

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 7, 2018

CLAIM NO. 201799744 & 201700948

MEGAN SHOEMAKER

PETITIONER

VS.                   **APPEAL FROM HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE**

KELLY SERVICES  
and HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

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

**STIVERS, Member.** Megan Shoemaker (“Shoemaker”) appeals from the July 18, 2018, Opinion and Order and the August 15, 2018, Order overruling her petition for reconsideration of Hon. John H. McCracken, Administrative Law Judge (“ALJ”). The ALJ dismissed Shoemaker’s claim for permanent income benefits and temporary total disability (“TTD”) benefits but awarded medical benefits from February 22, 2016,

through March 28, 2016, for Shoemaker's work-related cervical and right shoulder strains/sprains.

On appeal, Shoemaker first asserts the ALJ denied her claim based upon findings that are factually wrong. Shoemaker also asserts the ALJ misinterpreted the law with respect to traumatic versus cumulative trauma injuries. Further, Shoemaker argues the opinions of Drs. Rafid Kakel and Henry Tutt cannot form substantial evidence. Shoemaker asserts the ALJ discounted Dr. John Vaughn's opinion based upon a misinterpretation of his report and Kentucky law. Shoemaker also asserts the ALJ misunderstood Dr. Vaughan's opinions regarding causation. Finally, Shoemaker contends compelling evidence supports Dr. Vaughan's opinion that her cervical fusion was causally related to the February 22, 2016, injury.

#### **BACKGROUND**

The Form 101 for Claim No. 2018-99744 alleges Shoemaker sustained work-related repetitive motion injuries to multiple body part on February 22, 2016, while in the employ of Kelly Services, Inc. ("Kelly Services"). The Form 101 alleges as follows: "Repetitive motions caused neck to lock up."

The Form 101 for Claim No. 2017-00948 alleges Shoemaker sustained work-related repetitive motion injuries to multiple body parts on December 2, 2016, while in the employ of Toyota Motor Manufacturing, KY ("Toyota"). The Form 101 alleges as follows: "Repetitive motions caused neck to lock up."

By Order dated July 10, 2017, Hon. Roland Case, Administrative Law Judge, consolidated the claims.

Shoemaker was deposed on November 16, 2017. She testified she began working with Kelly Services in March 2015 and her last day with Kelly Services was either November 13 or 14, 2016.<sup>1</sup> She started working for Toyota the day after she left Kelly Services. Her job placement at Toyota was the only job she worked through Kelly Services which entailed work as a forklift and tugger operator. She testified concerning the events of February 22, 2016:

A: I was on the lane, I was on U Lane, and at this time that lane become [sic] real [sic] heavy. They was [sic] changing things in the plant. We had got [sic] a lot of heavier parts. We were getting blow outs all the time, which means – we only had six dollies, but if we – on that cycle if we have seven/eight palettes they got [sic] to throw, you know, extras over for the team leaders to run. We was [sic] constantly having six, six, you know, every single time and it was – it was heavy. And it's hard to explain, but they're in seasons, sales are lower, sales are higher for Toyota and it was at the time that sales started going higher, sales go higher our number gets bigger, how many cars we have to build a day. So that was the first time in a long good three/four months, I don't know, I'm sure you all could look it up, but it was the first time in a while that we had overtime and I had ended on that lane. It was just really heavy, it was hot. I hadn't had to – normally we run four lanes, maybe five at lunch depending on how it falls. When you run on overtime with, you know, staying on that lane with no break I was pushing myself, you have to, you to do your job and it was hard lifting those boxes and staying on time. I started dragging then everything just started getting tense, but I had to do my job. I was getting slower, but – and then I just remember being so tired picking up those airbags and I had to walk them – at that point I had to go through the AGBs. This time I couldn't just pull up to the flow rack to deliver my part, because the AGBs, that's an actual part we have to pick up, carry it, walk it over, drop it, take the empties back, drop it, walk – and it just started getting really, really tense and I just – my whole body just started

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<sup>1</sup> The Form 104 attached to her Form 101 indicates her last day of work was November 14, 2016.

getting fatigued and I was hot and this started getting painful, I guess, with pressure.

Q: You said, 'this started getting painful,' tell us what it was. I'm sorry.

A: The tense – everything my traps – everything just started pulling and in my neck, I don't know what this muscle is called –

Q: You're indicating both sides of your neck to the tops of your shoulders; is –

A: Yes, ma'am.

