

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: June 19, 2020

CLAIM NO. 201870815 & 201792231

NANCY RIGGS

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

TOYOTA BOSHOKU  
and HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
VACATING IN PART, AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Nancy Riggs (“Riggs”) appeals from the May 13, 2019, Interlocutory Opinion and Order, the May 29, 2019, Order ruling on Riggs’ Petition for Reconsideration, the June 13, 2019, Order of Clarification, and the February 20, 2020, Amended Opinion, Award, and Order of Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). In the May 13, 2019, Interlocutory Opinion and

Order, the ALJ dismissed Riggs' claim for a right shoulder injury allegedly occurring on May 29, 2018, based upon the medical opinions of Dr. Ronald Burgess. In the May 29, 2019, Order, the ALJ corrected a typographical error and reiterated his reliance upon Dr. Burgess. In the June 13, 2019, Order on Clarification, the ALJ again reiterated his reliance upon Dr. Burgess and re-stated his conclusion that Riggs' rotator cuff re-tear was caused by a pool skimming incident and not a failure of the first surgery. In a January 17, 2020, Opinion and Award, the ALJ dismissed Riggs' claim including a cervical spine injury claim based upon Dr. Thomas Becherer's opinions. Finally, in the February 20, 2020, Opinion ruling on both parties' petitions for reconsideration, the ALJ attached an "Amended Opinion, Award, and Order" in which he awarded Riggs permanent partial disability ("PPD") benefits for her January 27, 2017, right shoulder injury based upon Dr. Ellen Ballard's 3% whole person impairment rating and medical expenses from January 17, 2017, through "January 8, 2017."

On appeal, Riggs asserts three arguments. First, Riggs asserts the ALJ erred in concluding the August 1, 2018, surgery was unrelated to the failure of the first rotator cuff repair surgery. Next, Riggs asserts the ALJ erred by not considering the direct and natural consequence rule. Finally, Riggs argues the ALJ erred by relying upon Dr. Ballard's 3% impairment rating for the right shoulder injury.

### **BACKGROUND**

The Form 101 in Claim No. 201792231, filed September 4, 2018, alleges Riggs sustained a work-related injury to her right shoulder on January 27, 2017, while

in the employ of Toyota Boshoku (“Toyota”) and in the following manner: “Plaintiff was pulling hard plastic totes from overhead & felt pain in right shoulder.”<sup>1</sup>

The Form 101 in Claim No. 201870815, filed October 31, 2018, alleges Riggs sustained a work-related right shoulder injury on May 29, 2018, in the following manner: “Claimant was pulling rack, became entangled & jerked to pull free. She had immediate onset of right shoulder pain.”

By order dated December 20, 2018, the claims were consolidated under Claim No. 2018-70815.

Riggs was deposed on November 1, 2018. Regarding the January 27, 2017, work injury, she testified as follows:

Q: Okay. All right. Now, I want to talk about your worker’s compensation claim. And your application gives the date of injury as January 27<sup>th</sup>, 2017; is that right?

A: That’s when I first saw the doctor.

Q: Okay. So when – I mean, was that the first day you noticed –

A: No.

Q: Okay. So when did you start noticing your –

A: September, ’16.

Q: Okay.

A: The end of September.

Q: Of 2016?

A: Yes.

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<sup>1</sup> The Board notes that Toyota was insured by a different entity on the date of each alleged injury.

Q: Okay. You started noticing pain in your right shoulder?

A: Yes.

Q: Okay. Were you doing something specific that day or was it just kind of gradually you started noticing some symptoms?

A: No, I was pulling racks from over my head – totes, I'm sorry, totes.

Q: Okay. What was in the totes?

A: The totes were empty.

Q: Okay. And what sort of symptoms did you first notice?

A: Sharp, stabbing pain.

Q: Okay. So when you started noticing your symptoms, did you just keep working your regular job?

A: I reported it to my group leader.

Q: Okay. In September?

A: Uh-huh.

Q: Okay. And then what did they do?

A: At the end of the day I went to the office and they did a report, HR and one of the managers.

Q: Okay. Did they keep you working your regular job?

A: Yes.

Q: Okay. Was the sharp, stabbing pain something that was there all the time, or was it when you would reach overhead, or was there something specific you would do where it would be worse?

A: There was always some pain.

Q: Okay.

A: Dull.

Q: Okay. Did it gradually get worse?

A: Yes.

Q: Okay. And that – is that why – it got to the point where it got worse enough that that's when you decided to go see a doctor?

A: Yes. Well, I kept letting them know that it was still bothering me. And eventually I was like that's it, I got to go.

Q: Okay. So, you went to a doctor on January 27, 2017?

A: Yes.

