

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 11, 2020

CLAIM NO. 201900169 & 201857237

CARRIE HORNBACK

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

GE APPLIANCE/HAIER
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

STIVERS, Member. Carrie Hornback (“Hornback”) seeks review of the April 6, 2020, Opinion, Order, and Award and the May 4, 2020, Order overruling her Petition for Reconsideration of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”). The ALJ dismissed Hornback’s claims for a cervical condition and bilateral carpal tunnel syndrome against GE Appliance/Haier (“GE”). However, he awarded temporary total disability (“TTD”) benefits “associated with [her] October 9th right shoulder

injury” in the amount of \$595.77 per week from October 26, 2018, through July 23, 2019. Despite finding Hornback entitled to medical benefits through July 23, 2019, the ALJ did not award medical benefits.

On appeal, Hornback asserts the ALJ erred in dismissing her claim for a cervical injury, because he “relied upon medical evidence which was based upon inaccurate or incomplete facts and therefore cannot represent ‘compelling evidence’ sufficient to form the basis of the opinion.”

BACKGROUND

On December 31, 2018, Hornback filed a Form 101 in Claim No. 2018-57237 alleging an October 19, 2018, injury while in the employ of GE and asserting she sustained a repetitive injury to her right shoulder, right arm, and right hand. She listed injuries to multiple body parts.

On February 14, 2019, Hornback filed a Form 101 in Claim No. 2019-00169 alleging a May 22, 2017, injury to her right shoulder and neck due to “repetitively catching lids and placing them in 4 x 4.” Again, she alleged multiple body parts were injured.

By Order dated February 21, 2019, the ALJ consolidated the claims and set a Benefit Review Conference (“BRC”).

Hornback was deposed on February 14, 2019, and testified at the February 5, 2020, hearing. At her deposition, Hornback testified she is unable to mop, vacuum, or reach overhead because she loses feeling in her right arm and hand. Her children help with the laundry and dishes. She has started losing her ability to grip

items and drops them because of right hand numbness. She denied experiencing a left shoulder/arm injury although she experiences some left hand numbness.

Hornback testified she did not miss any work following the May 22, 2017, injury.¹ However, she missed work following the October 19, 2018, injury. At the time of the May 2017 injury, Hornback's job was "part inspector, and paint." She provided the following description of that job:

A: Yes, ma'am. You have hangers that you are on a line that moves, I think, at the speed of 32, and you grab every other part off the line and inspect it for any kind of flaws. That one off, flip it, inspect it, put it in the cart, push the cart away, pull another one up.

Q: How much are these parts weighing?

A: Up to 12 pounds depending on the part. They have numerous parts.

...

Q: Okay. So you're working with various different washing machine and dryer parts?

A: Yes. Either the lids or the covers. Sometimes side panels, top panels.

Q: Okay.

A: And pedestal covers.

Q: Right. Did you go back to work full duty after your May 11, 2000 --- or May -- I think it's actually May 22, 2017 -- did you go back to full duty after that injury?

A: Yes, ma'am.

Hornback provided the following regarding the injury or injuries in October 2018:

¹ Hornback's Form 101 for the alleged May 22, 2017, injury was filed on February 14, 2019, the date of her deposition.

Q: Okay. In October of 2018 – which is your second injury date, October 19, 2018, what was your position?

A: I worked on line 8. The job I owned was rod and spring builder, but we have a four-way rotation, so you do different jobs during that time.

Q: When did you switch from part inspector, and paint, to this rod position?

A: Part inspector, and paint – I got an upgrade in fabrication driving a fork truck. I did that for a year, and then in October I lost my upgrade. The other pos – the other gentleman, his position had ended on his upgrade. He came back to the job he owned, and that's when I bid on the line 8, rod and spring, and went there October 1st.

Q: Okay. So you were in the rod and spring for October 1st through the 18th, when this injury occurred?

A: Yes, ma'am. I still own that position.

...

Q: Tell me about, generally, what positions you would be working at from –

A: Yes.

Q: -- October 1, 2018 through October 19, 2018.

A: I started in the morning until 8:25 doing rod and springs, building them up.

Q: So you start in the morning at what time?

A: 6:00.

Q: Okay. 6:00 to 8:25, you did rod and spring?

A: Uh-uh. Yes, ma'am.

Q: Okay.

A: 8:35 to – I don't remember what time we went to lunch. I think it was 10:45. I done the – putting the two clips in the washer, but the way they trained me on that job was incorrect. There was supposed to be, like, a gun I

used. They had me doing it with pliers. And I actually got injured on that job.