Q: Got tense?

A: Tense.

Q: And you said that you were working – typically this is the tigger job that you're describing?

A: Yes, ma'am.

Q: And you said that you typically worked four lanes and that during this time period you were working regularly up to six lanes?

A: Six/seven.

Q: Okay. And about how long had that been going on, like, a couple of days, a couple of weeks?

A: No, ma'am. That just started, on that last lane.

Q: That day, okay. And so you were making these deliveries of heavy parts and working faster –

A: Uh-huh, (affirmative).

Q: - and everything around the sides of your neck and the tops of your shoulders started to get really tense?

A: Yes, ma'am. And my, you know, my arms just started getting tired too, because lifting, I mean, your body gets you – to those lanes and then you start slowing down and

you pick speed right back up and at the heaviest time our lanes had ever been, which we did tell the team leaders, the whole team had reported it, but you know you had – you know, they – they design the lanes and you got [sic] to report it so they can try to make it better. But – and then it was just painful and as soon as overtime was done – normally our lanes are still out, depending on which lane – which cycle you're on, you're out when everybody else is leaving, the plant is shutting down, but you have to deliver your parts. I delivered my parts and I left, I got in the car, my fiancé works – and he – at the time he worked in Plant 2, I drove over to Plant 2, because that's gates apart, I got in the passenger seat and I laid down, I made him drive home. Everything was still tense and I just – I barely even talked on the way home. I got into the house, laid directly down on the couch while he was putting his stuff away. And my dogs, my puppy and my Chihuahua, started play wrestling at the edge of the couch and I had reached up, leaned up, sat up, and went to grab a puppy and it locked by the time I got up with my arm out, everything just instantly – I don't even know how to explain the feeling. I almost – it made me sick whenever all of it came at once, it just increased 10 times, it was like exactly what was going on, but like intensified.

Q: All right. So you were feeling this increased tenseness and you described it sort of as locking up around –

A: Uh-huh (affirmative).

Q: -your neck and shoulders?

A: Everything was just like so tense that you can't move it.

Q: Okay. And so did you seek medical treatment that night?

A: No, I tried to sleep it off. I – he had to help me take – wash my hair whenever I got in the shower and I laid down and I could not sleep. I could not get my neck in a position to where it would ease off. And I went to work the next day, got up that morning, went into work and told them immediately, because I couldn't even put my hair up in a ponytail. But, yeah, I went and told them as soon as I walked in before [sic] shift.

Shoemaker first sought medical treatment at the Toyota plant because she was unable to get into IHS that next day, and Toyota put her on restricted duty. She followed up with IHS “a couple of times” but then eventually went to her own doctor at St. Joseph who put her on muscle relaxers. She was unable to work at the Toyota plant until she stopped taking the muscle relaxers. She eventually returned to her regular job:

Q: Okay. And once you went back to your regular duty, tigger and forklift job, did you continue to seek any medical treatment from either one of them or did you pretty much finish up the medical treatment?

A: I finished up with the treatment through IHS.

Q: Okay. So you finished up with IHS and then you went back to your regular tigger and forklift job until you were then hired by Toyota in November?

A: Yes, ma'am.

Concerning her symptoms between the time she returned to full-duty work in March 2016 and the time she was seen again by IHS on December 2, 2016, Shoemaker testified:

Q: Just to kind of try to clarify what your symptoms were between when you went back to work full duty in March of 2016 and when you were seen again by IHS on December 2<sup>nd</sup> of 2016. I'm looking at the medical note from the last time you were seen at the end of treatment for your first injury that was March 28, 2016, and the notes indicate that you did not have any neck or right shoulder pain at that time; correct?

A: Yes, ma'am.

Q: Okay. So the symptoms completely resolved at some point?

A: Yes, ma'am.

Q: All right. And then the next office note of December of 2016 indicates that you have been having some symptoms since you were last seen. So my question, I guess, is when did you start – when did you go from no pain to starting to feel symptoms again?

A: About two weeks later.

Q: Two weeks after March of 2016?

A: Yes, ma'am.

Q: Okay. And then – so between then and when you were seen again you said that the symptoms were tolerable?

A: Yes, ma'am.

Q: And what does that mean exactly, like, what – tell me.

A: If this started tensing up a little bit it would –

Q: You're indicating the sides of your neck again?

A: Yeah, yeah. The sides of my neck and my trap, this trap area.

