001 (Ky. 2010), the sixty-day rule found at 803 KAR 25:096 §11 applies only after an interlocutory decision or final award has been entered. Since an interlocutory award was not entered, the sixty-day rule was not applicable until after the ALJ rendered his decision. Because the ALJ properly declined to enforce the forty-five-day rule regarding the contested medical expenses, we affirm on this issue.

Accordingly, the Opinion, Award, and Order of October 9, 2018 and the Order on Petition for Reconsideration of November 9, 2020 rendered by Hon. Peter Naake, Administrative Law Judge are **AFFIRMED**.

ALL CONCUR

DISTRIBUTION:

COUNSEL FOR PETITIONER: **LMS**

HON EMILY WETMORE
100 CITIZENS LN, STE A
PO BOX 359
HAZARD, KY 41701

COUNSEL FOR RESPONDENT: **LMS**

HON BARRY LEWIS
151 E MAIN ST., STE 100
PO BOX 800
HAZARD, KY 41702

RESPONDENTS:

APPALACHIAN REHABILITATION TEAM **USPS**
149 MEDICAL PLAZA LN, STE A
WHITESBURG, KY 41858

DR JAMES VARNEY **USPS**
PIKEVILLE MEDICAL CENTER
911 BYPASS ROAD,
PIKEVILLE, KY 41501

DR JOHN GILBERT **USPS**
SPINE AND BRAIN
NEUROSURGICAL CARE PLC
3256 LOCKNESS DR,
LEXINGTON, KY 40517

DR VAN BREEDING **USPS**
226 MEDICAL PLAZA LANE
WHITESBURG, KY 41858

FUGATE FAMILY CHIROPRACTIC **USPS**
100 VETERANS DRIVE
HAZARD, KY 41701

KENTUCKY MOUNTAIN HEALTH **USPS**

101 HIBBARD ST, STE 100
PIKEVILLE, KY 41501

KENTUCKY PAIN MANAGEMENT SERVICES **USPS**
311 ROY CAMPBELL DRIVE
HAZARD, KY 41701

MOUNTIAN COMPREHENSIVE HEALTH CORPORATION **USPS**
PO BOX 4180
PIKEVILLE, KY 41501

PIKEVILLE NEUROLOGY **USPS**
PO BOX 2158
PIKEVILLE, KY 41502

WHITESBURG ARH **USPS**
240 HOSPITAL ROAD
WHITESBURG, KY 41858

ADMINISTRATIVE LAW JUDGE: **LMS**

HON PETER NAAKE
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601