Q: Okay. What other –

A: Then after lunch, 11:15 until 1:10 or 1:15, I hammered in two clips in the washer and put on two foam pads.

Q: Was it different then the two clips you were doing previous to lunch?

A: Yes.

Q: Okay. How?

A: These are the – second rotation was metal clips that you had to, like, squeeze with pliers and then, like, twist them in. The other ones were, like, these little peg-looking things, and you put them on the washer and you have to hammer them all in with a mallet.

Q: Okay. So in the second rotation you're using pliers?

A: Yeah.

Q: And the third rotation you're using a hammer?

A: A mallet. Yes.

Q: Okay. And then what else?

A: 1:15 to 2:31, I did the rod and springs again.

Q: Okay. So tell me about what you were doing in rod and spring?

A: You basically had to take two rods, gather your parts up top, building on up, put your finger in a – a like, curtain thing, step back, and the machine builds them. You grab them, push the parts down on the rod, and then hang them on a moving assembly.

Q: Okay. So you're kind of making some motions for me right here. Is the job that you're doing, like, right in front of you?

A: Uh-huh. Yeah. You're grabbing all these different parts and putting them in this thing, and then you put

your light in the curtain – your finger in the light curtains, step back, let the machine but it, and then you take – and you push all the parts down, and then you hang them on a moving rack.

Q: Okay. How much are these parts weighing?

A: Less than two pounds, I would think.

...

Q: Okay. And you said that you were injured in – when you were doing the second rotation, the two clips in the washer?

A: Uh-huh.

Q: That's related to that October 19, 2018 injury date, right?

A: I don't know.

Q: Okay.

A: I don't know. I don't know if it's tied in, but I did go to their medical department. I told the ABL and the team lead several different times that my hand was burning, it was on fire –

Hornback testified her right hand was very painful and swollen, and she could not bend her fingers. Her hand felt like it was on fire. When she informed her boss of her symptoms, he told her she was probably experiencing new job soreness. Hornback testified her hand was injured on a different date than her shoulder and neck. The injury date for her hand is October 18, 2018. Concerning that injury, she testified as follows:

Q: You said that you think you started getting these symptoms after the first week?

A: Uh-huh.

Q: So you started on October 1st?

A: Uh-huh.

Q: So sometime around October 8th, a week later?

A: Yes.

Q: Okay. And you were talking about things to these people at that time?

A: Yes.

Q: And were you noticing the symptoms during that second rotation?

A: With my neck and my shoulder, not really. The only kind of pain I felt was in my hand.

Q: Okay. And that's what we're talking about right now, that hand pain?

A: Uh-huh.

Q: You said that was only -- was it in that second rotation that you noticed it?

A: Yes.

Q: Did you have it when you were doing the rod and springs?

A: After I did that rotation, yes.

Q: Okay. So in the morning when you first came in, the first rotation was rod and spring. You didn't have it then?

A: No, ma'am.

Q: Then you go to your second rotation and third rotations, and when you came back to rod and spring, you would have symptoms?

A: After that second --- during that second rotation is when the pain was in my hand real bad.

Q: Okay.

A: And it went on throughout the day.

Q: Okay.

A: Uh-huh.

Q: And where was that pain in your hand located?

A: My whole right hand.

Q: Okay. So the entirety of it?

A: Yeah. I had blisters that would go across my fingers. So I would take my fingers up and then put my work gloves on to try to, like, minimize it, I guess.

Q: Okay.

A: They gave me a couple of gloves, but they didn't, like, work when they finally let me go to medical.

There were no restrictions placed on her activities because of her hand symptoms. Her symptoms have worsened since she has been off work. Hornback was unsure whether her hand problems were related to the October 18, 2018, incident or because of her shoulder and neck problems. At the time she developed right hand, shoulder and neck symptoms, she was performing the same job.

Hornback explained that when she was injured in 2017, she was in a different department which was catching parts and paint. Although Hornback sought treatment from GE's medical department, she was never put on restrictions, and continued to work full duty. She estimated receiving treatment for approximately two months following the May 2017 injury. When she experienced pain after the May 2017 injury, someone covered her job while she went to the medical department to be iced down and attended to by a nurse. Hornback denied receiving regular treatment between May 2017 and October 2018. During that period, when she felt discomfort she went home and applied ice and Biofreeze. Concerning the injury on October 19, 2018, Hornback testified:

Q: What were you doing when you noticed right shoulder and neck pain that made you go to medical?

A: It started – I want to say during my second rotation. By the time I got to my last rotation of building the rods and springs it was painful. It kept getting worse throughout that day. So that’s when – I finished my shift, I went home, and just took it easy over the weekend, and iced myself down and put Biofreeze, you know.