Q: On the right?

A: Yeah. I would just stretch it out and pull. It would slowly kind of start being irritated and I would just do my stretches that they had taught me to do, and it would relieve it or I would take my Ibuprofen and stretch it and it would relieve it.

Q: Okay.

A: It was manageable, I could – you know, it wouldn't –

Q: Okay.

A: - lock up or something.

Q: So you would have these episodes of a little flare up, you would treat it with stretches or over-the-counter Ibuprofen –

A: Ibuprofen.

Q: - and then it would go back to the baseline?

A: Yes.

Q: Completely resolved?

A: Yes, ma'am.

She was not on any restrictions when she was hired by Toyota in November 2016. Between November 14, 2016, when she was hired by Toyota, and December 2, 2016, when she reported the new injury, she did not see IHS. She noticed an increase in symptoms about a week before the alleged December 2, 2016, injury.

Shoemaker's last day of work at Toyota was April 12, 2017. She underwent cervical fusion surgery on August 18, 2017.

Shoemaker also testified at the May 21, 2018, Hearing. Shoemaker was put on light duty the morning after the February 22, 2016, injury:

Q: And – and there's a medical record filed into evidence, I believe it's March 24<sup>th</sup>, they said you could go back to regular duty, that you had gotten better?

A: If that's the day, yeah.

Q: Okay. And then on March 28<sup>th</sup>, this has been talked about in the record, they saw you and they said you were back at regular duty, and I want you to look at this. This is a medical record from, you call it IHS Toyota's in-house medical.

A: Yeah. Their doctors there.

Q: Okay. And it's 3/28, and well, it says what it says, but it indicates generally that your symptoms have resolved and that you've been working – you're back at full duty; right?

A: Uh-huh, (affirmative). Yeah.

Q: And that's 3/28?

A: Yes.

Q: Okay. So here's what I want – and I think that's the last time you were seen until December; correct?

A: I believe so.

Shoemaker confirmed that, from March 28 through December 2, she was not seen at IHS.

Q: Okay. And then Mr. Watts already asked you a question I was going to ask you. After you were released by Toyota Medical on March 28<sup>th</sup>, 2016, there was a gap where you didn't go back there for treatment until December 2016; is that right?

A: That's correct.

However, Shoemaker testified that she never fully recovered from the February 22, 2016, injury, and the symptoms she experienced before her cervical fusion surgery were the same symptoms she had developed on February 22, 2016.

Shoemaker introduced the February 23, 2016, medical record of Dr. Vaughan which indicates the following "history":

Pt presents as direct referral walk in due to right sided neck, thoracic, upper trap area pain with radiation into RUE. As noted in CC, started having some upper trap pain yesterday at end of workday and when she went home after laying down she tried to reach out for her dog and 'back locked up', currently reports right upper trap and neck pain 8/10, difficulty with neck motion, radiation of pain down right arm. Does report sleep disturbance due to pain last night. Has not tried any medications yet, did apply biofreeze this morning without relief. Reports no specific incident, but does state she works in conveyance and has had a lot more overtime than usual which she feels is cause. No lineside interventions were taken prior to clinic visit. Pertinent past medical history for scoliosis and reports she has had

tightness in her traps before but never anything to this degree.

Dr. Vaughan diagnosed “neck muscle strain.”

The March 30, 2017, medical record of Dr. Vaughan contains the following history:

The patient is a 22 year old female who presents to the practice today for a transition into care. Note for ‘Transition into care’: Patient complains of neck pain that radiates into her right arm. She has secondary complaints of chronic lower back pain. She attributes onset to work injury that occurred while working for Kelly temporary services. At the time she was working at Toyota. She said she injured herself in February 2016 while lifting. She said initially she was put off work and treated with muscle relaxers. She said when she returned to work her pain came back after 2 weeks. She has been treated by Dr. James rice [sic]. According to patient he has recommended surgical treatment. She is here for another opinion. She says she has tried physical therapy. She has tried a steroid injection on her neck. She has been taking gabapentin and a muscle relaxer. She says she is not working now and no longer works for Kelly temporary services.

Shoemaker also introduced Dr. Vaughan’s January 22, 2018, report.