On May 8, 2017, Dr. Ty Richardson performed the first rotator cuff repair surgery on Riggs' right shoulder. Riggs alleged that when she returned to work, she reinjured her shoulder. She explained:

Q: Okay. And when was that, do you remember that day?

A: May 21<sup>st</sup> of '18.

Q: Okay. And I guess tell me what happened on May 21<sup>st</sup>.

A: I was pulling racks, but there was other racks in the middle of the aisle blocking me. So, I had to pull my racks up on a rubber mat to get through my line, and kind of jerking them to keep from hitting the racks in the middle up onto the mat, pulling them through all day, and pain just – about 2:30 in the afternoon pain shot through that arm.

Q: Through your right arm?

A: Yes.

Q: Okay. Were these the racks that were, I think you said like seven foot tall?

A: Yes.

Dr. Richardson performed a second rotator cuff surgery on August 1, 2018.

The carrier at risk for the second injury introduced Dr. Burgess' October 26, 2018, Independent Medical Examination ("IME") report during his February 6, 2019, deposition. After performing a physical examination and a medical records review, he set forth the following opinions:

I feel Ms. Riggs is status post repair of a recurrent right supraspinatus rotator cuff tear. Ms. Riggs states today that she had had increasing pain in September 2017, which is noted in Dr. Richardson's notes of having occurred after skimming a pool. I feel within medical probability that she had a disruption of her rotator cuff tear during that period of time. It should be noted that the retraction of 4.5 cm is significant retraction, which would place Ms. Riggs at high risk for re-rupture. Dr. Moskal's evaluation prior to the date of injury on 05/29/18, including a sonogram of the right rotator cuff showed the failed rotator cuff tear. I feel, therefore, that the incident on 05/29/18 temporarily exacerbated her discomfort, but that the rotator cuff had already re-torn by that stage.

Dr. Burgess opined that Riggs would achieve maximum medical improvement ("MMI") six months after the August 1, 2018, surgery. He further opined, "I feel that the second surgery on 08/01/18 and any permanent impairment and restrictions are secondary to the failure of the first surgery, which occurred prior to the injury on 05/29/18."

As previously noted, Dr. Burgess was deposed on February 6, 2019. Dr. Burgess examined Riggs on October 26, 2018. He reviewed the ultrasound performed by Dr. Michael Moskal on May 17, 2018, a June 14, 2018, MRI, and two reports of Dr. Moskal dated February 4, 2019, and February 5, 2019. Dr. Burgess expected Riggs to feel pain carrying out normal activities on the day of the alleged May 29, 2018, work

incident because of the rotator cuff tear as noted on the May 17, 2018, sonogram.<sup>2</sup> Dr. Burgess testified the failed rotator cuff repair necessitated the surgery performed on August 1, 2018, by Dr. Richardson, and any impairment rating Riggs might have subsequent to the second surgery is secondary to the failure of the first surgery. He opined the symptoms occurring at work on May 29, 2018, were not the result of an injury, and any medical care rendered after May 17, 2018, the date of the sonogram, was due to the pre-existing rotator cuff tear. He testified as follows:

Q: Doctor, do you have an opinion as to whether or not the symptoms reported as occurring at work on May 21 [sic], 2018 caused any injury or permanent harmful change in the human organism?

A: No.

Q: Okay. And, Doctor, would any medical care or treatment, from and after May 17, 2018, the date of the sonogram, be due to the preexisting tear and the failed rotator cuff repair, noted on the sonogram of May 17, 2018?

A: Yes.

Q: Okay. So is there any past or future medical care or treatment necessary due to the symptoms reported by this patient on May 21, 2018?

A: No.

Regarding whether the September 2017 pool skimming incident caused the failure of Riggs' first rotator cuff surgery, Dr. Burgess testified:

Q: All right. Dr. Burgess, I have just a few. Failed rotator cuff repairs, are they, typically traumatically induced?

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<sup>2</sup> We note that, at this point in the deposition, counsel erroneously referred to the alleged work-related incident as occurring on May 21, 2018, instead of May 29, 2018.

A: Typically, there is not an – a single traumatic event associated with them. They just fall apart.

Q: Okay. So I guess in your report, you say that you think that the failed rotator cuff repair happened sometime in September of 2017, right?

A: Yes.

Q: Okay.

A: Based on her stories that her pain started increasing at that time, after doing well.

Q: Okay. And she reported that – or it's reflected in Dr. Richardson's notes that she had increased pain in her shoulder after skimming a pool, right?

A: Yes.