Hornback did not go to the clinic on Friday when she experienced this injury. She described what happened the following Monday when she returned to the plant:

A: No, ma’am. Monday, I had showed up to work and got a migraine. My migraines get so bad that if the pain goes into my eyes, my vision starts to blur. So at that point I rushed home. That way I can still see to drive, you know. Sat with ice packs on my head Monday, and took the Imitrex from Nurse Jackie. Tuesday, I called her and told them that I was still having my migraine with neck pain, and they told me to go to the ER. Saint Mary’s treated my migraine only. Wednesday, I followed up with Norton Associates. Nurse Jackie was unavailable.

Q: Is that your – is that your primary care, Nurse Jackie?

A: Uh-huh. Yes, ma’am.

Q: Okay.

A: They gave me a steroid shot and muscle relaxers. They had asked me if I had been injured at work, and I told them, yes, and they told me I needed to follow up with my employer. At that point on Thursday, I was at GE AP for medical.

Q: Okay. And that’s when you kind of reported the neck and shoulder injury?

A: Yes, ma’am.

Concerning the difference between her neck and shoulder symptoms before and after the October 19, 2018, injury, she testified:

Q: Okay. What kind of problems were you having with your neck and shoulder that were different from what you were having previous?

A: Typically, if you became uncomfortable and started feeling, like, pain, you could ice it down and Biofreeze. And if you kept doing that, eventually it will become tolerable again, to where you kind of work through it. This time it didn't. It kept getting worse and more painful.

Q: Okay. Are your pain areas the same, just worse? Or are they different pain areas?

A: Before, it was only in my neck and my shoulder. Now, it's become worse where it's actually going down into my arm and my right hand. And, again, I don't know if the hand and arm are related to the other. I don't know.

Her primary pain was in the right side of her neck. She clarified that the injury dates of May 2017 and October 2018 concern her shoulder and neck. She did not recall ever having any problems with her neck and right shoulder prior to May 2017. Although she had previously been treated for migraines, she never underwent treatment of her neck and shoulder. She denied sustaining a non-work-related right shoulder or neck injury between May 2017 and October 2018.

Hornback also experienced hand soreness while working in various other GE departments. She explained there was a time period required to adapt to the work in a different department because the work is very repetitive and demanding. Consequently, she applied ice and Biofreeze for a couple of weeks.

Hornback has not returned to work since Friday, October 19, 2018. She was off work because GE could not accommodate the restrictions imposed by Dr. Valerie Waters. At the time of her deposition, she believed her status was that of an employee waiting to return to work. Hornback testified her condition has continued to worsen since she stopped working. She explained:

Q: Okay. Since you have stopped working in October of 2018 –

A: Yes, ma'am.

Q: -- has your condition gotten worse, stayed the same, gotten better? Now that you're not doing those motions at work?

A: Getting worse.

Q: As far as severity, or location?

A: Both.

Q: Just – you – and you kind of mentioned for me earlier –

A: Going.

Q: -- it's from – down your arm more?

A: And I'm losing the feeling in my hand more.

Q: And in your hand it's not pain, it's numbness?

A: Is painfully numb.

Q: Okay.

A: It – it kind of draws up, where you have to try to, like, shake it out or, like, straighten your fingers.

Hornback was referred to physical therapy, and after completion of therapy, she was referred to Dr. Waters. After obtaining an MRI and EMG, Dr. Waters directed her to therapy, a pain management specialist, and a thoracic outlet syndrome specialist. Hornback did not see any of these specialists because she could not afford the treatment. Her current restrictions are no pushing, pulling, or lifting anything over ten pounds and no overhead work. She can perform limited work with her right hand. She also experiences some numbness in her left hand and soreness in

her left shoulder and neck. Hornback was taking Tramadol and Amitriptyline. She had a future appointment with Dr. Waters.

At the hearing, Hornback testified she began working for GE in August 2012. Because production work was physically imposing, she experienced physical problems shortly after she began work resulting in the medical department demonstrating how to use Biofreeze. In 2016, she repaired parts which caused neck soreness which was treated with ice and Tylenol. She was questioned about a February 24, 2017, report concerning an office visit to Norton Community Medical Associates (“Norton Associates”) which noted she had “some chronic neck pain” and was taking Tylenol as needed. She explained that on that date she went to Jacqueline Guetig (“Guetig”), a nurse practitioner, with Norton Associates, for her yearly wellness check-up.² The purpose of the visit was unrelated to neck problems. She informed Guetig she had some chronic neck pain and took Tylenol as needed. Guetig imposed no restrictions for the neck pain, and Hornback continued to work full time. In May 2017, she was catching and inspecting parts off the line and began experiencing right shoulder and neck pain. She described the subsequent treatment she received at GE’s medical department.