After performing a physical examination and medical records review, Dr. Vaughan diagnosed the following: “My diagnoses include herniated disc C5-C6 and status post anterior cervical discectomy and fusion C5-C6.” Dr. Vaughan attributed both diagnoses to the work injury of February 22, 2016, and further opined Shoemaker will reach maximum medical improvement (“MMI”) six months after her surgery date on February 18, 2018. He assessed a 27% whole person impairment rating and imposed the following restrictions: “I believe appropriate restrictions would be no overall lifting greater than 25 pounds, no repetitive lifting of weights greater than 5-7 pounds, avoid

repetitive bending and twisting of neck, and avoid overhead reaching and lifting.” He opined Shoemaker does not have the ability to return to her job at Toyota or any kind of factory work. He concluded as follows:

I believe her neck condition, including herniated disc C5-C6 and status post cervical fusion, her impairment rating, her need for medical treatment, and her restrictions are directly related to the work injury of 2/22/16. I believe her history and all medical records as noted above are consistent with this. All of her healthcare providers have directly stated that her symptoms began with the work incident of 2/22/16. There was no evidence in history taking or review of medical records of any pre-existing active conditions.

In an April 11, 2018, letter, Dr. Vaughan discussed the reasons why he disagreed with Dr. Corbett’s opinions regarding causation. He opined, in part, as follows:

I have reviewed the written deposition of Ms. Shoemaker. In my review of the deposition her neck pain radiating into her arms began with the work injury at Toyota. She clearly had a cause and effect of a significant injury and development of neck and arm pain after her Toyota incident. I believe the episode where she reached for her dog and had increased pain were [sic] her neck ‘locked’ was just an exacerbation of an already active problem. This seemed to be just a trivial incident (reaching for her dog). I believe the cause of her symptoms were [sic] her work activities at Toyota.

Kelly Services introduced the December 21, 2017, Independent Medical Evaluation (“IME”) report of Dr. Kakel. After performing a physical examination and medical records review, Dr. Kakel diagnosed a “cervical strain and right shoulder strain which are now completely resolved” and “status post a cervical spine fusion at the C5-6 level.” Dr. Kakel opined the only conditions related to the February 22, 2016,

injury are the cervical and right shoulder strain. Regarding the cervical fusion surgery,

Dr. Kakel opined as follows:

I am not able to relate her current cervical spine condition to her employment or work activities at Kelly Services. She is status post cervical fusion for cervical disc protrusion at the C5-6 level, and she also had disc protrusion at C6-7. The claimant's work activities with Kelly Services are not ones that would cause her to have cervical spine disc protrusions. As stated above, her original neck and right shoulder/upper extremity symptoms were treated conservatively, and she improved. She had no diagnostic tests at the time of her original complaints or any exam findings that would indicate any cervical spine disc involvement. She also went several months without the need for any formal treatment from March 2016 until December 2016. There was no traumatic inciting event that would have caused a cervical disc protrusion to occur from her work activities and the type of work she performed is not found to be an occupational risk factor in the development of cervical disc disorders. In addition, her MRI studies revealed disc changes at more than one level of the cervical spine, which is more consistent with naturally occurring changes than with changes occurring from work activities/injury. Therefore, I do not find that her cervical disc protrusions are causally related to her employment.

Dr. Kakel opined Shoemaker reached MMI from her cervical and right shoulder strain on March 28, 2016, and stated, "there is no permanent functional impairment that is causally related to her employment at Kelly Services." He imposed no restrictions. He assessed a 25% whole person impairment rating as a result of the August 18, 2017, cervical spine fusion.

Kelly Services also introduced Dr. Kakel's April 18, 2018, IME Addendum in which he opined as follows:

I have reviewed Dr. Vaughan's January 22, 2018, report and respectfully disagree with his opinions. Dr. Vaughan appears to relate the claimant's cervical disc protrusions

and subsequent fusion surgery to her work injury based upon the fact she did not have any pre-existing neck injuries or conditions and her first office visit took place on March 3, 2016 and there was 'fairly clear causation'. It does not appear that the mechanism of injury or gap in treatment were taken into consideration by Dr. Vaughan when formulating his opinion.

I on the other hand, based my opinion on Ms. Shoemaker's cervical disc protrusions and subsequent surgery as not being related to the February 22, 2016, work incident on the reported mechanism of injury/work activities, which did not consist of a traumatic inciting event that would cause such conditions. In my opinion, the described mechanism of injury is instead consistent with a cervical sprain and right shoulder strain. Also of importance when formulating my opinion was the fact the claimant improved with treatment and returned to her regular job on March 28, 2016, which is consistent with a sprain. In addition, there was a significant gap in treatment from March 2016 until December 2016 when Ms. Shoemaker against sought treatment for neck pain. Lastly, the February 2017 MRI findings, in my opinion, are too far removed from the date of injury to be causally related.