**Q: Is a traumatic event like that something that would begin – or start the process for the rotator cuff to 'fall apart,' as you've said?**

**A: It's possible, but I can't state that within medical probability.** (emphasis added).

The carrier at risk for the first shoulder injury filed a questionnaire completed by Dr. Becherer on November 28, 2018. Dr. Becherer checked "yes" by the following question: "Do you believe the January 27, 2017 work incident resulted in a harmful change to the human organism as evidenced by objective medical findings with regard to the patient's cervical spine?" He described the injury as follows: "temporary neck strain superimposed upon natural degenerative changes."

Attached to the Form 101 in Claim No. 201792231 is Dr. Moskal's May 24, 2018, IME report. After performing a physical examination of Riggs on May 17, 2018, and a medical records review, Dr. Moskal diagnosed cervical radiculopathy, assessed a 5% DRE Cervical II whole person impairment rating, and opined

continuing non-operative care was reasonable. With respect to Riggs' right shoulder condition, he opined she was not yet at MMI unless she declined further surgery. Riggs' "combined shoulder impairment is 13% upper extremity or 8% whole person." He stated the "total combined whole person impairment is 17%."<sup>3</sup>

The carrier at risk for the second alleged shoulder injury introduced Dr. Moskal's January 31, 2019, deposition. Relevant to the issues on appeal is the following testimony regarding the failure of Riggs' first rotator cuff repair:

Q: Okay. Doctor, based on your education experience and training, are you confident in your opinion rendered in your report that, in fact, this sonogram and these illustrations you've reviewed today do, in fact, reveal a failed rotator cuff repair?

A: What it identifies is a defect or a tear after rotator cuff which is failed.

Q: Yes. You're confident in that opinion today based on you [sic] review?

A: I just want to be – I just want to be sure on the context of that, that I'm not criticizing or saying someone did a poor job.

Q: I'm not getting into that. I just want –

A: Well, I just want to make sure. That's all.

Q: Yeah. You said in your report –

A: It's failed.

Q: - that sonogram failed?

A: It's a failed –

Q: And you've re-reviewed it today?

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<sup>3</sup> In his January 31, 2019, deposition, Dr. Moskal noted his combined whole person impairment rating should be 13% and not 17%.

A: It's a failed rotator cuff repair, yes.

Q: And you're confident in that opinion, based on your education, experience and training, what you just showed us?

A: It's my belief that I've expressed today.

Q: Yeah.

A: I don't have any reason, after I've looked at these images, these two images, to suggest that I'm wrong.

By order dated January 31, 2019, the ALJ bifurcated the claim to determine the issue of work-relatedness and causation concerning the alleged May 29, 2018, right shoulder injury.

In the May 13, 2019, Interlocutory Opinion and Order, the ALJ dismissed Riggs' claim for the May 29, 2018, right shoulder injury. His findings of fact and conclusions of law are set forth *verbatim*:

18. The Plaintiff has reported an injury occurring on May 29, 2018, which resulted in the immediate onset of right shoulder pain and which ultimately resulted in an additional surgery that was performed on August 1, 2018.

19. The ALJ finds in this matter that the most credible evidence consists of the deposition testimony of Dr. Ronald Burgess who indicated, based upon his comparison of the sonogram dated May 17, 2018, and the MRI dated June 4, 2018, that the symptoms which became apparent to the Plaintiff in late May of 2018, at work were the result of the failed rotator cuff repair as seen by imaging taken just days prior.

20. Dr. Burgess noted that the tear appeared to be almost the identical size in both images and that the difference that was noted was not clinically significant. Dr. Burgess then credibly opined that the August 1, 2018, surgery was due to the failure of the first rotator cuff repair and that the incident reported by the Plaintiff as occurring at work resulted in no harmful change to the human organism.

Dr. Burgess went on to opine that the failure of the prior surgical repair probably occurred in September of 2017 and noted that the Plaintiff reported increased pain at that time possibly in relation to an incident that occurred while she was skimming a pool. The ALJ finds that this opinion is credible and convincing.

21. Dr. Burgess further credibly opined that past or future medical care or treatment rendered due to the May 2018 work incident would be due to a re-tear of the prior surgical repair that must necessarily have occurred prior to the sonogram of May 17, 2018. This logical opinion based specifically upon objective medical evidence consisting of the comparison of imaging studies has convinced the ALJ and the ALJ thus finds that the Plaintiff did not suffer a harmful change to the human organism as of the date of the work injury reported in May of 2018.

22. The ALJ further finds based upon the opinion of Dr. Burgess, that any medical care or treatment rendered after the May 17, 2018, sonogram was due to the pre-existing tear and the failed rotator cuff repair noted on the sonogram and that no past or future medical treatment is attributable to the symptoms reported by the Plaintiff on May 21, 2018, or as referenced in the Form 101 as occurring on May 29, 2018.

Both parties filed petitions for reconsideration requesting clarification regarding whether the medical treatment Riggs received after May 21, 2018, was related to the January 27, 2017, claim or the September 2017 pool skimming incident.