Q: Okay. And what – what treatment, if any, did you get for that?

A: An AP1, their medical unit, I got Biofreeze, ice, and then they had a therapist that came in and kind of like done like massage techniques with like a rolling pin or some sort.

Q: All right. So was this done before work, scheduled work, after scheduled work, during work?

² Guetig is Hornback’s primary medical provider.

A: During my shift if they could find somebody to cover my job on the line.

Q: So you would leave the line, go get some treatment and then come back?

A: Yes, sir.

Q: Did those treatments seem to help?

A: It kept it contained to where I could continue working.

No restrictions were imposed as a result of the injury. After May 2017, Hornback drove a fork truck in a different department for almost a year. In October 2018, she was moved to Line 8 which entailed a four-way rotation performing different jobs. Concerning those jobs, she provided the following:

Q: And what were you doing in October of 2018?

A: 2018 is where I went to a new job on the line, Line 8. I was in a four-way rotation between different jobs.

Q: Okay. What were the four jobs that you were rotating?

A: The first job is you would build up what's called rod and springs. You stand in front of a press and you have parts that go into the rod and spring and then rods to your left-hand side. You reach to your left, grab two metal rods, put it on the machine, grab the parts, put them in the press, put your finger in the curtain, wait for it to assemble, pull the springs and then hang them on a moving line.

Q: Okay. What did that job involve in terms of your – were you sitting, standing?

A: You're standing continuously on Line 8.

Q: Did that job cause you any problems as far as your neck or shoulder were concerned?

A: Both.

Q: And what was it about that job that was problematic?

A: You're looking to your left. You're constantly looking up, then looking down, checking the moving line to your right to make sure you're keeping up with the line needs, and then hanging them on the line.

Q: So how long did that whole process take from, you know, whatever you had to do with these parts from start to finish?

A: You have to make the rod and springs in under six seconds to keep up production.

Q: Okay. And you would do that for how long during your shift?

A: Approximately an hour and a half until my first ten-minute break where we rotated to the next job.

Q: Okay. And what was the next job?

A: The next job was putting two metal clips into the apron with a pair of pliers.

Q: All right. And what – describe what that job involved.

A: You have to hold – in order to keep up with production, you have to keep like the metal clips in your hand and you have to grab them with a vice grips or the pliers and put them in two spots of the apron.

Sometimes if the apron come out and they have like little jagged pieces, you really got to kind of force them in there, you know.

Q: And you're doing that with your right arm, right hand?

A: Yes.

Q: Okay. Did that job cause you any problems?

A: That caused me a lot of problems to where it made my whole right hand swell. There was shooting and fire pain up into my arm and my neck. And when I had mentioned something about it to my business leaders, they told me it was new job soreness, to give it a while to let my body adjust.

Q: Okay. And how long would you do that particular job on this rotation?

A: Almost two hours until my 30-minute lunch.

Q: Okay. And then what were the other jobs? What's the next job?

A: The next rotation you would go to, you are putting two plastic pegs into the top of the apron with a mallet, and then putting two little square foam pieces on the apron.

Q: Okay. And did that cause you any problems?

A: After coming off the second rotation, you're already in so much pain, gripping the mallet bothered me quite a bit, and then looking down to hammer these pegs in the right way.

Q: Okay. And then what were – you said there were four rotations. What was the fourth one?

A: The last one is where you go back and you build up the rod and springs until you go home.

Q: The one you did at first?

A: Correct.

Q: The first job. Okay.

A: The job you own is the one you start and finish on.

Q: Okay. So this job where you put the clips in the apron with the pliers.

A: Yes.

Hornback testified that during the period between May 2017 until October 2018, her neck pain did not completely subside; rather, it was “contained.” After she went to Line 8, her neck, shoulder, and hand pain continued to worsen. She recounted the following:

Q: Were there any new symptoms that you didn't have in May of 2017 that you started to notice then or was it just the same symptoms but worse?

A: It was the same symptoms but worse, but my hand. My hand had gotten completely worse to where when I finally did go to medical, my hand was so swollen I couldn't bend it.

Q: Okay. Did you – did driving the fork truck aggravate your neck condition?

A: Yes, because you're – you're carrying two five-foot racks full of raw metal parts and you can't drive forward because you can't see, so you have to drive backwards. So you're constantly looking at your load to make sure it's safe and secure, but then you're looking backwards to make sure there's no traffic in your way.