Kelly Services also introduced the April 13, 2018, "Medical Review" report of Dr. Tutt. After performing a medical records review, Dr. Tutt diagnosed the following:

- a. Cervical strain/sprain, transient myofascial injury, resolved, relative to work event of 02/23/2016.
- b. Right C5-6 disk protrusion with cervical radiculopathy, resolved, status post anterior cervical discectomy and fusion, spontaneous occurrence.

Dr. Tutt opined Shoemaker reached MMI with respect to the February 23, 2016, transient cervical strain on March 28, 2016. He assessed a 25% whole person impairment rating due to Shoemaker's cervical fusion surgery, but stated the surgery and resultant impairment rating are not related to her work with Kelly Services.

Medical records from the Toyota Medical Department were introduced by Kelly Services. The first record, "IHS Patient Intake Form," is dated February 23, 2016, and indicates Shoemaker was experiencing "neck and shoulder blade spasms." Dr. Gregory Robbins diagnosed a "neck muscle strain" on the same date. The next record dated February 29, 2016, states Shoemaker was seen by Rachel Johnson, APRN ("Johnson"). The record notes, in relevant part, as follows: "States she is feeling improved, has increased ROM in neck, continues to have muscle tightness but feels EIA is helping, taking Ibuprofen otc as needed, using ice, and using biofreeze." A third medical record dated March 10, 2016, indicates Shoemaker, who was seen by Nan Pack, PA, was "improving." A March 21, 2016, record indicates Shoemaker was seen by Johnson again and feels ready to resume fully duty. Finally, a March 28, 2016, record indicates Shoemaker was seen by Carla Kelley, ARP, and was "doing much better," working regular duty, and not experiencing neck or right shoulder pain. She was returned to regular duty work on the same date.

The May 21, 2018, Benefit Review Conference Order and Memorandum lists the following contested issues: work-related injury/causation, permanent income benefits per KRS 342.730, TTD benefits, ability to return to work, vocational rehabilitation, and unpaid or contested medical expenses. Under "other contested issues" is "temporary vs. permanent injury." The parties stipulated to an average weekly wage of \$751.70.

Filed in the record is a Form 110-I Agreement as to Compensation and Order Approving Settlement entered into between Shoemaker and Toyota approved by the ALJ on June 28, 2018. The Form 110 reflects Shoemaker and Toyota settled

for \$5,000.00 which included a buyout of past medical benefits, future medical benefits, vocational rehabilitation, and a right to reopen.

In the July 18, 2018, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

**1. DID MS. SHOEMAKER SUSTAIN A WORK-RELATED INJURY AND WAS IT PERMANENT?**

Ms. Shoemaker pled the case, and has testified, that her injury occurred because of the repetitive motion caused by the fast pace movements required in the tugging portion of her job. This job required her to lift parts that she stated were heavy. However, she had been at this job for just under a year when she complained of her neck and right shoulder spasms and pain. She has not testified to lifting any specific part that caused a traumatic incident that produced her symptoms. Dr. Vaughan states that she had an injury on February 22, 2016 that produced her neck issues. As stated by Dr. Corbitt [sic], Dr. Vaughan rests his causation opinions on the fact that she had no prior neck or shoulder injuries. Since there were no prior injuries, the injury occurred on February 22, 2016. The only “incident” the ALJ can find that Ms. Shoemaker stated produced the “locking up” of her neck was when she reached for her dog. However, she never told Dr. Vaughan about the incident with her dog. There is a difference in the required proof for a cumulative trauma claim as opposed to an acute trauma claim. When reading Dr. Vaughan’s reports, the ALJ is convinced that he was under the impression some traumatic event occurred on February 22, 2016 that caused her neck symptoms and subsequent surgery. Ms. Shoemaker also failed to tell Dr. Kakel about the incident with her dog.

The ALJ does not believe that the incident with her dog caused her neck condition that ended up with surgery and, therefore, disagrees with Dr. Corbitt [sic]. However, the ALJ is puzzled as to why she did not tell Dr. Vaughan about this condition when that is the only thing that happened on February 22, 2016 that she stated caused her neck to lock up. Until that time, she was fatigued, having neck spasms that also involved her right shoulder.