In the May 29, 2019, Order, the ALJ corrected a typographical error and reiterated his reliance upon Dr. Burgess and the conclusions he reached in the May 13, 2019, Interlocutory Opinion and Order.

In the June 13, 2019, Order of Clarification, the ALJ held as follows:

This matter is before the ALJ upon the Joint Motion for Clarification made by the parties during a telephone conference conducted on June 7, 2019, seeking a factual determination regarding the cause of the Plaintiff's right shoulder injury. Having reviewed the matter and being

otherwise sufficiently advised, the following additional findings are hereby entered:

1. The ALJ reiterates the reliance upon the opinion of Dr. Burgess who opined that the failure of the prior surgical repair probably occurred in September of 2017 when the Plaintiff reported increased pain due to skinning a pool.

2. The ALJ finds that the comparison of diagnostic imaging referenced by Dr. Burgess supports the finding that medical care or treatment rendered as a result of the May 2018 work incident was due to a re-tear of the prior surgical repair that must necessarily have occurred prior to the sonogram of May 17, 2018. The ALJ finds that the re-tear was the result of the September 2017, pool skinning incident and was not due to an otherwise benign failure of the first surgery.

The November 19, 2019, Benefit Review Conference (“BRC”) Order and Memorandum reflects Riggs and the carrier at risk for the first injury stipulated Riggs sustained a January 17, 2017, work-related injury. The stipulations also indicate temporary total disability (“TTD”) benefits were paid from April 29, 2017, though January 6, 2018, for a total of \$15,035.71, and medical expenses were paid in the amount of \$33,875.62. The following contested issues were listed: “benefits per KRS 342.730, work-relatedness/causation (neck), unpaid or contested medical expenses, injury as defined by the Act, date of MMI, and proper use of the Guides (Dr. Ballard).”

In the January 17, 2020, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

...

6. The Plaintiff has presented the opinion of Dr. Moskal to establish a compensable cervical claim. The ALJ is not persuaded by the opinion of Dr. Moskal as his report is vague and inconsistent with the opinions of the treating neurosurgeon and the stated complaints of the Plaintiff. The opinion of Dr. Moskal is also admittedly based upon MRI results which he did not personally review.

7. The ALJ therefore finds that the opinion of the treating physician, Dr. Becherer, is the most persuasive and convincing in this matter. Dr. Becherer personally reviewed the Plaintiff's MRI and opined that the Plaintiff suffered a temporary neck strain superimposed upon natural degenerative changes. The opinion of Dr. Becherer has convinced the ALJ and the ALJ thus finds that the Plaintiff suffered a temporary strain that resolved.

8. The reliance upon the opinion of Dr. Becherer and the rejection of that of Dr. Moskal leads to the conclusion that the Plaintiff has failed to satisfy her burden to establish a harmful change in the human organism evidenced by objective medical findings. Accordingly, the Plaintiff's claim for benefits related to a cervical spine injury must be **DISMISSED**. All other contested issues have therefore been rendered **MOOT**.

Both parties filed petitions for reconsideration. Riggs asserted the ALJ erred by failing to address the January 27, 2017, injury to her right shoulder, an injury to which the parties stipulated. Riggs requested additional findings regarding whether the August 2018 surgery was a direct and natural consequence of Riggs' January 27, 2017, injury or a new injury. Riggs also asserted the ALJ failed to make sufficient findings regarding her attainment of MMI.

Toyota also requested additional findings regarding the extent and duration of Riggs' January 27, 2017, right shoulder injury. It requested that the ALJ award PPD benefits for the right shoulder injury based upon Dr. Ballard's 3% impairment rating.

Attached to the February 20, 2020, Order is an Amended Opinion, Award, and Order in which the ALJ set forth the following amended findings of fact and conclusions of law:

...

6. The Plaintiff has presented the opinion of Dr. Moskal to establish a compensable cervical claim. The ALJ is not persuaded by the opinion of Dr. Moskal as his report is vague and inconsistent with the opinions of the treating neurosurgeon and the stated complaints of the Plaintiff. The opinion of Dr. Moskal is also admittedly based upon MRI results which he did not personally review.

7. The ALJ therefore finds that the opinion of the treating physician, Dr. Becherer, is the most persuasive and convincing in this matter. Dr. Becherer personally reviewed the Plaintiff's MRI and opined that the Plaintiff suffered a temporary neck strain superimposed upon natural degenerative changes. The opinion of Dr. Becherer has convinced the ALJ and the ALJ thus finds that the Plaintiff suffered a temporary strain that resolved.

8. The reliance upon the opinion of Dr. Becherer and the rejection of that of Dr. Moskal leads to the conclusion that the Plaintiff has failed to satisfy her burden to establish a harmful change in the human organism evidenced by objective medical findings. Accordingly, the Plaintiff's claim for benefits related to a cervical spine injury must be **DISMISSED**.