And then you're taking them and raising them anywhere from five to ten feet in the air to make sure that you're getting the racks in the pegs and you're putting that load up safely to where it doesn't fall on anyone in that department.

The adjuster recommended she see Dr. Waters and BaptistWorx. Dr. Waters directed her to Results Physical Therapy and prescribed other therapy. She was sent to Dr. Thomas Gabriel who injected her hand. She was released by Dr. Waters in June 2019. The nurse practitioner referred Hornback to Dr. Duane Densler. On August 2, 2018, when she was seen by Dr. Densler, she reported neck, shoulder, and hand pain. She experienced multiple migraines a week and a shocking sensation. The pain then spread to her left hand, left shoulder, and left side of her neck. Dr. Densler performed surgery on September 16, 2019, which improved the neck pain, headaches, and shocking sensation. However, the arm and hand pain have worsened. Hornback described her current symptoms:

A: My whole neck and shoulder hurts so bad. It's all the way across and down into my arms and my hands. My

hands constantly will draw up and when the pain gets so bad they just like, I don't know, go like into a claw movement, I guess you would say.

Hornback believes she is unable to return to any of her prior jobs at GE.

She described the difference in her symptoms in February 2017 and in October 2018:

Q: I want you to tell me how that – those symptoms compared to what you experienced in October of 2018 when you got to the point that you had to go to medical for the problems you were having.

A: Back then I wasn't in pain. I could go into work and take a Tylenol or do Biofreeze and ice and work a 16- to 18- hour shift with no problem, you know. I mean, I didn't think it was problematic back then.

Hornback acknowledged experiencing debilitating migraines prior to May 2017; however, she denied any longstanding neck pain before that time. She explained the October 2018 injury was to her neck, right shoulder, and right arm. Hornback believed her shoulder condition had worsened in the last couple of months.

The parties introduced numerous medical records concerning Hornback's treatment both prior to and after the injuries.

The February 5, 2020, BRC Order reflects the parties stipulated Hornback received work-related injuries on May 22, 2017, and October 19, 2018, and TTD benefits were paid from October 26, 2018, through July 7, 2019. The contested issues were "benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the ACT, exclusion for pre-existing disability/impairment, and TTD." Under "Other" is the following: "Compensability of cervical fusion: causation/reasonableness/necessity; compensability of treatment outside Form 113 physician; waiver of defense against 113 physician." The BRC Order reflects the claim remained bifurcated "for all issues except cervical." A March 6, 2020,

Order directed the BRC was amended to read that under “other matters” the claim remains bifurcated for all issues except cervical impairment.

After summarizing the medical and lay evidence, the ALJ provided the findings of facts and conclusions of law regarding the alleged injuries which are set forth *verbatim*:

Causation/Work-Relatedness/Injury under the Act

As an initial, threshold issue, the employer disputes plaintiff suffered any permanent work-related injuries on either May 22, 2017 or October 19, 2018. It acknowledges plaintiff suffered a temporary right shoulder injury on one or both dates, but it denies plaintiff's cervical condition is related to either injury. The defendant further points out plaintiff only alleged a neck injury in her application for her May 22, 2017 claim. In support of its position, the defendant relies on a February, 2017 treatment record in which plaintiff reported a history of chronic neck pain for which she took Tylenol as needed; and he relies on another treatment note in August, 2017 in which plaintiff reports she still has neck pain with no known injury. The defendant also relies on its expert, Dr. Lyon, who evaluated plaintiff and reviewed these medical records and her diagnostic studies and concluded plaintiff's cervical condition is not due to any work-related injury or activities but, instead, is due to her pre-existing, chronic cervical condition of which she complained in February, 2017.

For her part, plaintiff relies on her expert, Dr. Nazar, who concluded plaintiff's neck problems began in May, 2017, but were made markedly worse by the October 19, 2018 work injury. Plaintiff argues the various jobs she performed with the defendant clearly had a harmful effect on her neck, necessitating her recent cervical fusion surgery with Dr. Densler.

Having reviewed the evidence of record, the Administrative Law Judge is not persuaded plaintiff has carried her burden of proving her cervical condition is work-related. In reaching this conclusion, Dr. Lyon's opinions were simply found most persuasive. He explained how plaintiff reported chronic neck pain in

February, 2017, three months before the alleged incident of May 22, 2017, and that, even as of August, 2017 plaintiff was still reporting to her medical provider that she had chronic neck pain with no known injury. Dr. Lyon explained that such ongoing neck pain with occasional flareups is consistent with a chronic, pre-existing cervical condition rather than due to performing repetitive work in May, 2017. This is especially true given that plaintiff was taken off that repetitive work and assigned to driving a forklift for approximately one year up to October, 2018 during which time plaintiff now claims her neck pain significantly worsened. Therefore, even though plaintiff was not performing the repetitive job duty she alleges caused her neck problems for one year as of October, 2018, her neck pain actually worsened during that time according to plaintiff. Moreover, plaintiff's expert, Dr. Nazar, acknowledge that plaintiff's records allow for the possibility that her current neck condition is due to a chronic situation that existed prior to May, 2017. Given the totality of this evidence, the ALJ is not persuaded plaintiff's neck condition is causally related to the work injury alleged. As such, her claim for benefits associated with her cervical condition must be dismissed.