Dr. Kakel stated that her current cervical issues, and subsequent surgery, were not related to the original injury of February 22, 2016. Key to her medical condition is answering the question of what caused the cervical disc protrusions. Dr. Kakel opined that there was no traumatic inciting event that could have produced the cervical disc protrusion. She was treated conservatively and got better. Additionally, he stated that the MRI studies revealed disc changes at multiple levels in her cervical spine that was not consistent with her described work activities, but, more in line with naturally occurring changes.

The ALJ understands that Ms. Shoemaker testified that she continued to have problems beginning a few weeks after she returned to work in March of 2016. However, she did not present those problems to anyone at Kelly Services or Toyota. Then, within a couple of weeks of being hired by Toyota, she stated that her neck had been worse the few weeks before December 2, 2016. The ALJ has trouble with the gap in time where she received no treatment and made no complaints to either Defendant or Toyota regarding her neck. She reported that the flare-ups she had quickly resolved during this gap of time.

The ALJ relies on Dr. Kakel and Dr. Tutt to find that Ms. Shoemaker sustained a work injury on February 22, 2016 while working for Defendant, Kelly Services. The ALJ relies on these doctors to find that she sustained a cervical strain/sprain and right shoulder strain injury that was temporary in nature and resolved on March 28, 2016. The ALJ relies in part on Ms. Shoemaker's testimony that her symptoms were resolved on March 28, 2016 and that she had returned to work to her regular job. The ALJ finds that her MMI date is March 28, 2016. The ALJ relies on the opinions of Dr. Kakel and Dr. Tutt to find that the gap in time between March 28, 2016 and approximately December 2, 2016 is sufficient to terminate any nexus between the original February 22, 2016 injury and her subsequent cervical fusion. The ALJ relies on these doctors to find that the subsequent cervical surgery and her current neck condition is not related to the February 22, 2016 work injury.

## **2. MEDICAL BENEFITS**

Having found a temporary injury with an MMI date of March 28, 2018, the ALJ finds that Ms. Shoemaker is entitled to medical benefits from February 22, 2016 to March 28, 2016, for the cervical and shoulder conditions. The ALJ finds that she is not entitled to future medical benefits.

## **3. KRS 342.730**

The ALJ has found that Ms. Shoemaker sustained a temporary injury, not permanent. Therefore, the ALJ finds that she is not entitled to permanent partial income benefits pursuant to KRS 342.730.

## **4. TEMPORARY TOTAL DISABILITY BENEFITS (TTD)**

KRS 342.040 requires a claimant to suffer a disability rendering them unable to work for longer than seven days in order to receive TTD from the first day of disability. In this claim, Ms. Shoemaker did not miss more than seven days between February 22, 2016 and March 28, 2016 that would qualify her for TTD payments. Therefore, the ALJ finds, based upon the testimony of Ms. Shoemaker, that she is not entitled to receive TTD benefits.

## **5. VOCATIONAL REHABILITATION**

KRS 342.710 allows an employee to receive vocational rehabilitation services when the injury causes that person to be unable to perform work for which he had prior training or experience. The ALJ has found that Ms. Shoemaker sustained a temporary injury that resulted in no TTD benefits being awarded. Therefore, the ALJ finds that vocational rehabilitation services are not appropriate in this claim.

## **6. UNPAID OR CONTESTED MEDICAL EXPENSES**

The ALJ has awarded medical expenses related to her cervical and right shoulder strain/sprains as a result of the February 22, 2016 injury, through March 28, 2016, the date of MMI. The Defendant is responsible for her

medical expenses related to those injuries during that time frame.

Both parties filed petitions for reconsideration. In her petition, Shoemaker asserted the ALJ “misinterpreted” the report of Dr. Vaughan, and the medical opinions of Dr. Kakel and Dr. Tutt cannot form substantial evidence. By order dated August 15, 2018, the ALJ denied Shoemaker’s petition stating, in part, as follows:

The ALJ believes that Plaintiff is re-arguing her case. The ALJ found that she sustained a work-related injury while working for Defendant, but that the injury was temporary in nature, not permanent. The ALJ found that the gap in time between the date of injury and her cervical surgery was too long to relate the cervical surgery to the work injury.