**Benefits Per KRS 342.730/  
Proper Rating Per the AMA Guides  
(Right Shoulder)**

9. The ALJ has previously found that the September 2017 pool skimming incident was the cause of the re-tear of the Plaintiff rotator cuff and thus that said re-injury as well as the resulting surgery were not causally related to the work incident.

10. When assessing the impairment that was present prior to this noncompensable re-injury, the ALJ is presented with the opinions of Drs. Ballard and Moskal.

11. Dr. Ellen Ballard interpreted the Plaintiff's right shoulder MRI to reveal a full thickness supraspinatus tendon tear and diagnosed right shoulder pain post rotator cuff repair. She assessed a 3% functional impairment rating for the plaintiff's shoulder based upon range of motion measurements and commented that there would be no need for any future treatment. Dr. Ballard placed the Plaintiff at MMI relative to the January

2017 work incident as of January 7, 2018, and concluded that any treatment following January 7, 2018, would not be related to the January 27, 2017, work incident.

12. Dr. Ballard evaluated the Plaintiff at a time closer to the compensable January 27, 2017 injury while Dr. Moskal evaluated the Plaintiff at a time where she was experiencing more intense symptoms likely due to the pool skimming incident, which was non-work-related. The ALJ therefore finds that Dr. Moskal's impairment rating, is less consistent with the initial mechanism of injury.

13. The ALJ therefore finds based upon the credible opinion of Dr. Ballard, that the Plaintiff has sustained a 3% whole person impairment to the right shoulder prior to the non-work-related exacerbation of said injury.

14. The Plaintiff's treating physician, Dr. Richardson, released her to return to work at full duty following the January 27, 2017, work incident and she successfully returned to work at her regular job. Likewise, Dr. Ballard did not assess any restrictions related to the January 2017 work incident. Even Dr. Moskal only issued temporary restrictions for the initial injury. The ALJ therefore finds that there is no entitlement to the three multiplier per KRS 342.730(1)(c)1 per the January 2017 work incident.

15. The ALJ finds that the impairment rating issued by Dr. Ballard is rendered in accordance with the Fifth Edition of the AMA Guides (the "Guides"). Dr. Ballard based her impairment rating upon the shoulder flexion and abduction measurements per Figure 16-40 and 16-43 of the Guides respectively. As such, the ALJ finds that the Impairment rating issued by Dr. Ballard is in conformity with the Guides.

#### **Unpaid or Contested Medical Expenses**

16. It is the employer's responsibility to pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may reasonably be required at the time of injury and thereafter during disability...KRS 342.020.

17. The ALJ is convinced by the opinion of Dr. Ballard that the Plaintiff's injury of January 27, 2017, resolved as of the date that she was released to return to full duty work and that the Defendant Employer should only be responsible for the medical expenses related to the Plaintiff's right shoulder injury incurred on or before January 7, 2018.

The ALJ awarded PPD benefits for Riggs' right shoulder injury in the amount of \$8.08 per week beginning on January 27, 2017, and medical expenses from January 27, 2017, "up to and including the day of January 8, 2017."

### ANALYSIS

Riggs first asserts the ALJ erred in determining the August 1, 2018, surgery is non-compensable because it was necessitated by the September 2017 pool skimming incident instead of a failure of the first rotator cuff repair. We reverse the ALJ's determination the August 1, 2018, rotator cuff repair surgery is non-compensable and remand for entry of an amended opinion and order determining the surgery to be compensable.

In the May 13, 2019, Interlocutory Opinion and Order, the ALJ relied upon Dr. Burgess in finding the August 1, 2018, surgery non-compensable, stating, in relevant part, as follows:

Dr. Burgess then credibly opined that the August 1, 2018, surgery was due to the failure of the first rotator cuff repair and that the incident reported by the Plaintiff as occurring at work resulted in no harmful change to the human organism. Dr. Burgess went on to opine that the failure of the prior surgical repair probably occurred in September of 2017 and noted that the Plaintiff reported increased pain at that time **possibly** in relation to an incident that occurred while she was skimming a pool. The ALJ finds that this opinion is credible and convincing. (emphasis added).

The ALJ reiterated his reliance upon Dr. Burgess in the June 13, 2019, Order of Clarification, stating the “re-tear was the result of the September 2017, pool skimming incident and was not due to an otherwise benign failure of the first surgery.”