With respect to plaintiff's carpal tunnel condition, the ALJ is persuaded by both Dr. Lyon and Dr. Gabriel. Dr. Gabriel was plaintiff's treating physician and explained his belief that plaintiff's carpal tunnel condition is not work-related. Dr. Lyon further that point and explained that current medical literature does not support a causative link between plaintiff's employment activities and carpal tunnel syndrome. Based on the credible opinions of plaintiff's treating hand specialist, Dr. Gabriel, the ALJ is again not persuaded that plaintiff has carried her burden of proving her carpal tunnel complaints are work-related and that portion of her claim must be dismissed as well.

As he had dismissed the cervical and carpal tunnel syndrome claims, the ALJ concluded the only issue was Hornback's entitlement to additional TTD benefits for her work-related right shoulder condition. Relying upon the opinions of Drs. J. Rick Lyon and Gregory Nazar, the ALJ found her shoulder condition reached

maximum medical improvement (“MMI”) on July 3, 2019. Consequently, TTD benefits were awarded from October 26, 2018, through July 18, 2019. Because a physician did not assign an impairment rating for the right shoulder condition, permanent income benefits were not awarded for the injury. The ALJ found GE responsible for medical expenses associated with the right shoulder injury through July 23, 2019. Significantly, the ALJ did not determine the start date of the entitlement to medical expenses nor enter an award of medical benefits.

In the Order and Award, the ALJ ordered the carpal tunnel syndrome and cervical claims dismissed and awarded only TTD benefits for the October 19, 2018, right shoulder injury from October 26, 2018, through July 23, 2019.

Hornback filed a Petition for Reconsideration noting the ALJ failed to address her alleged October 19, 2018, injury which she maintained was more significant and precipitated her cervical fusion surgery. Hornback contended GE’s entire defense stems from the February 24, 2017, notation by her primary care physician. She maintained the purpose of the visit was an annual examination because her physician reported Hornback was doing well with no problems or concerns. That note reflects Hornback had some chronic neck pain for which she was taking Tylenol as needed. Hornback pointed out the February 2017 office note does not reference radicular complaints. She also observed a physician did not assign an impairment rating for these symptoms. Hornback contended a comparison of the February 24, 2017, cervical complaints with the symptoms presented following the October 19, 2018, injury reveals a significant worsening following the latter injury. She also noted Dr. Nazar opined she suffered a cervical herniated disc on October 19, 2018, and Dr.

Lyon found no evidence of radicular complaints in the February 24, 2017, office note. Hornback insisted the medical evidence does not support a finding of a prior active cervical condition.

Concluding the Petition for Reconsideration did not identify any patent errors and attempted to re-argue the merits of the claim, the ALJ overruled the Petition for Reconsideration.

On appeal, Hornback maintains the ALJ's reliance upon Dr. Lyon's testimony is erroneous, as it cannot constitute the basis of the ALJ's decision. She argues Dr. Lyon's opinion that her cervical condition pre-existed either of the two injury dates is not supported by the record. She contends Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007) is applicable. Thus, the ALJ erred in dismissing her cervical injury, as her symptoms were transient and there is no evidence the February 2017 neck complaints were ratable pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. In support of her argument, Hornback cites Dr. Lyon's statement that the complaints reflected in the February 2017 office note would not support an impairment rating. Consequently, the cervical symptoms referenced in the February 2017 office note are too inconsequential to support a finding of prior active cervical symptoms.

Hornback asserts her 2018 symptoms were much more severe, noting she worked full-time for GE for five years prior to February 2017 and thereafter until her October 19, 2018, injury. She references Dr. Nazar's testimony that the February 2017 note may substantiate her claim of a repetitive injury instead of refuting it. Thus, Hornback asserts Dr. Lyon was either unaware of her work activities prior to 2017 or

chose to ignore them. In either case, Hornback charges he had a substantially inaccurate and largely incomplete history rendering his opinions valueless. Consequently, Hornback urges Dr. Lyon's mischaracterization of her medical history taints his opinion regarding causation. She contends that following the May 2017 event she improved to the extent that she was able to bring her symptoms to a tolerable level requiring only intermittent self-treatment.