#### **ANALYSIS**

As the claimant in a workers’ compensation proceeding, Shoemaker had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Shoemaker was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). 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 that 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 discretion to determine 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). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

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 that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Shoemaker first asserts the ALJ denied her claim based upon findings that are factually wrong. Specifically, Shoemaker asserts the ALJ erroneously concluded she did not seek medical treatment between the time she returned to her job at Kelly Services in March 2016 and the time she was hired by Toyota in November 2016. She asserts she had an appointment at Kentucky One Primary Care Associates

("Kentucky One") on April 27, 2016, during which an MRI scan was recommended.<sup>2</sup> Shoemaker also asserts the ALJ erroneously believed the February 22, 2016, incident during which her neck locked up when she was reaching for her dog, is the *only* incident occurring that day and caused her neck to lock up. We affirm on this issue.

In the July 18, 2018, Opinion and Order, the ALJ determined there was a "gap in time" between March 28, 2016, and December 2, 2016, during which "she received no treatment and made no complaints to either Defendant or Toyota regarding her neck." This finding of fact is consistent with Shoemaker's deposition testimony as well as IHS records. Shoemaker testified her symptoms resolved at some point between March 28, 2016, and December 2, 2016, she was working the tugger and forklift job the entire time, she was tolerating the job "pretty well," and she was not under any restrictions. Contemporaneous IHS records indicate the same. We acknowledge Shoemaker's deposition testimony indicates she experienced occasional symptom flare-ups between March 28, 2018, and December 2, 2016, and her hearing testimony indicates she never fully recovered from the February 22, 2016, injury as she experienced pain during this entire period. We also acknowledge Shoemaker's argument that she was seen at Kentucky One on April 27, 2016. *However, there is no evidence Shoemaker complained to Kelly Services or Toyota of pain during this time period.* Further, we are unable to locate any medical records from Kentucky One dated April 27, 2016. In fact, consistent with the ALJ's summary of the medical evidence, the only

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<sup>2</sup> Shoemaker states as follows in her brief: "In fact, Plaintiff was seen at Kentucky One Primary Care Associates on 4-27-16, and was quoted stating that on the previously [sic] Tuesday she had started having pain, burning and a pinching feeling in her back and neck, running over her shoulder blades **and into her right arm. An MRI scan was recommended at that time.** These are virtually the same symptoms which she reported on 2-23-16." (emphasis in original).

medical records filed in the record from Kentucky One are dated March 3, 2016, and March 8, 2016. We note Dr. Tutt's medical record of April 13, 2018, mentions Kentucky One's April 27, 2016, medical record in his medical records summary.<sup>3</sup> However, the ALJ is not required to rely upon a physician's summary of a medical record. More importantly, Dr. Tutt opined Shoemaker reached MMI from her February 22, 2016, injury on March 28, 2016, the date IHS released Shoemaker to regular-duty work without restrictions.

As substantial evidence supports the factual findings that Shoemaker did not report ongoing problems with her neck or shoulder to Kelly Services or Toyota between March 28, 2016, and December 2, 2016, or receive treatment, we will not disturb this finding of fact by the ALJ.

In this same section of her brief, Shoemaker also asserts the ALJ erred in finding the incident of Shoemaker reaching for her dogs on February 22, 2016, is the only incident that caused her neck to lock up on that date. However, this finding is wholly consistent with Shoemaker's deposition testimony in which she testified that, even though she was experiencing tension in her neck and shoulder while working on February 22, 2016, it was only when she was at home and reaching for one of her dogs that her neck locked up. We will not disturb this finding of fact.

In her second argument on appeal, Shoemaker asserts the ALJ misinterpreted the law pertaining to cumulative trauma injuries and acute trauma

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<sup>3</sup> The summary reads: "On 04/27/2016, the patient related that the previous Tuesday at work she started having pain, burning and a pinching feeling in the back of her neck, running over her shoulder blades. She related the neck pain seemed to get better and then Tuesday she started having pain in her neck that moved into her right arm to her elbow. Nikita Sutton, APRN, recommended a cervical MRI scan."

injuries and, therefore, misinterpreted Dr. Vaughan's opinions on causation. We affirm on this issue.