A review of Dr. Burgess’ October 26, 2018, IME report and his February 6, 2019, deposition reveals he did not definitively opine within reasonable medical probability that the failure of the prior surgical repair of Riggs’ rotator cuff occurred as a result of the September 2017 pool skimming incident. In Dr. Burgess’ report, he opined as follows regarding the pool skimming incident: “Ms. Riggs states today that she had had increasing pain in September 2017, which is noted in Dr. Richardson’s notes of having occurred after skimming a pool. I feel within medical probability that she had a disruption of her rotator cuff tear **during that period of time.**” (emphasis added). In his deposition, Dr. Burgess testified that he could not state within medical probability that the pool skimming incident started the process for Riggs’ rotator cuff repair to fall apart. In fact, Dr. Burgess testified there is typically not a single traumatic event associated with failed rotator cuff repairs. As he testified, “[t]hey just fall apart.” Thus, at no point in his report or in his deposition did Dr. Burgess opine within reasonable medical probability that the failure of the surgical repair occurred as a result of the pool skimming incident. In his report, Dr. Burgess concluded that the disruption of the rotator cuff tear occurred “during that period of time,” and in his deposition, Dr. Burgess opined that he could not state within reasonable medical probability that the pool skimming incident led to the failure of the first surgery, a requirement for proving medical causation. Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). Consequently, Dr. Burgess’ testimony cannot constitute substantial

evidence in support of the ALJ's conclusion that the pool skimming incident led to the failure of the first rotator cuff repair.

Critical here is the parties' stipulation to a work-related injury occurring on January 27, 2017, and the parties do not dispute the first rotator cuff surgery stemmed from the January 27, 2017, work-related injury. As previously noted, at the November 19, 2019, BRC, the parties stipulated to a January 27, 2017, work-related injury, medical expenses were paid in the amount of \$33,875.62 and TTD benefits were paid from April 29, 2017, through January 6, 2018. There is no disagreement Riggs' January 27, 2017, right shoulder injury and the first rotator cuff repair surgery are work-related. Consequently, if the second surgery occurring on August 1, 2018, is necessitated in any part by Riggs' work-related right shoulder injury, *it must be compensable*. Since the second surgery was necessitated because of the first failed compensable surgery, it too is compensable.

As determined, the ALJ cannot rely upon Dr. Burgess' opinions to conclude that the failure of the first surgery is due to the September 2017 pool skimming incident. Further, in the May 13, 2019, Interlocutory Opinion and Order, relying upon Dr. Burgess, the ALJ dismissed Riggs' claim for a second work-related right shoulder injury occurring on May 29, 2018. As set forth herein, Dr. Burgess testified at his deposition that the symptoms Riggs reported as allegedly occurring at work on May 29, 2018, were not the result of a new injury to her right shoulder but, instead, a result of the failure of her first rotator cuff repair. Dr. Burgess' opinions, on this issue, constitute substantial evidence. Special Fund v. Francis, 708 S.W.2d 641

(Ky. 1986). Thus, we affirm the ALJ's reliance upon Dr. Burgess' opinions in dismissing Riggs' claim for an injury occurring on May 29, 2018.

As the ALJ is unable to rely upon Dr. Burgess' opinions regarding a causal connection between the pool skimming incident and the August 1, 2018, surgery, and the ALJ dismissed Riggs' claim for the May 29, 2018, injury, the opinions of Dr. Moskal and Dr. Burgess are germane to the cause of the re-tear of Riggs' rotator cuff and the resultant August 1, 2018, surgery. In his January 31, 2019, deposition, Dr. Moskal opined that, based upon his education, experience, and training, Riggs' first rotator cuff surgery failed. As he testified, "[w]hat it identifies is a defect or a tear after rotator cuff which is failed." Further bolstering Dr. Moskal's testimony is Dr. Burgess' deposition testimony that there typically is not a single traumatic event that causes a rotator cuff repair to fail; rather, "[t]hey just fall apart."

In sum, the ALJ cannot rely upon Dr. Burgess' opinions in finding the pool skimming incident caused the need for the second surgery. Since he dismissed Riggs' claim for a second work-related right shoulder injury occurring on May 29, 2018, the medical evidence in the record supports only one conclusion – Riggs' second rotator cuff repair surgery was necessitated by a failure of the first surgery and not due to the pool skimming incident or an acute second injury.<sup>4</sup> Consequently, the second surgery and its effects are compensable. On remand, in an amended order and award, the ALJ must find the August 1, 2018, surgery is work-related and compensable.

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<sup>4</sup> The Board is aware of the medical opinions of Dr. Ty Richardson. In his November 20, 2018, Medical Questionnaire, Dr. Richardson indicated that he does not believe the May 17, 2018, ultrasound shows a failed rotator cuff repair. However, Dr. Richardson's November 29, 2018, Medical Questionnaire indicates his belief that the alleged May 2018 work incident resulted in a *work-related injury*, a claim the ALJ has firmly rejected. Therefore, the ALJ cannot be seen to rely upon Dr. Richardson's qualified opinions in resolving the issue of the work-relatedness of the August 1, 2018, surgery.