Hornback also contends Dr. Nazar had a firm grasp of her medical history, as he identified the October 2018 work injury as the primary cause of her cervical condition. She cites to Dr. Nazar's opinion indicating the job she was performing in October 2018 was the cause of increased symptoms. She also notes the records of Baptist Health Occupational Medicine and Dr. Waters document the severe cervical and radicular symptoms which Dr. Lyon overlooked.

Finally, Hornback asserts that even though she did not allege an October 2018 cervical injury, the issue was tried by consent. She observes she testified to neck pain following this injury which Dr. Nazar testified was work-related, and this testimony was admitted without objection by GE.

For the following reasons, we vacate the ALJ's findings of fact and conclusions of law, and award, and remand.

ANALYSIS

Of primary importance is the parties' stipulation in the February 5, 2020, BRC Order that Hornback sustained work-related injuries on May 22, 2017, and October 19, 2018. The stipulation does not identify the body part or parts injured on each date. That stipulation was not withdrawn by the parties or rejected by the ALJ.

Thus, pursuant to the statute the ALJ was required to enter separate awards for each injury. Findings of fact and conclusions of law were required to address the nature and duration of each of Hornback's stipulated injuries. The ALJ failed to do this. In his opinion, the ALJ provided general findings as to whether Hornback sustained work-related cervical, carpal tunnel, and right shoulder injuries. He did not specifically address the injuries the parties stipulated occurred on May 22, 2017, and October 19, 2018. In light of the stipulation, the ALJ was obligated to address each injury delineating the body part or parts injured and the extent and duration of each injury. This is particularly true since Hornback's Petition for Reconsideration requested the ALJ to provide specific findings concerning the alleged October 19, 2018, injury which were not provided in the May 4, 2020, Order. A general finding that Hornback did not sustain cervical and bilateral carpal tunnel injuries but sustained a shoulder injury is insufficient and not in accordance with the statute and case law.

In Plumley v. Kroger, Inc., 557 S.W.3d 905, 915-916 (Ky. 2018), the Kentucky Supreme Court held:

In Plumley's case, the Board noted that "[e]xisting case law supports the notion that if the injuries are successive, the award of PPD benefits must be separated." Both the Board and Court of Appeals pointed to this Court's decision in *Lewis v. Ford Motor Co.* [footnote omitted] for guidance on this issue. Somewhat factually analogous to Plumley's case, the claimant in *Lewis* suffered injuries to the same body part, the lumbar spine, which "produced various periods of temporary total disability." [footnote omitted] This Court affirmed the Court of Appeals' determination that partial disability awards rendered for specific injuries to the same body part occurring at different times should not be aggregated to allow the claimant to receive payments that exceed the maximum for permanent total disability

...

As the Court of Appeals stated in this case, “the record contains ample evidence of specific instances of workplace trauma causing injuries of appreciable proportion. Although these injuries all converged to create the partially disabled condition in which Plumley now finds himself, to rule that these singular—but repeated—injury events created a gradual injury defies existing case law.” Lastly, Plumley can point to no legal support for his position, hanging his argument simply on attempted logical and policy considerations.

The ALJ was required to enter separate awards for the May 22, 2017, and October 19, 2018, injuries. The decision is devoid of a finding as to the body part or parts injured on the two dates and the extent and duration of each injury.

In awarding TTD benefits, the ALJ noted the parties stipulated TTD benefits were paid from October 26, 2018 through July 7, 2019. Persuaded by Drs. Lyon and Nazar, who concluded MMI for the shoulder condition occurred on July 23, 2019, the ALJ found Hornback was entitled to TTD benefits at the rate of \$595.77 per week from October 26, 2018, through July 23, 2019. Presumably, the injury date for which Hornback was awarded TTD benefits is October 19, 2018. However, in the findings of fact the ALJ did not find Hornback sustained a work-related injury on a specific date. Moreover, the ALJ did not specify which injury merited the award of TTD benefits. We concede that in the Order and Award, the ALJ stated the award of TTD benefits was for the October 19, 2018, right shoulder injury. However, there are no findings of fact specifying a date of injury and delineating the extent of the injury justifying the award. To justify an award of TTD benefits the ALJ must enter findings of fact identifying each injury as well as the extent and duration of each such injury.

This is necessary in order for the parties and the Board to be apprised of the basis for his finding concerning each injury.