The ALJ recognized Shoemaker originally pled she sustained a repetitive motion injury in her Form 101. As stated in the July 18, 2018, Opinion and Order, "Ms. Shoemaker pled the case, and has testified, that her injury occurred because of the repetitive motion caused by the fast past movement required in the tugging portion of her job." Further, the ALJ *fully* understood Dr. Vaughan's medical opinions and the fact that Dr. Vaughan drew a causal connection between the injury of February 22, 2016, and her subsequent August 18, 2017, cervical fusion surgery. As the ALJ stated in the July 18, 2018, Opinion and Order, "[w]hen reading Dr. Vaughan's reports, the ALJ is convinced that he was under the impression some traumatic event occurred on February 22, 2016 that caused her neck symptoms and subsequent surgery." The ALJ stated that "Dr. Vaughan rests his causation opinions on the fact that she had no prior neck or shoulder injuries. Since there were no prior injuries, the injury occurred on February 22, 2016." However, instead of relying upon Dr. Vaughan's opinions on the causal connection between the injury of February 22, 2016, and Shoemaker's cervical fusion surgery, the ALJ relied upon the opinions of Drs. Kakel and Tutt who, as previously discussed, diagnosed only a *transient* injury that fully resolved by March 28, 2016. The ALJ further relied upon the opinions of Drs. Tutt and Kakel in concluding "the gap in time between March 28, 2016 and approximately December 2, 2016 is sufficient to terminate any nexus between the original February 22, 2016 injury and her subsequent cervical fusion." The ALJ, fully aware of the substance of Dr. Vaughan's opinions, decided to nonetheless reject those

opinions, which he is entitled to do. When “the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe.” Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). We affirm on this issue.

In her third argument on appeal, Shoemaker asserts the opinions of Drs. Kakel and Tutt cannot constitute substantial evidence because they erroneously determined Shoemaker reached MMI from the February 22, 2016, neck and right shoulder strain in late March 2016. We affirm on this issue.

In the Glossary of the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, P. 601, “MMI” is defined as follows:

Maximal Medical Improvement. A condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated.

Drs. Kakel and Tutt determined Shoemaker sustained a *temporary* neck and right shoulder strain on February 22, 2016, and she reached MMI status on March 28, 2016. This finding is supported by the above-discussed IHS records and Shoemaker’s testimony that she did not receive medical treatment for her injury from March 28, 2016, through December 2, 2016. The ALJ is certainly not required to challenge a physician’s opinion regarding MMI but, instead, may rely upon the physician’s expertise in determining an MMI date. Two physicians, Drs. Kakel and Tutt, opined Shoemaker sustained a transient neck and right shoulder injury on

February 22, 2016, which resolved on March 28, 2016. As the opinions of Drs. Kakel and Tutt comprise substantial evidence, the ALJ was free to rely on those opinions. This Board will not disturb the ALJ's discretion.

In her fourth and fifth arguments on appeal, Shoemaker asserts, in sum, that the ALJ misinterpreted Dr. Vaughan's report and failed to properly weigh his opinions on causation. As these are mere re-arguments of Shoemaker's second argument on appeal, and since that argument was fully addressed and disposed of, we will not address it again.

Finally, Shoemaker asserts compelling evidence supports the opinion of Dr. Vaughan that Shoemaker's cervical fusion surgery is causally related to the injury of February 22, 2016, because "Dr. Tutt's and Dr. Kakel's opinions that Plaintiff had a full recovery in the last week of March are simply factually wrong." For the reasons already stated herein, we affirm the ALJ on this issue. As stated, the opinions of Drs. Tutt and Kakel regarding Shoemaker's recovery in late March are not only supported by the medical records from IHS but by Shoemaker's testimony. The ALJ relied upon the opinions of Drs. Tutt and Kakel to conclude the span in time between March 28, 2016 and December 2, 2016 is sufficient to terminate any causal connection between the original February 22, 2016 injury and her subsequent cervical fusion. While Shoemaker may point to evidence supporting a different outcome than that reached by an ALJ, in this case the opinions of Dr. Vaughan, such proof is not an adequate basis to reverse on appeal as long as substantial evidence supports the ALJ's ultimate determination. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The ALJ was not required to rely upon the opinions of Dr. Vaughan. The opinions of Drs. Tutt

and Kakel constitute substantial evidence in support of the ALJ's determination Shoemaker's cervical fusion surgery is not casually connected to the injury of February 22, 2016. Thus, we affirm on this issue.

Accordingly, the July 18, 2018, Opinion and Order and the August 15, 2018, Order are hereby **AFFIRMED**.

ALL CONCUR.

**DISTRIBUTION:**

**METHOD**

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