Due to our ruling on Riggs' first argument on appeal, Riggs' second argument on appeal is rendered moot.

Riggs next asserts the ALJ erred in relying upon Dr. Ballard's impairment rating since it was rendered prior to Riggs attaining MMI following the August 2018 surgery. We reverse the ALJ's reliance upon Dr. Ballard's 3% impairment rating and remand the claim for entry of an amended order and award of PPD benefits based upon Dr. Moskal's 8% whole person impairment rating for Riggs' right shoulder as adopted by Dr. Ballard in her December 5, 2018, report.

The record reveals Dr. Ballard's 3% impairment rating for Riggs' right shoulder was assessed in her January 10, 2018, report generated seven months prior to Riggs' August 1, 2018, surgery. While the record contains two supplemental reports by Dr. Ballard dated August 20, 2018, and December 5, 2018, Dr. Ballard did not reassess and/or reaffirm her 3% impairment rating in either report. However, in her December 5, 2018, report authored four months *after* Riggs' second shoulder surgery, Dr. Ballard adopted Dr. Moskal's 13% whole person impairment rating, of which 8% is attributed to Riggs' right shoulder injury, as noted in the following series of questions and answers:

7. Have you had an opportunity to review the May 24, 2018, IME of Dr. Michael Moskal? [Dr. Ballard checked "yes."]

8. Do you believe that Dr. Moskal's 17% whole person impairment rating is compliant with the 5<sup>th</sup> Edition of the AMA guidelines? [Dr. Ballard checked "yes."] Because

she had returned to work and reported no appreciable symptoms.<sup>5</sup>

While Dr. Moskal assessed his impairment rating on May 24, 2018, over two months prior to Riggs' second surgery, it is clear Dr. Ballard, by opining Dr. Moskal's impairment rating is compliant with the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") and stating Riggs returned to work with no reported appreciable symptoms, believed Riggs reached MMI following the second surgery. Therefore, Dr. Ballard, by adopting Dr. Moskal's impairment rating in her report generated four months after Riggs' second surgery and opining the impairment rating is consistent with the AMA Guides, has fully rehabilitated Dr. Moskal's pre-MMI impairment rating. In an amended opinion and order, the ALJ shall enter an award of PPD benefits for Riggs' right shoulder injury based upon Dr. Moskal's 8% whole person impairment rating.

We also vacate the ALJ's dismissal of Riggs' January 27, 2017, cervical spine injury. Abundantly clear from the February 20, 2020, Amended Opinion, Award, and Order is the ALJ's reliance upon Dr. Becherer's medical opinions in resolving Riggs' alleged cervical injury claim. However, according to Dr. Becherer's answers to the November 28, 2018, Medical Questionnaire, Riggs sustained a temporary work-related injury to her cervical spine on January 27, 2017, in the form of a "temporary neck strain superimposed upon natural degenerative changes." Therefore, the ALJ cannot rely upon Dr. Becherer's medical opinions in dismissing Riggs' cervical spine injury claim, since at the least, Riggs would be entitled to

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<sup>5</sup> We again emphasize in his January 31, 2019, deposition, Dr. Moskal indicated his combined whole person impairment rating should be 13% and not 17%.

reasonable and necessary medical benefits for the cure and relief from the effects of a work-related injury, even one that is temporary in nature. Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001).

On remand, the ALJ must take a second look at the medical evidence in the record and resolve Riggs' alleged cervical spine injury claim on its merits. The ALJ is not required to rely upon Dr. Becherer's opinions once again on remand as he is entitled to make new findings and reach a different outcome on remand. Armstrong Coal Company, Inc. v. Piper, Claim No. 2019-CA-001333-WC, rendered April 24, 2020, Designated Not To Be Published. However, if the ALJ chooses to once again rely upon Dr. Becherer, he must enter an award of medical expenses and determine if Riggs is entitled to any additional periods of TTD benefits beyond that what was already paid by Toyota due to the January 27, 2017, injury. Pursuant to Robertson, supra, Riggs need not establish that she sustained a permanent injury to her cervical spine in order to be entitled to temporary benefits, including medical benefits and TTD benefits. We also point out that Dr. Moskal, in his April 14, 2019, IME report assessed a 5% impairment rating for Riggs' January 27, 2017, cervical spine injury; thus, there is a permanent impairment rating in the record relating to Riggs' alleged cervical spine injury. Should the ALJ choose to rely upon Dr. Moskal's medical opinions in resolving Riggs' alleged cervical spine injury claim, the ALJ must award both income and medical benefits, including future medical benefits, in an amended order and award.