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

The ALJ declared the compensability of medical expenses associated with Hornback's right shoulder condition was not in issue. Thus, GE was responsible for payment of medical expenses relating to the treatment of the right shoulder through July 23, 2019. This declaration provides no insight as to the date of the right shoulder injury for which the medical benefits were awarded. Further, in the Order and Award, the ALJ did not award medical benefits for the right shoulder condition. Stated another way, even though there was a finding of entitlement to medical benefits there was no finding of the occurrence of a right shoulder injury justifying the award of the benefits and no award of medical benefits for the right shoulder injury.

As both parties have addressed Hornback's failure to amend her Form 101 to allege an October 19, 2018, neck injury, we will resolve the issue for the benefit of the parties and the ALJ. At the end of its brief, GE notes Hornback never alleged a neck injury exacerbation as a result of the October 19, 2018, injury. Similarly, it observes Hornback did not move to amend the claim to contain such an allegation. We reject the premise that the existence of an October 19, 2018, cervical injury was not to be decided by the ALJ. Hornback's initial Form 101 alleged an October 19, 2018, injury with multiple body parts affected. He identified the right shoulder, arm, and hand. Her subsequent Form 101 relating to the May 22, 2017, injury specifically identified injuries to the right shoulder and neck. Even though she stated multiple body parts were injured and did not list a cervical injury as part of the October 19, 2018, injury, the record reveals that during her February 14, 2019, deposition Hornback was questioned extensively by GE concerning the nature of her alleged October 19, 2018, neck injury. She specifically testified she sustained a right shoulder and neck injury on October 19, 2018. Hornback introduced testimony from Drs. Nazar and Densler concerning the alleged neck injuries occurring on May 22, 2017, and October 19, 2018. GE did not object to the testimony nor move to strike it. Further, both Drs. Michael Best and Lyon, GE's medical experts, expressed opinions concerning the existence of the October 19, 2018, neck injury. The BRC Order lists the compensability of cervical fusion, causation, reasonableness and necessity of the treatment outside the physician and waiver of defense against a 113 physician as contested additional issues. It did not list Hornback's failure to allege a specific neck injury. Further, in his decision, the ALJ noted GE was disputing Hornback suffered permanent work-related injuries on either

May 22, 2017, or October 19, 2018. Thus, the existence of an October 19, 2018, neck injury was tried by consent.

In Hodge v. Ford Motor Co., 124 S.W.3d 460, 462-463 (Ky. 2003), the Supreme Court held:

Pursuant to CR 15.02, “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” In *Nucor Corp. v. General Electric Co.*, our Supreme Court discussed the purpose of CR 15.02, and explained how the rule should be interpreted by Kentucky courts:

Bertelsman Philipps explains “[o]ne of the reasons” for the rule “is to take cognizance of the issues that were actually tried.”

“The Rule goes further than authorizing amendments to conform to the evidence. It provides that if issues not raised by the pleadings are tried by express or implied consent, they shall be treated as if they had been so raised [citation omitted].

....

The decision whether an issue has been tried by express or implied consent is within the trial courts discretion and will not be reversed except on a showing of clear abuse.

....

It seems clear that at the trial stage the only way a party may raise the objection of deficient pleading is by objecting to the introduction of evidence on an unpleaded issue. Otherwise he will be held to have impliedly consented to the trial of such issue.”

Furthermore, the Supreme Court has noted that “[t]here is a need for uniformity and stability in our approach to the application of the civil rules to Workers' Compensation matters.” [footnote omitted] The

uniformity principle was followed in *Divita v. Hopple Plastics*, [footnote omitted] where this Court held that since the defendant employer's misrepresentation defense "was tried before the ALJ," the defense was properly considered by the ALJ even though the employer had failed to raise the issue in the pre-hearing conference order. [footnote omitted] This Court went on to state that CR 15.02 applied to workers' compensation proceedings, explaining that "we would not apply a more stringent rule [than CR 15.02] to an administrative hearing."

In light of the evidence in the record, we find no merit in GE's assertion that Hornback's failure to plead an October 19, 2018, neck injury prevented the ALJ from addressing whether she sustained a work-related neck injury on that date.

Accordingly, for the reasons set forth herein, the ALJ's analysis, findings of fact and conclusions of law contained in the April 6, 2020, Opinion, Order, and Award are **VACATED**. This claim is **REMANDED** to the ALJ for entry of separate awards for the injuries occurring on May 22, 2017, and October 19, 2018, in accordance with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON PHILLIPE RICH
1001 TREVILIAN WAY
LOUISVILLE KY 40213

LMS

COUNSEL FOR RESPONDENT:

HON KRISTIN DOWNS
771 CORPORATE DR STE 101
LEXINGTON KY 40503

LMS

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

LMS