We also reverse the ALJ's award of medical expenses for the January 27, 2017, right shoulder injury "up to and including the date of January 8, 2017," the alleged date of MMI based upon Dr. Ballard's opinion, and remand for an amended

order and award to include future medical benefits. Not only is the termination date of the award of medical benefits a typographical error, as the date of MMI assessed by Dr. Ballard is January 8, **2018**, but the ALJ cannot prohibit prospective medical expenses - when there is a permanent impairment rating in the record upon which the ALJ has relied. This Board has consistently held that a worker who has established a work-related permanent impairment rating has also established a disability for purposes of KRS 342.020 and need prove nothing else to receive an award of future medical benefits. We interpret the Court's holding in FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007) to mean that where there is evidence of a permanent impairment rating in accordance with the AMA Guides, as a matter of law it is error for an ALJ to rule broad-spectrum and prospectively that future medical care is unreasonable and unnecessary, notwithstanding non-specific expert medical testimony to the contrary. In such circumstances, pursuant to KRS 342.020(1), a general award of future medical benefits is mandated, and as noted by the Court: “[u]nder 803 KAR 25:012; Mitee Enterprises v. Yates, 864 S.W.2d 654 (Ky. 1993) and National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991), an employer is free to move to reopen an award to contest the reasonableness or necessity of any medical treatment and also whether the need for treatment is due to the effects of the injury.” FEI Installation v. Williams at 319.

The parties stipulated a work-related injury occurred on January 27, 2017, and the ALJ awarded PPD benefits based upon Dr. Ballard's 3% whole person impairment rating for Riggs' right shoulder. While we have vacated the ALJ's reliance upon Dr. Ballard's 3% impairment rating for the reasons stated herein and remanded

for an award based upon Dr. Moskal's 8% whole person impairment rating for Riggs' right shoulder, Riggs is, nonetheless, entitled to an award future medical benefits. We are cognizant Riggs did not raise this issue in her January 29, 2020, petition for reconsideration. However, she is entitled to future medical benefits for her January 27, 2017, right shoulder injury as a matter of law. Consequently, a petition for reconsideration was unnecessary. As the Court of Appeals instructed in the case of AGI Transportation, Inc. v. Adkins, Claim No. 2018-CA-000861-WC, rendered November 30, 2018, Designated Not To Be Published, "[w]hether an award conformed to Chapter 342 was a question of law that a court should review, regardless of whether contested by a party....[citation omitted]." Pursuant to KRS 342.285(2), this Board is authorized to determine whether an award conforms with Chapter 342 regardless of whether the particular error was contested by a party or whether the initial award was appealed on a different ground. On remand, in an amended order and award, the ALJ must award Riggs future medical benefits for her January 27, 2017, right shoulder injury.

Accordingly, the ALJ's dismissal of Riggs' claim for a work-related injury occurring on May 29, 2018, as set forth in the May 13, 2019, Interlocutory Opinion and Order and affirmed in the May 29, 2019, Order, the June 13, 2019, Order of Clarification, and the February 20, 2020, Amended Opinion, Award, and Order is **AFFIRMED**.

The ALJ's determination that the August 1, 2018, rotator cuff repair was due to the September 2017 pool skimming incident as held in the May 13, 2019, Interlocutory Opinion and Order and affirmed in the May 29, 2019, Order, the June

13, 2019, Order of Clarification, and the February 20, 2020, Amended Opinion, Award, and Order is **REVERSED**. The claim is **REMANDED** to the ALJ to enter an amended order and award finding the August 1, 2018, rotator cuff repair surgery to be compensable.

The ALJ's award of PPD benefits for Riggs' January 27, 2017, right shoulder injury based upon Dr. Ballard's 3% whole person impairment rating as set forth in the February 20, 2020, Amended Opinion, Award, and Order is **REVERSED**. On remand, the ALJ shall enter an amended opinion and award of PPD benefits based upon Dr. Moskal's 8% whole person impairment rating as adopted by Dr. Ballard in her December 5, 2018, report.

Further, the ALJ's award of medical benefits for Riggs' January 27, 2017, right shoulder injury as set forth in the February 20, 2020, Amended Opinion, Award, and Order is **VACATED**. On remand, the ALJ shall enter an amended opinion and award awarding future medical benefits.

Finally, the ALJ's dismissal of Riggs' January 27, 2017, cervical spine injury claim is **VACATED**. The claim is **REMANDED** to the ALJ for a resolution of Riggs' cervical spine injury claim on its merits and entry of an award of either income and medical benefits or medical benefits based upon the medical evidence in the record.

The ALJ shall also resolve any contested issues identified in the November 19, 2019, BRC Order that have renewed relevance due to our rulings herein. We express no opinion as to the outcome on remand.

ALL CONCUR.

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